THE FIRST AMENDMENT AND CONTROVERSIAL ISSUES IN THE SCHOOL

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FIRST AMENDMENT

The First Amendment of the United States Constitution states:

“Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.”

FIRST AMENDMENT (CONT.)

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of any idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414.

RIGHTS OF COMMUNITY MEMBERS AT BOARD MEETINGS

NEW MEXICO OPEN MEETINGS ACT

The OMA expressly states that "all persons desiring shall be permitted to attend and listen to the deliberations and proceedings." N.M. Stat. Ann. § 10-15-1(A) (1978).

That provision means that "Board meetings, with the exception of those portions permitted or required to be closed by New Mexico law, are limited public fora for the *receipt* of information about the Board's business." MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ., 2015 WL 13659218, at *2 (D.N.M. Apr. 6, 2015).

In other words, the Court appears to have found a First Amendment right to attend a NM Open Meeting.

QUESTIONS?

Does that mean that a board must tolerate:

- Threats of violence?
- Constant interruptions from the audience?
- Personal attacks on the integrity of board members, administrators, or employees?
- Breaches of rules of decorum for the public meeting?
- The obstruction of public business?

NMSA 1978, § 30-20-13

A. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivisions, willfully deny to staff, public officials or the general public:

- (1) lawful freedom of movement within the building or facility or the land on which it is situated;
- (2) lawful use of the building or facility or the land on which it is situated; or
- (3) the right of lawful ingress and egress to the building or facility or the land on which it is situated.

§ 30-20-13, CONT'D

B. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivisions, willfully impede the staff or a public official or a member of the general public through the use of restraint, abduction, coercion or intimidation or when force and violence are present or threatened.

§ 30-20-13, CONT'D

C. No person shall willfully refuse or fail to leave the property of or any building or other facility owned, operated or controlled by the state or any of its political subdivisions when requested to do so by a lawful custodian of the building, facility or property <u>if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the property, building or facility.</u>

§ 30-20-13 CONT'D

D. No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

E. Nothing in this section shall be construed to prevent lawful assembly and peaceful and orderly petition for the redress of grievances, including any labor dispute.

F. Any person who violates any of the provisions of this section shall be deemed guilty of a petty misdemeanor.

NMSA 1978, § 30-3-9. ASSAULT; BATTERY; SCHOOL PERSONNEL

Creates enhanced penalties for assault and battery when committed against a "school employee" in the lawful discharge of his or her duties.

"School employee" includes a member of the school board and all employees.

Battery upon a school employee is the unlawful, intentional touching or application of force to the person of a school employee while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner. This is a 4th Degree Felony.

Assault upon a school employee is an attempt to commit battery or any unlawful act, threat or menacing conduct which cause the employee to believe his is in danger of immediate battery.

EXAMPLES OF ALLOWABLE REMOVALS FROM MEETINGS:

Courts have consistently allowed local government officials to temporarily remove disruptive people from public meetings to prevent interruptions, disregard of rules of decorum and disruptive behavior.

Dumping several bags of trash on the floor during a school board meeting was not protected speech. The citizen was appropriately removed. McMahon v. Albany Unified Sch. Dist., 104 Cal. App. 4th 1275, 129 Cal. Rptr. 2d 184 (2002)

REMOVALS AUTHORIZED

Allowed to remove a citizen for spoken interruptions of board deliberations when comments limited to public comment period of meeting. Removal based on timing, not content of speech. Galena v. Leone, 638 F.3d 186, 211 (3d Cir. 2011)

Removal allowed for plaintiff's badgering, constant interruptions, and disregard for the rules of decorum. Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 281 (3d Cir. 2004)

REMOVALS AUTHORIZED

Ejection authorized when plaintiff yelling and trying to speak when it was not his turn and for making an obscene gesture toward a board member. Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 271 (9th Cir. 1995)

Speaker may be silenced or removed for speaking too long, being unduly repetitious, or extending discussion of irrelevancies. White v. City of Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990)

PUBLIC COMMENT

Open Meetings Act does not require local boards of education to allow for public comment at any of its board meetings. OMA does not turn a school board meeting into a public forum for the public to speak.

Although it is not required, many school boards (if not most or all) have decided to allow for public comments during board meetings by specifying a place on the meeting agenda for receiving such comments.

If the board allows public comment, it creates a forum for speech and First Amendment standards apply depending on the type of forum opened by the board's rules on public comment.

THE RIGHT TO SPEAK AT BOARD MEETINGS IS NOT ABSOLUTE

The First Amendment does not require that students, teachers, or anyone else have an absolute right to all parts of a school for unlimited expressive purposes.

The standards by which limitations on free speech are evaluated differ depending on the character of the property at issue.

- "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." Minn. State Bd. of Community Colleges v. Knight, 465 U.S. 280, 283 (1984).

FORUM ANALYSIS

The public has no right to speak at a board meeting unless the Board opens up a "forum" for public comment.

The types of restrictions that can be put on the speech depend on the type of forum the board opens.

In no type of forum must the Board tolerate threats to the safety of other people or actual disruption that prevents the board from conducting its business.

FORUM ANALYSIS

There are basically two types of public forums the local school board may create to allow for public speech at school board meetings:

- On one side, in a “designated public forum” there is no limit on speech when the meeting is open.
- On the other side, in a “limited public forum” a school board may restrict speech to the subject matter of the meeting which the school board intended to address in conducting its business.

DESIGNATED PUBLIC FORUM

First, a designated public forum is public property not traditionally open that the government has "opened for use by the public" as a place for speech and expressive activity. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983).

If the board allows public comment at board meetings on any subject at all, it has created a Designated Public Forum.

DESIGNATED PUBLIC FORUM.

A school board may choose whether or not to designate a forum as public, but once it does so, it is very limited in how it can restrict speech there.

Though the board is not required to maintain the designated public forum indefinitely, as long as its open, the same standards apply as in a traditional public forum.

Reasonable time, place, and manner regulations are permissible, and a content based (i.e., subject matter based) restriction must be narrowly tailored to effectuate a compelling board interest.

DESIGNATED PUBLIC FORUM

Public Comment on any matter

- Only necessary time and place restrictions
  - Limiting time for comments

Comments on Superintendent and other employees of the School District

- Comments cannot be limited except for fighting words causing disruption
- Warning about defamation

Comments on Board members

- Comments cannot be limited except for fighting words causing disruption
- Warning about defamation

LIMITED PUBLIC FORUM

The second forum that can be created is a limited public forum.

A limited public forum is public property that the government allows to be used by certain groups or dedicated solely to the discussion of certain subjects. Christian Legal Soc'y. v. Martinez, 561 U.S. 661, 679, 130 S. Ct. 2971, 2984, 177 L. Ed. 2d 838 (2010)

LIMITED PUBLIC FORUMS

Allows for public expression of particular kinds, or by particular groups.

Board may restrict speech in a limited public forum so long as it (1) does not discriminate against speech based on viewpoint, and (2) is reasonable in light of the purpose served by the forum. A restriction based on subject matter (i.e., content) may be permissible if it preserves the purposes of the forum.

LIMITED PUBLIC FORUM

In a limited public forum, a government entity is justified in limiting its meeting to discussion of specified agenda items and imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business.

Such restrictions may not, however, discriminate on the basis of the speaker's viewpoint. *Steinberg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 387 (4th Cir. 2008).

LIMITED PUBLIC FORUM

For example, city council meetings are regarded as public forums, albeit limited ones. A city council does not violate the First Amendment when it restricts public speakers to the subject at hand. White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990); *see also* Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266 (9th Cir. 1995)

LIMITED PUBLIC FORUM

Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747 (5th Cir. 2010)

School Board meetings can be limited public forums

- local school board meeting here "fits the hornbook definition of a limited -- not designated -- public forum, in which 'the State is not required to and does not allow persons to engage in every type of speech.'" Fairchild, 597 F.3d at 759, *quoting* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

LIMITED PUBLIC FORUM

A board may:

- create a rule to limit public comment to people who live in the district
- create a rule to limit public comment to items on the board's meeting agenda
- restrict speakers from invoking the name of individual students
- be able to restrict employees from raising employment grievances in a public meeting, particularly if there is an alternative grievance procedure to follow
- create a rule limiting the total public comment period to a fixed amount of time and may create time limits for each individual commenter

These rules are constitutional "on their face." They could be unconstitutional if applied in a discriminatory way.

LIMITING SPEECH REGARDLESS OF FORUM

The board must also be familiar with what sorts of restrictions may be placed on disruptive comments and behavior at board meetings.

The Fourth Circuit has held that the presiding officer at a board meeting has the discretion to stop speech that the officer "reasonably perceive[s] to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion." Collinson v. Gott, 895 F.2d 994, 1000 (4th Cir. 1994).

The Fourth Circuit has also concluded that "a personal attack leads almost inevitably to a responsive defense or counterattack . . . that has the real potential to disrupt the orderly conduct of the meeting." *See* Steinberg v. Chesterfield County Planning Comm'n, 527 F.3d 377, 387 (4th Cir. 2008). But see MacQuigg.

Spectators may also be prevented from boisterously commenting upon the deliberations of the board. Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1971).

MACQUIGG V. ALBUQUERQUE PUB. SCH. BD. OF EDUC., (D.N.M. AUG. 10, 2015)

First Amendment case against APS related to the ejection of plaintiff from APS board meetings;

The issue in the written decision was whether APS's rules barring public comment about "personnel issues" and "personal attacks" was Constitutional;

The Court held that by setting aside a public comment period, the Board created a limited public forum.

MACQUIGG CONT'D.

The Court held that the rule against public comment about "personnel issues" discriminated against speech based on "content" (i.e., subject matter) but not on "viewpoint."

Because, by law, the Board has limited authority over personnel matters (that don't involve the Superintendent's employment), it was reasonable to make a rule that confined public comment to things within the board's purview. In other words, the rule was Constitutional "on its face."

However, the evidence showed that Plaintiff's comments were about the handling of whistleblower complaints, district finances, resistance to an audit to uncover mismanagement, and the alleged cover-up of criminal misconduct. Not *per se* "personnel issues." Therefore, the Court held that the rule may be unconstitutional "as applied" to Plaintiff.

MACQUIGG,CONT'D.

The Court found that the Board's "personal attacks" policy was unconstitutional "on its face," and issued a permanent injunction banning the Board from enforcing it.

The Court determined that the "personal attacks" policy was a speech restriction based not only on content but also viewpoint because it allowed praise or neutral comment but not criticism or disapproval.

MACQUIGG, CONT'D.

The Court noted that viewpoint-based restrictions are impermissible when directed at speech otherwise within the forum's limitations unless they are narrowly drawn to effectuate a compelling state interest.

The Court also held that evidence showed that plaintiff's comments were not "personal attacks," so even if the rule was facially constitutional, it was unconstitutional as applied.

The Court noted that other courts have come to opposite conclusions about whether "personal attacks" policies are viewpoint discrimination.

LIMITING SPEECH FOR DISRUPTION

In a limited public forum, a speaker may be removed from a public meeting for refusing to limit his comments to the topic at hand and responding to the chair in an antagonistic manner as long as the restriction on his speech is not based merely upon disapproval of the speaker's viewpoint. Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989).

LIMITING SPEECH FOR DISRUPTION

In another case, the evidence showed that the speaker was repetitive and truculent and that he repeatedly interrupted the chair during the meeting. The court upheld his ejection from the meeting as based upon the content-neutral desire to prevent his badgering and disregard for decorum. Eichenlaub v. Township, 385 F.3d 274 (3rd Cir. 2004).

LIMITING SPEECH FOR DISRUPTION

The President of the board must be clear in dealing with such individuals as to ensure that the reasons for terminating the speech and/or removing an individual from a meeting are not based on the content of the individual's speech but on the orderly completion of the board's business, including ensuring the viewpoint neutral reasons are placed in the minutes of the meeting.

BE CAREFUL ABOUT PERMANENT BANS

Bans from attending board meetings or making public comment should, as much as possible, be of limited duration and leave open the possibility of alternative channels for expressive activity, such as permitting reasonable and responsible written questions.

POLICY DEVELOPMENT

Create limited public forum by policy

- **Give notice of limited forum**
- **Agenda items only**
- **Limitations on time and place**
    - **Limited time**
    - **Only during public comment portion of meeting**

Training of board members on control of meetings to limit speech to agenda items only.

- **Restricting comment**
- **No expanding the forum**

PRACTICAL TIPS

Have a clearly written policy for dealing with unruly audience members and consistently follow the policy.

Adopt rules of order that clarify the types of behavior deemed disruptive.

Adopt written rules of decorum, protocol, and procedures.

Explain the rules to the public, and how they will be applied.

For controversial issues, ask law enforcement to be present.

PRACTICAL TIPS

Meet with appropriate people ahead of time to discuss how to deal with disruptions.

Provide at least one warning before removing a disruptive person.

Organize agenda to ensure that business gets done even if disruptions are anticipated with a particular agenda item.

Consider limiting comment at all board meetings to items on the agenda.

At all board meetings, limit total and individual time for public comment.

PRACTICAL TIPS

Focus on the conduct, rather than the content of the speech.

Before reacting, consider whether it will appear to be action (i.e., discrimination) based on content or view point.

Listen for legitimate criticism. Be careful of your body language.

Stop and think about whether you are creating an impression of content or viewpoint discrimination.

PRACTICAL TIPS

Remind audience to be civil.

Expect coarsely phrased criticism of yourself, and the district's policies, services, and employees.
Expect and respect disagreement and conflict.
Rise above the disruption.

Avoid debates.

Refer legitimate complaints to staff.

Take a break.

PUBLIC EMPLOYEE SPEECH RIGHTS

FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

Landmark case is a public school case: Pickering v. Board of Ed. (1968)

Pickering was a HS teacher who wrote a letter to the editor criticizing the Board and Superintendent's handling of a bond issue. He was terminated for conduct "detrimental to the efficient operation and administration of the schools"

He sued, alleging that his free speech rights were violated.

PICKERING BALANCING TEST

Supreme Court recognized the tension between protecting First Amendment rights of public employees and the competing need for orderly school administration.

Court created a balancing test to weigh the interest of "a citizen, in commenting upon matters of public concern and the interests of the state, as an employer in promoting the efficiency of the public services it performs through its employees."

PICKERING BALANCING TEST (CONT'D.)

Court found that the question of whether the district needs additional funds is a matter of public concern about which teachers are likely to have informed opinions

Court found no evidence that the letter "impeded the teacher's proper performance of his duties in the classroom or… interfered with the regular operations of the schools."

Court decided the balance tipped in Pickering's favor.

CONNICK V. MYERS (U.S. 1983)

Assistant District Attorney created and circulated office questionnaire to co-workers asking about morale, confidence in supervisors, and other office complaints.

Court held that these were more personal gripes about the office than matters of public concern and that the speech endangered the functioning of the office. Found no 1st Amendment violation.

GARCETTI V. CEBALLOS (U.S. 2006)

DA claimed that he was rejected for promotion for, within the scope of his duties, criticizing the legitimacy of a warrant.

Court held that since this speech was made as part of his official duties, he was not speaking as a citizen, and the First Amendment did not apply

SAME PRINCIPLES APPLY TO ONLINE SPEECH

Richerson v. Beckon (9th Cir. 2009)– mentor teacher was demoted for online blog in which she posted negative comments about employer and co-workers.

Court found that her position required her to have trusted mentor relationships with newer teachers and her posts impeded her ability to do that to the detriment of the school.

BLAND V. ROBERTS (4TH CIR. 2013)

Deputy sheriffs were terminated for "liking" the Sheriff's election rival's Facebook page.

4th Circuit held that the "likes" were protected speech, and since the deputies were not engaged in policy-making, they could not be fired for expressing their political views.

CZAPLINSKI V. BOARD OF EDUCATION (D.N.J. 2015)

School security guard fired after off-duty social media posts about the killing of a police officer.

She called the killers "black thugs" and stated that "all white people should start riots and protests and scare the hell out of them."

Court held that the speech was on a matter of public concern but that the speech undermined her ability to resolve disputes and maintain peace as a security guard. No 1st Amendment violation

MUNROE V. CENTRAL BUCKS SCHOOL DISTRICT (E.D. PA 2014)

HS teacher fired for blog posts negative comments about her students and their parents. Though she did not specifically identify them, they were identifiable to readers.

Used descriptions of students like "frightfully dim," "whiny, simpering grade-grubber," and "ratlike."

Main focus of comments was complaints about students living up to her expectations, as opposed to "larger discussions about educational reform, pedagogical methods or school policies."

Court found that blog-entries weren't protected by 1st Amendment

THE PUBLIC EMPLOYEE FREE SPEECH STANDARD

A public employee's speech is protected when he or she (1) speaks as a private citizen upon (2) a matter of public concern and (3) the employee's interest in exercising his or her First Amendment rights are greater than the employer's interest in the efficient operation of the public agency."

If speech has no "nexus" or connection with the school, it is less likely that speaker may be disciplined.

Each case is different and courts look to the totality of the circumstances in performing the balancing.

FIRST AMENDMENT FREE SPEECH STUDENTS

WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE (1943)

WWII era case. In 1942, West Virginia passed a law requiring students to salute the flag and recite the pledge of allegiance. Refusal leads to expulsion. Jehovah's Witnesses refused on religious grounds. Jehovah's Witnesses in Germany had been sent to concentration camps for refusing to salute Nazi flag. Not a religious freedom case/but a free speech case.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

BARNETTE, CONT.

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

TINKER v. DES MOINES ICSD (1969)

High school students planned to wear black armbands to protest the Vietnam war. School learned of planned protest and implemented a policy to deter participation. Three students, including 13 year old Mary Beth Tinker, wore armbands and were sent home. No disruption occurred at the school due to the armbands.

Did the school's prohibition of the armbands (symbolic speech) violate the First Amendment?

7-2 Decision Against School. The Court held that students did not lose their First Amendment rights to freedom of speech when they stepped onto school property; and Armbands were pure speech which could not be infringed without proving that speech would *"materially and substantially" interfere with the operation of the school or impinge on the rights of other students.*

Became known as the "substantial disruption" test which still governs the free speech rights of students in public schools.

REASONABLE FORECAST OF SUBSTANTIAL DISRUPTION

Disruption need not actually occur. School may act to prevent problems if the situation might *reasonably* lead school authorities to forecast substantial disruption or interference with rights of others.

Forecast must be reasonable. Officials may not restrict speech based on unsupported fear, or on a mere desire to avoid unpleasantness accompanying an unpopular viewpoint.

REASONABLE FORECAST OF SUBSTANTIAL DISRUPTION (CONT'D.)

For a school's forecast to be reasonable, courts generally require that it be based on a concrete threat of substantial disruption.

A silent, passive expression that merely provokes discussion in the hallway would not constitute such a threat.

TINKER CONT.

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[

“But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”

BETHEL v. FRASER (1986)

While speaking at a school assembly a student used a graphic sexual metaphor. School District suspended the student pursuant to its rule prohibiting conduct that substantially interferes with the educational process.

7-2 Decision for the school. The court distinguished the political speech in Tinker from speech that was inconsistent with "the fundamental values of public school education."

"Conduct which materially and substantially interferes with the educational process is prohibited, including the use of *obscene, profane language or gestures*."

HAZELWOOD V. KUHLMEIER (1988)

A school paper, written and edited by students ,submitted a draft to the school principal. Principal determined that two articles (divorce and teen pregnancy) were inappropriate and ordered that the articles not be printed.

Can a school censor student speech in a school sponsored publication?

5-3 Decision for the School. The court held that the First Amendment does not require a school to endorse or otherwise authorize speech disseminated in a school sponsored publication.

"Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities," the Court said, "so long as their actions are *reasonably related to legitimate [educational] concerns*."

MORSE v. FREDRICK (2007)

At a school-supervised event, a student held up a banner with the message "Bong Hits 4 Jesus." The student's principal took away the banner and suspended the student for ten days.

Can a school prohibit certain speech at school-supervised events?

5-4 Decision for School. The Court held that students' right to political speech in school does not extend to pro-drug messages that undermine the school's mission to discourage drug use.

MAHANOY AREA SCHOOL DISTRICT V. B.L (US 2021)

Girl didn't make varsity cheer team but she did make JV. Two posts on Snapchat: The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "F*** school f *** softball f *** cheer f *** everything." The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" Suspended from JV team for a year, student sues District.

Court:

While public schools may have a special interest in regulating some off-campus student speech, the special interests offered by the school are not sufficient to overcome B. L.'s interest in free expression in this case

MAHANOY AREA SCHOOL DISTRICT V. B.L (US 2021)

The special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Circumstances that may implicate a school's regulatory interests **include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices**.

MAHANOY AREA SCHOOL DISTRICT V. B.L (US 2021)

Off campus speech is different, because:

1. **School generally not standing *in loco parentis* when speech is off-campus.**
2. **If school can regulate all campus speech and all off-campus speech, that is every bit of a student's speech.**
3. **School has an interest in protecting unpopular student speech to teach the value of free speech.**

Speech cause no serious disruption. She was criticizing a group she was part of, off- campus and off-hours. Posts didn't mention school or any particular person. Post were made on her phone, to a private circle of friends.

School violated free speech rights by suspending her from the softball team for her snapchat posts.

SOCIAL MEDIA POSTS USUALLY OFF-CAMPUS, OUTSIDE SCHOOL HOURS. CAN YOUR REGULATE?

Apply *Mahanoy* and the *Tinker* standard: Can the school show:

- The speech "materially and substantially interfered" with the educational process; or
- The speech is reasonably forecasted to materially and substantially interfere with the educational process.

Courts differ on standard for "substantial disruption"

SOME FIRST AMENDMENT QUESTIONS ABOUT STUDENT SOCIAL MEDIA USE

Is it speech (including expressive conduct)?

If it is speech, is it private speech or school-sponsored speech?

Does the speech contain a credible threat of violence?

Is the speech lewd and offensive?

Is the speech so directed at one person that it limits their ability to get an education?

SOME FIRST AMENDMENT QUESTIONS ABOUT STUDENT SOCIAL MEDIA USE (CONT'D.)

Is the speech disruptive? If so, how substantial is the disruption?

Is there a nexus between the speech and the school?

Does the speech violate any applicable state law requirements?

STUDENT ONLINE FREE SPEECH CASES

Bell v. Itawamba (5th Cir. 2015)– student recorded and posted rap video accusing coaches of sexual misconduct. Included: "I'm going to hit you with my rueger," and "going to get a pistol down your mouth." He admitted that he intended the video to be viewed by the school community.

Court finds jurisdiction to regulate off-campus speech where student "intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher…"

STUDENT ONLINE FREE SPEECH CASES (CONT'D)

Snyder v. Blue Mountain School District (3rd Cir. 2011)-- Student posted a MySpace parody of principal as sex addict and pedophile. Court stated that the speech was so outlandish that it couldn't be taken seriously, and that district could not discipline for it since it was off-campus and did not substantially disrupt.

Layschock v. Hermitage School District (3rd Cir. 2011)- Student created a fake MySpace profile off-campus that ridiculed Principal. Court found that speech did not create a substantial disruption, rejected claims that there was a sufficient "nexus" to the School, and overturned discipline.

STUDENT ONLINE FREE SPEECH CASES (CONT'D)

Kowalski v. Berkeley County Schools (4th Cir. 2011)– Student created a MySpace page that implied that another student had herpes. She was suspended from school for violating bullying policies. Court stated that "where (bullying) speech has sufficient nexus with the school, the Constitution is not written to hinder administrator's good faith efforts to address the problem."

TRUE THREATS ARE NOT PROTECTED SPEECH

High school student D.J.M. used his home computer's "instant messaging" program to send message to his friend, C.M. ***D.J.M. ex rel. D.M. v. Hannibal Public School Dist. No. 60, 647 F.3d 754 (8th Cir. 2011).***

Messages included statements that D.J.M. wanted to go to school and shoot several classmates and himself. He named five specific students whom he said "would go" or "would be the first to die," and he referred to these students using hate-filled and discriminatory language.

D.J.M. was depressed at the time because he had been rejected by a romantic interest.

TRUE THREATS ARE NOT PROTECTED SPEECH (CONT'D.)

D.J.M.'s messages talked about using a 357 magnum that could be borrowed from a friend.

D.J.M. told C.M. that he "wanted Hannibal [School District] to be known for something."

C.M. was concerned and reported D.J.M.'s messages to the school principal. School principal and superintendent called the police and suspended him from school.

Numerous parents called principal asking what the school was doing to address D.J.M.'s threats and whether their children were on a rumored hit list.

TRUE THREATS ARE NOT PROTECTED SPEECH (CONT'D.)

D.J.M.'s parents sued the school district, alleging that his suspension had violated his First Amendment right to free speech. D.J.M. claimed the instant messages were intended as a joke.

Although D.J.M. did not communicate any threatening statements to the students targeted in his messages, he intentionally communicated them to his friend, C.M.

The district court found that because C.M. was a classmate of the targeted students, D.J.M. knew or should have known that the classmates he referenced could be told about his statements.

TRUE THREATS ARE NOT PROTECTED SPEECH (CONT'D.)

Court found that D.J.M.'s statements were true threats not subject to First Amendment protection.

D.J.M.'s depression and access to weapons made his threats believable. The juvenile court judge had ordered him to have a psychiatric evaluation, and no one who became aware of D.J.M.'s message thought he was joking.

The Eighth Circuit court found that school district did not violate D.J.M.'s First Amendment rights by notifying the police about his threatening instant messages and suspending him after he was placed in juvenile detention.

TRUE THREATS ARE NOT PROTECTED SPEECH (CONT'D.)

The school district was not required to see whether D.J.M. carried out his talk about taking a gun to school and shooting certain students.

The Eighth Circuit stated that school officials would have exposed the District to what reasonably appeared to them as a serious risk of harm to students and disruption of the school environment if no action had been taken in response to D.J.M.'s threatening instant messages.

D.J.M.'s conduct probably would violate New Mexico's new cyberbullying law.

QUESTIONS

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