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STUDENT OFF-SCHOOL GROUNDS COMMUNICATIONS: POLICY IMPLICATIONS

Overview

In the “post-9-11 era” safety and security are top priority goals in all settings including our nation’s public schools. Fueled by reports of school and college shootings, increases in street gang membership, potential terrorist threats, and an escalation of domestic abuse (including child abuse) incidents, local school boards across the country spend inordinate hours working to develop and implement policies and procedures to make school buildings safe, secure, healthy, and disruption free.

Violence in Schools. It is difficult to get an accurate accounting of violence in public schools. Not only do incidents go unreported, the literature in education law reflects differing opinions regarding the frequency of violent events taking place in our nation’s public schools. Some reports show a decrease and leveling off of violent and or criminal behavior (*e.g.*, nonfatal student victimization, incidents of crime reported to the police), while other reports indicate an increase. (See, *e.g.*, National Center for Educational Statistics, 2013). However, “social networking” (texting, emailing, Facebook, MySpace, Instagram, *et al.*) is often mentioned as a common thread source of major disciplinary problems (*e.g.*, threats, intimidation, harassment, pornography, obscene language, instigation of physical confrontations) in today’s public schools (see, *e.g.*, Cyberbullying Statistics, 2014). In some communities this growing problem has prompted school systems to implement a program called “Think Before You Link.” As our local newspaper recently reported, “this is an on-line course [free] for students from grades three through eight with a focus on cyber-safety, on-line bullying and internet ethics.” *Richmond Times-Dispatch*, A18 (November 30, 2014)

Off School Grounds Behavior. Because student “social networking” activities are more often than not created off school grounds, on non-school time, using privately owned not school-system owned technologies, school officials are faced with the following question: What can be done about student communications that have their genesis off school grounds? Courts have generally held that material produced by students at home, on their own time, using their own computers, that does not constitute a threat (*i.e.*, actual threat) of harm or interfere with or disrupt activities inside the school, are protected by the First Amendment. *Killion v. Franklin Regional School*

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District (W.D. Pa. 2001) However, courts also have made it clear that school officials cannot be *deliberately indifferent* to student behavior, on or off school grounds, that: (1) *threatens* (i.e., communicates an intent to do actual harm to) the safety and well-being of students and staff, and/or (2) *forecasts* actual disruption of the school's learning environment, and/or (3) *encourages* or *promotes* illegal activity. In essence school officials are expected to "take reasonable steps" to protect students in their care. (Vacca, 2004 and 2008)

The Changing Nature of Student Discipline. Three decades ago, in handing down New Jersey v. T.L.O. (1985), the United States Supreme Court's landmark search and seizure decision, Justice White observed that, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major problems." Justice White's comment accurately predicted the changing nature of the public school environment—where establishing and maintaining safety and security emerged as top priorities for local school boards.

As public education moved into the late-1980s and early 1990s, the United States Supreme Court broadened the disciplinary authority of public school officials. In doing so the Court expanded and made more flexible the standards created by such earlier decisions as Tinker v. Des Moines (1969) "material and substantial disruption," and Goss v. Lopez (1975) "fundamental due process," when it handed down such benchmarks as Bethel School District No. 403 v. Fraser (1986) and Hazelwood v. Kuhlmeier (1988), where the student disciplinary authority of school boards and administrators was strengthened. As the Supreme Court opined in Fraser (1986), "the schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be in a school that tolerates lewd, indecent, or offensive speech and conduct...."

In the mid-1990s and early 2000s the Supreme Court's focus turned to the "special characteristics and needs" of the school environment—especially in securing order and protecting students and teachers from "the few students whose conduct in recent years has prompted national concern...." Securing the safety of students and teachers, said the Court, requires that "students be subjected to greater controls than those appropriate for adults...." Vernonia v. Acton (1995) Recognizing that "[s]chool principals have a difficult job, and a vitally important one....," the Supreme Court, in Morse v. Frederick (2007) extended the disciplinary authority of public school officials to student behavior that occurs "off school grounds." In Morse the off-school property behavior occurred at a school-sanctioned event and dealt with the "promotion of illegal drug use."

Recently I came across a decision from the United States Court of Appeals for the Ninth Circuit involving a challenge to a local school system's expulsion of a student for sending "violent and threatening instant messages from his home to his friends about planning a school shooting." The Court's opinion is most instructive since it reads like a restatement of the law.

Wynar v. Douglas County School District (9th Cir 2013)

Facts. Briefly summarized the facts are these. A high school sophomore Landon (hereafter referred to as L.W.) communicated regularly with friends by exchanging instant messages through MySpace. Among other things L.W. wrote frequently and "bragged about" his weapons, going shooting, and World War II. His messages also expressed "social insecurity."

L.W.'s messages became increasingly violent and disturbing. They centered around a school shooting to take place on April 20 (the date of Hitler's birth and the Columbine massacre, and within days of the anniversary of the Virginia Tech Massacre). In his messages he mentioned shooting specific classmates. While L.W.'s friends joked with him about school violence, some of his comments alarmed them to the extent that they corresponded about what to do. Two boys decided to speak with one of the school's coaches—a football coach whom they trusted. Together with the coach they talked to the school principal about the situation. They told the principal "that they had information about a possible school shooting." Subsequently, two police deputies interviewed the boys and saw MySpace printouts. They questioned L.W. in the principal's office and took him into custody.

After the police took L.W. into custody, school administrators met with him. They asked if he wanted his parents to be present for their discussion. He said that he did not. He was then asked about his MySpace messages. He admitted writing them but said they were "a joke." After providing a written statement L.W. was suspended from school for 10 days.

Subsequently, the school board charged L.W. with violating Nevada law (Nev. Rev. Stat. 392.4655, *et seq.*). A board hearing was convened during which L.W. was represented by an attorney, had the opportunity to testify, call and cross-examine witnesses, and present evidence. The Nevada statute provides that "a student will be deemed a habitual discipline problem if there is written evidence that the student threatened or extorted another pupil, teacher, or school employee." The statute also provides that "a student who is deemed a habitual disciplinary problem must be suspended or expelled for at least a semester." The school board decided that L.W. violated the Nevada statute and expelled him for 90 days.

Court Action. L.W. and his father (acting as guardian) sued the school district, school officials, and administrators in federal district court. In their action they claimed violation of L.W.'s constitutional rights under 42 U.S.C. 1983, as well as negligence and infliction of emotional distress. The court denied plaintiffs' motion for summary judgment, but granted summary judgment to defendants, at 2011 U.S. Dist. LEXIS 89261 (D. Nev. 2011). L.W. and his father appealed the district court's decision.

Ninth Circuit Court Rationales and Decision. Acknowledging that The United States Supreme Court has not addressed student speech originating off-campus (such as L.W.'s MySpace messages written at home), the Ninth Circuit Court looked to the United States Supreme Court's prior student speech decisions and decisions of the other United States Circuit Courts of Appeal for guidance. Citing the Supreme Court's decisions in Tinker (1969), Fraser (1986), Hazelwood (1988), and Morse (2007), and the Ninth Circuit Court's prior decision in Chandler v. McMinnville School District (9th Cir. 1992), the Court stated that while students do not "shed their constitutional rights to freedom of speech or expression at the school house gate," the "constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." However, in the Ninth Circuit's view, because these cases and others address behavior "on school grounds or at school sanctioned events," uncertainty exists regarding the "outer boundaries" as to when courts should apply prior student speech precedents.

The Ninth Circuit then launched into a comprehensive case law-based analysis of the following issue: When does the Tinker test of “material and substantial disruption” reach “beyond the school yard”—*i.e.*, create reasonable foreseeability that off-campus created student speech meeting the Tinker test will wind up at school thus permitting the imposition of school discipline on that speech. To put it another way, when is a *nexus* created between the off-campus speech and potential in-school disruption? In this case, said the Ninth Circuit, “[g]iven the subject and addresses of Landon’s messages, it is hard to imagine how their nexus to the school could have been more direct.... It should have been reasonably foreseeable to Landon that his messages would reach campus. Indeed, the alarming nature of the messages prompted Landon’s friends to do exactly what we would hope any responsible student would do: report to school authorities.” Citing its prior decision in La Vine v. Blaine School District (9th Cir. 2001), among others, a case involving a student’s off-campus speech where the Court’s analysis focused on the “reasonable forecast” of “substantial disruption of or material interference with school activities,” the Ninth Circuit emphasized, however, that care still must be taken “when evaluating a student’s First Amendment right of free expression against school officials’ need to provide a safe school environment [and] not to overreact to either.” This approach, said the Court, strikes the appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students.

Under the circumstances of the Wynar case, the Ninth Circuit Court said, “Douglas County did not violate Landon’s First Amendment rights by expelling him for 90 days.” The Court cites and quotes from Tinker (1969) where the United States Supreme Court held that school authorities may restrict speech that “reasonably (lead) school authorities to forecast substantial disruption or material interference with school activities.” In the appellate court’s view, “Douglas County did not need to wait for an actual disruption to materialize before taking action.” School officials “have a duty to prevent such actions.” It was reasonable for Douglas County to “interpret the messages as a real risk and to forecast a substantial disruption.” Moreover, said the Ninth Circuit Court, because L.W.’s messages “threatened the student body as a whole and targeted specific students by name...., [t]hey represent the quintessential harm to the rights of other students to be secure.” It is important to note that the Ninth Circuit made it clear that in holding that the Douglas County School system officials and administrators did not violate L.W.’s First Amendment rights it did not “mean to imply approval of Douglas County’s particular response to the perceived threat....” “Our responsibility” said the Court, ‘is not to parse the wisdom of Douglas County’s actions, but to determine whether they were constitutional. We conclude that they were.”

Reiterating that under Nevada law L.W. had a “property interest” in his public education, and relying on the three prongs (notice, tell his side of the story, hearing) of Goss v. Lopez (1995), the Court next looked at procedural due process and both the 10-day suspension and the 90-day expulsion. In the Court’s view, even if defendants did not follow exactly their own administrative procedures, L.W. received “adequate due process” before both disciplinary actions were taken. Additional procedures were not required. The Court also stated that the School District was not required to give parental notice prior to imposing the 10-day suspension or prior to meeting with L.W.

At the close of its opinion the Ninth Circuit Court made it clear that in taking disciplinary action against L.W. “the school was not acting in the role of a government prosecutor enforcing a criminal

statute.” Thus, “Douglas County was not required to prove Landon’s subjective intent in writing the messages before expelling him.”

Decision. The decision of the district court is affirmed.

Policy Implications

While Wynar v. Douglas County School System (9th Cir. 2013) is but one decision from one jurisdiction it is most instructive given the lack of case law involving student off-school grounds activities initiated and communicated to other students through social networking media. The Court’s rationale also demonstrates the evolving and “long arm” nature of such old standards as Tinker (1969), Goss (1975), Fraser (1986), and Hazelwood (1988)—discipline-related landmarks grounded in student on-campus, pre-social networking activities. In my view Wynar represents a new breed of developing First Amendment “cyber” case law—an area of education law where judicial standards are in the process of evolving to keep pace with a rapidly changing world outside school as more and more students use and rely on various modes of technology-driven (social media) speech and expression as primary vehicles of communication.

What follow are suggestions to consider as local school boards audit current policies related to student off-campus communications.

School system policies must make it clear that:

- While the Board respects the First Amendment speech and expression rights of students, student speech and expression (including electronic speech and expression created and communicated off-school property) that is threatening and harmful to students or staff, and/or causes disruption to the learning environment of the school (including school sponsored and sanctioned activities), and/or advocates illegal activity shall not be tolerated.
- School administrators are empowered to immediately act in situations where student speech and expression activities (including electronic speech and expression created and communicated off-school grounds) that present the potential to threaten harm to students or school staff, or disruption of the school’s learning environment, or advocate illegal activity.
- Students in violation of Board policy shall be subject to the procedures and disciplinary options outlined in the *Student Code of Conduct*.

Resources Cited

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Final Comment. The reader is encouraged to watch for a decision from this year's term of the United States Supreme Court. A non-school (domestic relations) matter, the case involves an individual's Facebook postings. Here the Court is faced with the following question: Should a person posting statements on the internet foresee that his statements might be interpreted as an *actual threat* to a "reasonable person" receiving the posting? Elonis v. United States (3rd Cir. 2013)

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