Disciplining Off-Campus Conduct: The Evolution of School Authority


Disciplining students for expressive conduct has never been simple. Even in-school expression has triggered a varied line of case law for school administrators to navigate. See Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Morse v. Frederick, 551 U.S. 393 (2007); B.H. ex. rel. Hawk v. Easton Area School District, 725 F.3d 293 (3d. Cir. 2013). Off-campus conduct presents even more challenges for schools, especially since the ever-expanding world of social media. A few off-campus speech cases involving criticism of and personal attacks on school personnel by students on social media resulted in additional limits on school discipline authority. See J.S. ex. rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915 (3d. Cir. 2011); Layshock v. Hermitage School Dist., 650 F. 3d 205 (3d. Cir. 2011). But even despite the complexity, school attorneys have been operating under a fairly understandable set of rules for when a school has the authority to discipline a student for out of school conduct, including, off-campus speech and expression (e.g., social media, text messages, etc.). Until recently, students could be disciplined for out of school expression protected by the First Amendment if their conduct/expression caused or was likely to cause a substantial disruption of, or material interference with, school activities. See Tinker v. Des Moines Independent Community Sch. Dist., 393U.S. 503 (1969); Niziolek v. Upper Perkiomen Sch. Dist., 228 F. Supp. 3d 391, (E.D. Pa. 2017).

The 3rd Circuit’s opinion in B.L. v. Mahanoy changed things dramatically for school districts, and as of the date of this handout, we are awaiting a decision from the U.S. Supreme Court that will likely shape school responses to off-campus expression for the next decade. B.L. by and through Levy v. Mahanoy Area School Dist., 964 F.3d 170, (3d. Cir. 2020), cert. granted (U.S. January 8, 2021). As lawyers tend to lament, bad facts make bad law. This appears to be the case with Mahanoy. Although all of the local details are not always clear from court opinions, we do wish that the facts were different (or the behavior was more serious). However, regardless of the facts, the holding issued by the Third Circuit Court is a concern. Prior to Mahanoy, off-campus expression that caused or was likely to cause a substantial disruption at school fell within the
school’s authority to address with school discipline. The “substantial disruption” basis for discipline has helped many school districts respond to speech that was not necessarily a true threat but was concerning enough to seriously disrupt the educational setting. The current holding in *Mahanoy* limits a school’s ability to respond to out of school expression that causes a substantial disruption but does not fall outside of the First Amendment (e.g., true/terroristic threats, hate speech, harassment, bullying). As we await the High Court’s decision in *Mahanoy*, it is imperative that schools review their codes of student conduct and ensure that they clearly and correctly prohibit conduct (both in school and out of school conduct) that could be a threat to the school or a threat of school violence. All other out of school expression that is protected by the First Amendment is off-limits as far as school discipline goes (for now).

The following case summaries, some of which will be discussed during the presentation, are provided as a reference:

*Tinker v. Des Moines* 393 U.S. 503 (U.S. 1969) – Students wore black armbands to school to protest the Vietnam War. The armbands were not disruptive and the school was prohibited from upholding discipline against the students. Students do not shed their constitutional rights at the school house doors, but schools can prohibit speech that is likely to or does lead to a substantial disruption of school activities. Although *Tinker* was addressing in-school speech, the “substantial disruption” standard has been applied to both in-school and out-of-school speech cases for decades.

*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) – Student gave a lewd speech during a school assembly promoting a friend for student government. His speech used language that compared his friend’s ability to serve the student body to his sexual prowess. The student was subjected to discipline and the discipline was upheld. The Court concluded that schools can punish offensive, lewd, and indecent speech in the school setting.

*Morse v. Frederick*, 551 U.S. 393 (2007) – Student was suspended for displaying a large banner at a school sponsored activity (attending the Olympic Torch Relay). The school principal, saw students unfurl a banner stating “BONG HiTS 4 JESUS,” which she regarded as promoting illegal drug use. The principal directed the students to take the banner down and when one student (Frederick) refused, she confiscated the banner and later suspended him. The Court held it was a school event, the banner promoted illegal drug use, and the principal did not violate the student’s First Amendment rights by restricting his speech at school when the speech was reasonably viewed as promoting drug use.

*Layshock v. Hermitage School Dist.*, 650 F. 3d 205 (3d. Cir. 2011) – Parents of high school student brought § 1983 action against school district, superintendent, principal, and co-principal, alleging that they violated student’s First Amendment rights by disciplining him for creating a fake internet profile of his principal on a social networking site and also violated the parents’ Fourteenth Amendment substantive due process rights. The Court determined that the student use of the principal’s photograph which was found on the district’s public website was not sufficient to create a nexus between the school and the profile (created outside of school) and school district did not
have authority to punish student for expressive conduct outside of school that district considered lewd and offensive. **Further, the out of school conduct did not create a substantial disruption at school.**

_J.S. ex. rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915 (3d. Cir. 2011)_ – Parents, on behalf of student, filed a § 1983 action against the school district, claiming violation of free speech rights, due process rights, and state law by suspending student from middle school for creating a fake profile for the school principal from her home computer. The MySpace profile contained the principal’s photograph (also taken from school district website) and profanity-laced statements insinuating that he was sex addict and pedophile. The Court held that the school district could not have reasonably forecasted substantial disruption of, or material interference with, school due to the profile, could not punish student for use of profane language outside the school, during non-school hours, and student’s lewd, vulgar, and offensive speech that had been made off-campus had not been turned into on-campus speech when another student brought printed copies of that speech to school at the express request of the school principal.

_B.H. ex. rel. Hawk v. Easton Area School District, 725 F.3d 293 (3d Cir. 2013)_ – Middle school students successfully challenged school’s ban of breast cancer awareness bracelets. The court held that the District could not restrict speech that was commenting on political/social issues, the bracelets were not lewd under _Fraser_ and the bracelets did not cause a substantial disruption under _Tinker_. The school was also unable to defend the ban under a Title IX theory.

_Burge v. Colton School Dist. 53, 100 F. Supp. 3d 1057 (D. Oregon 2015)_ - Middle school student was suspended for out-of-school comments about teacher on social media site, including comment “she needs to be shot.” The Court held that the student's out-of-school comments about teacher on social media site, including that “she needs to be shot,” did not present a true threat beyond the protection of the First Amendment. The Court found in favor of the student on his First Amendment claim, ordered that the suspension be removed from his record and awarded reimbursement for his attorney fees and costs.

_A.N. by and through Niziolek v. Upper Perkiomen Sch. Dist., 228 F. Supp. 3d 391, (E.D. Pa. 2017)_ - High school student brought action under §§ 1983 and 1988 against school district, superintendent, assistant superintendent, and principal, alleging violation of free speech in violation of the First and Fourteenth Amendment for suspending the student and pursuing expulsion. Student made an out-of-school social media post that led to a perceived threat of a school shooting which resulted in the superintendent canceling school for the safety and well-being of students. Because the social media post actually caused a substantial disruption, the court found that the student was unlikely to prevail on merits of his free speech claim because the social media post reasonably led school officials to forecast a substantial disruption of, or a material interference with, school activities.

_B.L. by and through Levy v. Mahanoy Area School Dist., 964 F.3d 170, (3d. Cir. 2020), cert. granted_ (U.S. January 8, 2021)- B.L. made a social media post snap chat on a Saturday (photo of her and another student giving the middle finger with the caption “F*** school f*** softball f***
cheer f*** everything.” She was suspended from participating in cheerleading for a year. B.L. brought a First Amendment challenge and the Middle District Court ruled in her favor finding that even though B.L. agreed to the team rules, she did not waive her First Amendment rights, the snap was made on a Saturday, so it did not implicate Fraser, it did not cause a substantial disruption so Tinker did not apply, and the discipline violated the First Amendment. School district appealed to the 3rd Circuit and the Court took it even further, affirming the decision of the Middle District, but adding a holding that the Tinker standard does not apply to off-campus speech! The case is now pending before the United States Supreme Court.

Appeal of G.S., Civ. No. 2019-006041 (Delaware Co. Ct. of Com. Pleas 2020) – G.S. was expelled after posting what he thought was innocent post on social media. G.S. posted the following song lyrics on Snapchat, “Everyone, I despise everyone! F*** you, eat s***, blackout, the world is a graveyard! All of you, I will f***ing kill off all of you! This is me, this is my snap!” Judge upheld the District’s adjudication expelling the student for harassment and engaging in conduct/speech that disrupted the school environment, the Judge did not uphold the District’s administrative charge of “Terroristic Threats” under the Student Code of Conduct. Terroristic Threats was not defined by the Code of Conduct and so the court applied the Crimes Code definition and determined that the conduct did not constitute Terroristic Threats. Note that G.S. did not raise a First Amendment claim.

T.W. v. Southern Columbia Area School District, 2020 WL 7027636 (M.D. Pa. 2020) – T.W. was suspended from participating in extracurriculars and athletics for the 2020-2021 school year after his 3rd violation of the drug and alcohol policy. The student handbook prohibited students from “attending any event in which underage drinking, smoking, or drug use is occurring.” Actual consumption of alcohol or drugs is not required to establish a violation. T.W.’s family filed for a temporary restraining order to lift the suspension. The Court held that the District had a rational basis for the handbook prohibition and would likely prevail on the merits, and that the relative harm to the school district would outweigh the harm to the student. The TRO was denied.

Morgan Earnest, a minor, by and through her mother, Linda Kohler v. Mifflin County School District, Civil No. 1:20-CV-01930 (M.D. Pa. 2020) – The District Court granted a temporary restraining order enjoining Mifflin County School District (Mifflin County) from enforcing its policy to prevent a student from wearing a mask with the words “Women for Trump,” and a shirt that stated “Trump 2020 Keep America Great” on the front and “Trump 2020 The Sequel Make Liberals Cry Again” on the back. The school sent the following email message to families: Starting on Monday October 5, 2020, no masks, articles of clothing or other items may be worn or otherwise brought on to Mifflin County School District property, which contain political speech or symbolize a particular political viewpoint, including but not limited to confederate flags and swastikas, as well as BLM logos or phrases associated with that movement… The court determined that the student was likely to prevail on the merits, acknowledging that the Supreme Court has held that articles of clothing are akin to “pure speech” which “is entitled to comprehensive protection under the First Amendment.”
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BULLYING/CYBERBULLYING

The School Code also requires schools to adopt anti-bullying polices. Those policies can included out of school cyberbullying. The relevant statutory language provides:

...(d) In its policy relating to bullying adopted or maintained under subsection (a), a school entity shall not be prohibited from defining bullying in such a way as to encompass acts that occur outside a school setting if those acts meet the requirements contained in subsection (e)(1), (3) and (4). If a school entity reports acts of bullying to the office in accordance with section 1303-A(b), it shall report all incidents that qualify as bullying under the entity’s adopted definition of that term.
(e) For purposes of this article, “bullying” shall mean an intentional electronic, written, verbal or physical act, or a series of acts:
(1) directed at another student or students;
(2) which occurs in a school setting;
(3) that is severe, persistent or pervasive; and
(4) that has the effect of doing any of the following:
   (i) substantially interfering with a student's education;
   (ii) creating a threatening environment; or
   (iii) substantially disrupting the orderly operation of the school.

To date, there are no known published cases specifically challenging this statute or anti-bullying policies including this language.