



Hypotheticals

Hypothetical 1:

- Does the fact that these pictures were taken and published off campus mean that they cannot be punished by the school?

Some but not all courts have concluded schools do have the authority to exclude students from extra-curricular activities based on activities they engage in outside of school. In this case, if the school argued it was not punishing the students for their expression by posting the pictures online but rather for engaging in behavior in contradiction of the agreement they signed, First Amendment protections would probably not be implicated.

- Has the school violated their right to privacy by looking at these photos on Facebook?

No. Assuming that the school didn't access the site by hacking into the students' social networking page but rather saw the images through someone who had access to them, there is no reasonable expectation of privacy on the students' part.

Hypothetical 2:

- What grounds, if any, would the school have to punish the student?

Some courts have allowed schools to punish students for off-campus expression when it satisfies the *Tinker* standard, that is, it creates a material and substantial disruption of school activities or an invasion of the rights of others. The school could argue the Facebook page disrupts the classroom by making students unable to learn because they suspect the teacher of inappropriate behavior. However, other courts have said school official's ability to punish student expression ends at the school house gate. If a teacher has been libeled by material students have published outside of school on their own time, that teacher has the ability to pursue his or her own legal claim against the students. The law doesn't give school officials any greater rights to defend their reputations than you or I have.

- Would or could the punishment be any different if items like these were published in a school newspaper?

The school's ability to punish expression in a school-sponsored student newspaper is much clearer than the school's authority to punish off-campus independent student speech. If the publication is operating as a designated public forum where student editors have been given the authority to determine content, school officials can punish if they can show that the content met the *Tinker* standard, that is, it created a material and substantial disruption of school activities or an invasion of the rights of others. The school still has to present evidence to back up its claim of disruption, but assuming it could show some direct physical interference with the classroom or that the teacher was libeled by the statements published, their punishment would probably be upheld.

If the publication isn't operating as a designated public forum, then school officials only have to satisfy the requirements of the *Hazelwood* decision. They could punish if they could show that their justification for acting was educationally reasonable. I suspect most courts would find this censorship permitted under *Hazelwood* with very little discussion.

•What other consequences might the student face outside of school?

Again, there is nothing to keep this teacher from bringing his or her own civil lawsuit for libel against this student. (To succeed in the libel suit, the teacher would have to show that his or her reputation was damaged and that people who saw the page actually believed it was true and not just a cruel joke.) And Facebook would likely suspend the student's own account for violating Facebook's terms of service. I would also imagine that quite a few students might find themselves facing some punishment from their parents for this kind of behavior. The First Amendment won't protect them from that!