

Bell v. Itawamba County School Board **2014 WL 7014371 (5th Cir. 2014 – Mississippi)**

December 12, 2014

Background

A male student created a rap song which contained allegations that certain high school coaches were being inappropriate with female students. In addition, the rap song contained violent insinuations that if the coaches continued their behavior, intentional harm could befall the coaches. The student posted a video of the song on YouTube and his Facebook page. The student was not on school property when he created the song and posted the video. The video was not viewed on school property because such social media is blocked on campus (and the phones are banned on campus – despite a teacher and administrator viewing the video on their cell phones).

After returning to school, the male student did not inform anyone at school about the video and no one approached him until he was informed by the principal that he was to be suspended and subject to a disciplinary hearing for the video and the song. At the disciplinary hearing, the school presented no evidence that the song had caused any disruption to the school or that anyone at the school or any student listened to the song (although one of the coaches asked to hear the song on a students' cell phone – in violation of school policy). Despite this lack of evidence, the committee upheld the suspension and placed the student in an alternative school for the remainder of the grading period.

The parents of the student filed suit and the trial court held that the school could discipline the student for the rap song, despite its off-campus production, and that the discipline did not otherwise violate the First Amendment. In addition, the trial court concluded that the song constituted a “true threat”, not entitled to First Amendment protection.

Holding

Relying on the critical U.S. Supreme Court case of *Tinker v. Des Moines*, the Fifth Circuit Court of Appeals explained that school officials may prohibit student speech and expression only after showing the speech either had a substantial disruption or material interference with school activities or there was a reasonable likelihood the speech would cause a substantial disruption or material interference.

As previously reported, although federal appellate courts have disagreed on whether schools can regulate off-campus student speech, the U.S. Supreme Court has not yet rendered any decision on the subject. The Fifth Circuit Court of Appeals relied on the *Tinker* analysis that schools could regulate off campus speech if it established that the song created a substantial disruption. The Fifth Circuit ruled in this case that the school did not successfully defend its actions and violated the student's First Amendment rights.

The appellate court found the school failed to put forth any evidence that a substantial disruption took place as a result of the student posting the rap song. Instead, the evidence clearly showed that there was no commotion, boisterous conduct, interruption of classes or any lack of order, discipline and decorum at the school as a result of the posting of the song on YouTube and Facebook. In addition, the appellate court ruled that school presented no indication that the posting might have reasonably lead to disruption since blocked on school computers and school policy prohibited the use of personal cell phones on campus.

The appellate court acknowledged that First Amendment protection did not extend to speech brought to campus "gravely and uniquely threatens violence to the school population as a whole" such as speech advocating a Columbine-type event or to speech that is a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals (*i.e.* a "true threat"). However, it nevertheless found these exceptions did not apply because the school presented no evidence that song threatened school wide violence or evidence of a true threat. The song contained violent imagery typical of the hyperbolic rap genre and not specific to school wide violence. Moreover, the song did not unequivocally threaten the alleged victims and there was no fear of violence because the purported victims recognized "it was just a rap song".

As a consequence, the appellate court reversed the trial court and ruled that the school was liable to the student for violating his First Amendment rights.

Learning Point:

While it may seem counter-intuitive to educators, public schools may not suppress speech simply to protect the school community from potentially offensive speech or violent speech. Good faith reasons used to justify such suppression is not enough as appellate courts typically take alleged violations of constitutional rights very seriously and do not give schools the "benefit of doubt" when such allegations are made.

As in this case, a school must establish, through admissible evidence, a defense to such allegations once a bona fide case is made against the school involving violations of constitutional rights. Thus, a school must not simply rely on its conclusions, but must gather clear and concrete evidence to support the defense to such claims.

Ultimately, a case arising from a First Amendment challenge to off-campus regulation of student speech will reach the U.S. Supreme Court. At this point, however, there is no clear

bright line rule that schools can rely on to determine whether their regulation of such off-campus speech runs afoul of the First Amendment. Thus, it is critical that schools fully document any attempts to regulate off-campus student speech, or punish a student for speech related activity, and ensure that such regulation is consistent with the case law relevant to the regulations of on-campus student speech. In doing so, a school will be able to demonstrate that good faith attempts were made to comply with the law should a claim arise.