

650 F.3d 915
United States Court of Appeals,
Third Circuit.
J.S., a minor, through her parents; **Terry
SNYDER**; Steven Snyder, Appellants
v.
BLUE MOUNTAIN SCHOOL DISTRICT; **Joyce
Romberger**; James McGonigle.
No. 08–4138.
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Argued June 2, 2009.
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Argued En Banc June 3, 2010.
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Filed: June 13, 2011.

OPINION OF THE COURT

CHAGARES, Circuit Judge, with whom **McKEE**, Chief Judge, **SLOVITER**, **AMBRO**, **FUENTES**, **SMITH**, **HARDIMAN**, and **GREENAWAY, JR.**, Circuit Judges, join.

.... This case arose when the School District suspended J.S. for creating, on a weekend and on her home computer, a MySpace profile (the “profile”) making fun of her middle school principal, James McGonigle. . . . The profile did not identify McGonigle by name, school, or location, though it did contain his official photograph from the School District’s website. The profile was presented as a self-portrayal of a bisexual Alabama middle school principal named “M–Hoe.” The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family. For instance, the profile lists M–Hoe’s general interests as: “detention, being a tight ass, riding the fraintain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents....” Though disturbing, the record indicates that the profile was so outrageous that no one took its content seriously. J.S. testified that she intended the profile to be a joke between herself and her friends. At her deposition, she testified that she created the profile because she thought it was “comical” insofar as it was so “outrageous.”

Initially, the profile could be viewed in full by anyone who knew the URL (or address) or who otherwise found the profile by searching MySpace for a term it contained. The following day, however, J.S. made the profile “private” after several students approached her at school, generally to say that they thought the profile was funny.... The School District’s computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. McGonigle (ultimately learned which student had created the fake profile and eventually suspended her from school).

The School District asserted that the profile disrupted

school in the following ways. There were general “rumblings” in the school regarding the profile. More specifically, on Tuesday, March 20, McGonigle was approached by two teachers who informed him that students were discussing the profile in class. App. 322. Randy Nunemacher, a Middle School math teacher, experienced a disruption in his class when six or seven students were talking and discussing the profile....

Although the precise issue before this Court is one of first impression, the Supreme Court and this Court have analyzed the extent to which school officials can regulate student speech in several thorough opinions that compel the conclusion that the School District violated J.S.’s First Amendment free speech rights when it suspended her for speech that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school.

A.

^[1] We begin our analysis by recognizing the “comprehensive authority” of teachers and other public school officials. *Tinker*, 393 U.S. at 507, 89 S.Ct. 733. See generally *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (describing the public schools’ power over public school children *926 as both “custodial and tutelary”). Those officials involved in the educational process perform “important, delicate, and highly discretionary functions.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). As a result, federal courts generally exercise restraint when considering issues within the purview of public school officials. See *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (“[F]ederal courts should not ordinarily ‘intervene in the resolution of conflicts which arise in the daily operation of school systems.’ ” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968))); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (“[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”).

^[2] ^[3] The authority of public school officials is not boundless, however. The First Amendment unquestionably protects the free speech rights of students in public school. *Morse*, 551 U.S. at 396, 127 S.Ct. 2618 (“Our cases make clear that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ ” (quoting *Tinker*, 393 U.S. at 506, 89 S.Ct. 733)). Indeed, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). The exercise of First Amendment rights in school, however, has to be “applied in light of the special characteristics of the school environment,” *Tinker*, 393 U.S. at 506, 89 S.Ct.

733, and thus the constitutional rights of students in public schools “are not automatically coextensive with the rights of adults in other settings,” *Fraser*, 478 U.S. at 682, 106 S.Ct. 3159. Since *Tinker*, courts have struggled to strike a balance between safeguarding students’ First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.

¹⁴¹ ¹⁵¹ The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.³ The Court in *Tinker* held that “to justify prohibition of a particular expression of opinion,” school officials must demonstrate that “the forbidden conduct would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school.” *Tinker*, 393 U.S. at 509, 89 S.Ct. 733 (emphasis added) (quotation marks omitted). This burden cannot be met if school officials are driven by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* Moreover, “*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir.2001). Although *Tinker* dealt with political speech, the opinion has never been confined to such speech. See *id.* at 215–17 (holding that the school’s anti-harassment policy was overbroad because it “appears to cover substantially more speech than could be prohibited under *Tinker*’s substantial disruption test”); see also *Killion*, 136 F.Supp.2d at 455–58 *927 (holding that the school overstepped its constitutional bounds under *Tinker* when it suspended a student for making “lewd” comments about the school’s athletic director in an e-mail the student wrote at home and circulated to the non-school e-mail accounts of several classmates).

As this Court has emphasized, with then-Judge Alito writing for the majority, *Tinker* sets the general rule for regulating school speech, and that rule is subject to several narrow exceptions. *Saxe*, 240 F.3d at 212 (“Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption.”). The first exception is set out in *Fraser*, which we interpreted to permit school officials to regulate “‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech *in school*.” *Id.* at 213 (quoting *Fraser*, 478 U.S. at 683, 685, 106 S.Ct. 3159) (emphasis added); see also *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir.2002) (quoting *Saxe*’s narrow interpretation of the *Fraser* exception). The second exception to *Tinker* is articulated in *Hazelwood School District v. Kuhlmeier*, which allows school officials to “regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school’s own speech) on the basis of any legitimate pedagogical concern.” *Saxe*, 240 F.3d at 214.

The Supreme Court recently articulated a third exception to *Tinker*’s general rule in *Morse*. Although, prior to this case, we have not had an opportunity to analyze the scope

of the *Morse* exception, the Supreme Court itself emphasized the narrow reach of its decision. In *Morse*, a school punished a student for unfurling, at a school-sponsored event, a large banner containing a message that could reasonably be interpreted as promoting illegal drug use. 551 U.S. at 396, 127 S.Ct. 2618. The Court emphasized that *Morse* was a school speech case, because “[t]he event occurred during normal school hours,” was sanctioned by the school “as an approved social event or class trip,” was supervised by teachers and administrators from the school, and involved performances by the school band and cheerleaders. *Id.* at 400–01, 127 S.Ct. 2618 (quotation marks omitted). The Court then held that “[t]he ‘special characteristics of the school environment,’ *Tinker*, 393 U.S. [] at 506[89 S.Ct. 733], and the governmental interest in stopping student drug abuse ... allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.” *Id.* at 408, 127 S.Ct. 2618.

Notably, Justice Alito’s concurrence in *Morse* further emphasizes the narrowness of the Court’s holding, stressing that *Morse* “stand[s] at the far reaches of what the First Amendment permits.” 551 U.S. at 425, 127 S.Ct. 2618 (Alito, J., concurring). In fact, Justice Alito only joined the Court’s opinion “on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions” than those recognized by the Court in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*. *Id.* at 422–23, 127 S.Ct. 2618. Justice Alito also noted that the *Morse* decision “does not endorse the broad argument ... that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission.’ This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs.” *Id.* at 423, 127 S.Ct. 2618 (citations omitted). Moreover, Justice Alito engaged in a detailed discussion distinguishing the role of school authorities from the role of parents, and the school context from the “[o]utside of school” context. *Id.* at 424–25, 127 S.Ct. 2618.

*928 B.

¹⁶¹ There is no dispute that J.S.’s speech did not cause a substantial disruption in the school. The School District’s counsel conceded this point at oral argument and the District Court explicitly found that “a substantial disruption so as to fall under *Tinker* did not occur.” App. at 17. Nonetheless, the School District now argues that it was justified in punishing J.S. under *Tinker* because of “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities....” *Tinker*, 393 U.S. at 514, 89 S.Ct. 733.... The facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable....

Because *Tinker* does not justify the School District’s suspension of J.S., the *932 only way for the punishment to pass constitutional muster is if we accept the School District’s argument—and the District Court’s holding—that J.S.’s speech can be prohibited under the *Fraser*

exception to *Tinker*.¹⁰ The School District argues that although J.S.’s speech occurred off campus, it was justified in disciplining her because it was “lewd, vulgar, and offensive [and] had an effect on the school and the educational mission of the District.” School District Br. 7. The School District’s argument fails at the outset because *Fraser* does not apply to off-campus speech. Specifically in *Morse*, Chief Justice Roberts, writing for the majority, emphasized that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected....”

Thus, under the Supreme Court’s precedent, the *Fraser* exception to *Tinker* does not apply here. In other words, *Fraser*’s “lewdness” standard cannot be extended to justify a school’s punishment of J.S. for use of profane language outside the school, during non-school hours.¹

^[11] The School District points out that “a hard copy or printout of the profile *actually* came into the school.” School District Br. 22. However, the fact that McGonigle caused a copy of the profile to be brought to school does not transform J.S.’s off-campus speech into school speech. The flaws of a contrary rule can be illustrated by extrapolating from the facts of *Fraser* itself. As discussed above, the Supreme Court emphasized that Fraser’s speech would have been protected had he delivered it outside the school. Presumably, this protection would not be lifted if a school official or Fraser’s fellow *933 classmate overheard the off-campus speech, recorded it, and played it to the school principal. Similarly here, the fact that another student printed J.S.’s profile and brought it to school at the express request of McGonigle does not turn J.S.’s off-campus speech into on-campus speech.

Under these circumstances, to apply the *Fraser* standard to justify the School District’s punishment of J.S.’s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed “offensive” by the prevailing authority. Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark “offensive.” There is no principled way to distinguish this hypothetical from the facts of the instant case.

Accordingly, we conclude that the *Fraser* decision did not give the School District the authority to punish J.S. for her off-campus speech.

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^[12] Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.

For the foregoing reasons, the District Court’s judgment

will be affirmed in part, reversed in part and remanded.

SMITH, Circuit Judge, concurring, with whom McKEE, Chief Judge, SLOVITER, FUENTES, and HARDIMAN, Circuit Judges, join.

Because the school district suspended J.S. for speech that she engaged in at home on a Sunday evening, I fully agree with the majority’s conclusion that it violated J.S.’s First Amendment rights. I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large. . . .

Tinker’s holding is expressly grounded in “the special characteristics of the school environment,” 393 U.S. at 506, 89 S.Ct. 733, and the need to defer to school officials’ authority “to prescribe and control conduct in the schools,” *id.* at 507, 89 S.Ct. 733.¹ The Court’s later school-speech *938 cases underscored *Tinker*’s narrow reach. *Tinker*, according to the Court’s decision in *Fraser*, rests on the understanding that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” *see* 478 U.S. at 682, 106 S.Ct. 3159, and that students are a captive audience while at school, *see id.* at 684, 106 S.Ct. 3159. *See also id.* at 688 n. 1, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) (stating that the Court’s school-speech cases “obviously do not [apply] outside of the school environment”). *Kuhlmeier*, moreover, described *Tinker* as “address[ing] educators’ ability to silence a student’s personal expression that happens to occur on the school premises.” 484 U.S. at 271, 108 S.Ct. 562. Finally, in *Morse*, the Court took care to refute the contention that the plaintiff’s speech, which took place at a school field trip, did not occur “at school.” 551 U.S. at 401, 127 S.Ct. 2618. In concluding that the plaintiff’s suit was governed by the *Tinker* line of cases, the Court stressed that the field trip “occurred during normal school hours,” that it “was sanctioned by [the principal] as an approved social event or class trip,” that “[t]eachers and administrators were interspersed among the students and charged with supervising them,” and that the “high school band and cheerleaders performed.” *Id.* at 400–01, 127 S.Ct. 2618. If *Tinker* and the Court’s other school-speech precedents applied to off-campus speech, this discussion would have been unnecessary. *See also id.* at 406, 127 S.Ct. 2618 (“‘First ... Amendment rights [] are different in public schools than elsewhere.’”) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)). Indeed, in his *Morse* concurrence, Justice Alito essentially recognized that *Tinker*’s substantial-disruption test does not apply to students’ off-campus expression. *See id.* at 422, 127 S.Ct. 2618 (Alito, J., concurring) (noting that *Tinker* allows schools to regulate “in-school student speech ... in a way that would not be constitutional in other settings”)....

Having determined that J.S.'s speech took place off campus, I would apply ordinary First Amendment principles to determine whether it was protected. I agree with the majority that this was protected speech. The speech was not defamatory, obscene, or otherwise unprotected. See *941 *Hustler Magazine*, 485 U.S. at 57,

108 S.Ct. 876; *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). J.S.'s suspension, then, violated the First Amendment.

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