

# Children's Law Center of Indiana



## Delinquency

05/13/2008

In **A.B. v. State**, 885 N.E.2d 1223 (Ind. 2008), the Court reversed the judgment of the trial court adjudicating the juvenile a delinquent for her postings on the Internet site MySpace.com. The trial court's adjudication was based on six counts of Harassment, offenses that would be Class B misdemeanors pursuant to IC 35-45-2-2(a)(4) if committed by an adult. In 878 N.E.2d 212 (Ind. 2007), the Court had previously granted transfer and vacated the Court of Appeals decision in 863 N.E.2d 1212 (Ind. Ct. App. 2007), in which the Court of Appeals had reversed the trial court concluding that the juvenile's allegedly harassing messages were protected political speech. In February 2006, the juvenile transferred to a different school and made some postings on MySpace.com which were derogatory to her prior school and its principal Mr. Gobert, and which were the subject of the delinquency proceedings. She made some of her "vulgarity laced" postings to a false "Mr. Gobert" "profile" created by a friend of hers who was still at the school from which she had transferred. This "profile" was accessible to only twenty six designated "friends." The juvenile also made some postings to a MySpace.com "group" page which the juvenile had created. The juvenile contended on appeal that the evidence failed to prove the requisite intent common to all the counts: that she transmitted the messages with the intent to harass, annoy, or alarm Mr. Gobert but without any intent of legitimate communication.

**The Court reversed the judgment of the trial court because the evidence failed to prove that the juvenile made postings and comments on MySpace with the intent "to harass, annoy, or alarm" her former principal "but with no intent of legitimate communication," IC 35-45-2-2(a), the requisite intent common to the six Counts on which the juvenile was adjudicated a delinquent child. *Id.* at 1228.** The Court noted that the evidence presented regarding the use and operation of MySpace.com, which is central to this case, was extremely sparse, uncertain, and equivocal and neither of the two testifying witnesses provided knowledgeable and reliable details about MySpace. Observing that the Commentary to Canon 3B of the Indiana Code of Judicial Conduct provides that a judge is not to independently investigate facts in a case and must consider only the evidence presented, the Court included in its opinion information regarding the operation and use of MySpace from identified sources outside the trial record of this case, in order to facilitate understanding of the facts and application of relevant legal principles. *Id.* at 1225. IC 35-45-2-2(a)(4) provides in relevant part:

A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:

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- (4) uses a computer network ... or other form of electronic communication to  
(A) communicate with a person; or

(B) transmit an obscene message or indecent or profane words to a person; commits harassment, a Class B misdemeanor.

The Court opined that “for a person to commit an act with the intent to harass, annoy, or alarm another person, common sense informs that the person must have a subjective expectation that the offending conduct will likely come to the attention of the person targeted for the harassment, annoyance, or alarm.” *Id.* at 1226. The trial court’s findings stated: “While the court does not know exactly what [the juvenile’s] intent was from the common sense reading of the displayed message, the Court can not envision any other intent but to harass, annoy or alarm.” *Id.* at 1226-27. The Court noted that, (1) for the purposes of the Court’s analysis, the only significant distinction among the postings which were the subject of these six counts, was in the difference of private and public access to them; and (2) of the six counts of Harassment involved, four counts pertained to postings on the false “Mr. Gobert” private MySpace “profile” created by the juvenile’s friend which “profile” was accessible to only named individuals, and two counts pertained to the juvenile’s remarks on her “group” page which was publicly accessible. *Id.* at 1227. Regarding the postings on the privately accessible “profile,” the Court (1) observed that there was no evidence presented at the hearing showing that the juvenile expected that Mr. Gobert would see or learn about her messages posted there; and (2) concluded that there was “no probative evidence or reasonable inferences to establish that [the juvenile], when making her postings on her friend’s private “profile,” had a subjective expectation that her conduct would likely come to the attention of Mr. Gobert.” *Id.* As to the postings on the publically accessible “group” page, the Court concluded that (1) “because this site was publicly accessible, it may be reasonably inferred that [the juvenile] had a subjective expectation that her words would likely reach Mr. Gobert;” but (2) “the content of the posting presents strong evidence that [the juvenile] intended her ‘group’ page as legitimate communication of her anger and criticism of the disciplinary action of Mr. Gobert and the Greencastle Middle School against her friend, the creator of the private ‘profile,’” and “this affirmative proof makes it impossible for the State to have carried its burden to prove ‘no intent of legitimate communication’” as required by IC 35-45-2-2(a). *Id.*