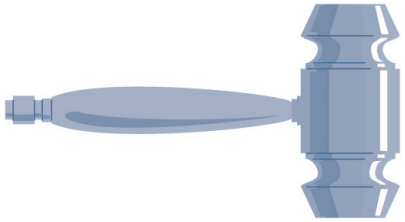
Legal Corner



By Michael I. Levin, Esq., PA Principals Association General Counsel

Addressing Critical Speech from Students, Parents and Community Members

Recently, we discussed the topic of regulating off-campus student speech as addressed by the U.S. Supreme Court in *Mahanoy Area Sch. Dist. v. B.L. by & through Levy,* 141 S. Ct. 2038 (2021). That discussion led to some questions from administrators related to online speech, not by students, but instead from parents or members of the community. More specifically, administrators raised the issue of what to do when students, parents or community members make or post critical or disparaging remarks about administrators at public meetings of the school board or on social media.

No doubt that many administrators have been on the receiving end of unflattering comments made by students, parents and community members. Such examples can span the spectrum, from parents voicing displeasure at grading or disciplinary matters related to their children, to voicing opinions on more broader topics such as racism, student safety, curriculum, sports programs or health measures. Some remarks are aimed at the school district as a whole, and some are aimed at particular school officials. Some are accusatory, personal in nature and/or offensive. Sometimes it is not the comments but the tone or manner in which the comments are presented that is objectionable.

The question then is what, if anything, can the school district or the administrator do about such comments?

Unlike student speech in school, outside of limited school forums (board meetings or school-sponsored events), schools and school administrators have limited control, authority or jurisdiction to regulate or restrict speech by parents or community members and even less authority to "punish" such speech. When it comes to social media in particular, unless the social media platform utilized by an adult is one provided by the school, that authority is almost non-existent as to online speech. Even during school board meetings, speech may be protected, at least to some extent.

Even where the school has such limited authority, a recent decision by the U.S. District Court for the Eastern District of Pennsylvania, albeit decided in a different context, provides some overarching guidance related to this topic. In *Marshall v. Amuso*, No. CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021), attendees of school board meetings whose public comments were interrupted or terminated pursuant to board policies brought action against the school district and its solicitor to obtain a preliminary injunction to prevent the application of those policies that restricted their speech at public meetings. Granting the injunction, the court held that the school district's policies which prohibited certain comments constituted viewpoint discrimination in violation of the First Amendment, free speech clause.

Applicable to this discussion, the court noted that the First Amendment protections for free speech apply to speaking at public school board meetings which are considered limited public forums. Id., citing, City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n, 429 U.S. 167, 174-75, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). The court continued:

> In a limited public forum, "[c]ontent-based restrictions are valid as long as they are reasonable and viewpoint neutral." NAACP v. City of Phila., 834 F.3d 435, 441 (3d Cir. 2016). However, "viewpoint discrimination is impermissible in any forum." Ctr. for Investigative Reporting v. Se. Pa. Transp. Auth., 975 F.3d 300, 313 (3d Cir. 2020), cert. denied sub nom. SEPTA v. Ctr. for Investigative Reporting, No. 20-1379, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2021 WL 4507651 (Oct. 4, 2021).
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> "[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, [the Supreme Court has] observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of Univ. of*

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> *Va.*, 515 U.S. 819, 829-30, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is ... blatant." Id. at 829, 115 S. Ct. 2510. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Id. Apropos of the case at hand, "[i]f the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." Id. at 831, 115 S. Ct. 2510. *Id. at *4.*

In a nutshell, what the court said is that in a limited public forum although school districts can limit the content (the topics) of discussion, the school district cannot restrict the speaker's viewpoint (opinions) offered as to those topics.

The court further noted that a viewpoint need not be political; any form of support or opposition to an idea could be considered a viewpoint. Id. at *4 citing Matal, —— U.S. ——, 137 S. Ct. 1744 at 1766. Moreover, in response to the argument that such speech may be offensive, the court noted that "Giving offense is a viewpoint." Id. at *4 citing Matal v. Tam, —— U.S. ——, 137 S. Ct. 1744, 1763, 198 L.Ed.2d 366 (2017). "[D]isfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment." Id. at *4, citing Iancu v. Brunetti, —— U.S. ——, 139 S. Ct. 2294, 2301, 204 L.Ed.2d 714 (2019). The court further asserted:

> The School Board has also censored and terminated comments deemed "abusive" because they include comments deemed offensive racial stereotypes. While this Court does not address the School Board's or its employees' assessment of whether the speech was offensive or to whom, suffice it to say that the First Amendment protects offensive speakers. The Policy terms invoked to terminate the offensive comments ("abusive" and "personally directed") "prohibit speech purely because it disparages or offends." Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887, 894 (6th Cir. 2021); see also Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). This, too, is impermissible viewpoint discrimination. *Id. at *5.*

Simply stated, the court held that the fact that the content of the speaker's comments may be "offensive" to some does not permit the school district to restrict the speaker's comments.

Finally, in terms of restricting "personally directed" comments, the court noted that "Calling for a School Board member's resignation, for example, is 'personally directed' and could be considered 'irrelevant' to an underlying issue or problem but it could also be considered highly relevant to the School Board member's role in creating or failing to address or solve the issue or problem." Id. at *6. The court further noted that personally directed opinions by citizens as to decisions to hire or fire employees are relevant to its business. The court held that by "[c]haracterizing criticism of a District employee's possible wrongful conduct or competence as 'personally directed' or 'abusive,' the District itself demonstrates the overbreadth of its policy." Id. at *8.

What this means is that such personally directed accusations of incompetence or wrongdoing, etc., as long as they are related to the topic of discussion, are not impermissible and cannot be restricted, especially if "positive" personally directed comments are permitted without restriction.

Although the court indicated that school districts can certainly limit public speech to the stated purpose of the forum, and regulate clearly defined inappropriate or illegal conduct, as the above-referenced decision indicates, the school district is limited in its ability to restrict or limit parents and community members from commenting on applicable school matters and school personnel, even in limited public forums. On social media, that ability is almost non-existent.

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Given the aforementioned legal and logistical limitations attendant to regulating otherwise public speech, what is left for school administrators to do in terms of online comments and criticisms? In brief, administrators can attempt to publicly "set the record straight" or they can seek legal redress if the circumstances warrant it. These two options each presuppose that the criticism or comments are inaccurate or out and out falsehoods. The first option also must presuppose that publicly "setting the record straight" will not violate or infringe upon the rights and privileges of any other person such as a student or staff member.

What this means is that administrators must first assess whether comments directed at them bear any response at all. The first issue should be whether the comments are so egregious as to require or necessitate any type of corrective response. This determination should be based upon an analytical approach and not be based upon ego or pride. In addition, the decision should be viewed as broadly as possible, estimating and considering the logical path that further comments will take. (The goal should be to avoid making matters worse). The second issue is whether a response is even appropriate under the circumstances. This will depend upon the circumstances at issue. The third issue is to whom such a response or explanation is to be made and in what manner. (Who is the intended audience?) To the extent that a response is deemed necessary and appropriate, the administrator should make sure that the response as crafted does not violate the rights of any other individuals, especially students or staff. To the extent that the offending comments are related to the administrator's employment, the administrator should also review and clear the response with the school district's administration. To the extent that such comments or response implicate the school districts responsibilities, the school district's administration should review the matter with its solicitor.

If on the other hand, the administrator believes that the public comments are false and defamatory and professionally or personally harmful, the administrator may wish to seek legal counsel to determine whether any legal action is merited. Although such advice is entirely fact-intensive and beyond the scope of this article, the following is a brief overview of such matters.

As noted by the Pennsylvania courts, "Defamation, of which libel, slander, and invasion of privacy are methods, is the tort of detracting from a person's reputation, or injuring a person's character, fame, or reputation, by false and malicious statements." *Joseph v. Scranton Times L.P.,* 959 A.2d 322, 334 (Pa.Super.Ct.2008) (citing *Zartman v. Lehigh County Humane Soc'y,* 333 Pa. Super. 245, 482 A.2d 266, 268 (1984)).

In order to successfully establish a claim for defamation, a plaintiff has the burden of proving:

(1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) Special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion.

42 Pa.C.S. § 8343(a).

Once a plaintiff establishes these elements, the defendant has the burden of proving the following, when relevant to the claim:

(1) The truth of the defamatory communication.
(2) The privileged character of the occasion on which it was published.
(3) The character of the subject matter of defamatory comment as of public concern.

42 Pa.C.S. § 8343(b).

In *Mzamane v. Winfrey*, the U.S. District Court for the Eastern District of Pennsylvania outlined Pennsylvania defamation law. *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010). The court noted that the purpose underlying defamation law is to compensate an individual for pecuniary harm to one's reputation inflicted by a defamatory statement. *Id.,* 693 F. Supp. 2d at 471, citing *Wilson v. Slatalla,* 970 F.Supp. 405, 414 (E.D.Pa.1997). As explained, under Third Circuit jurisprudence, in federal claims, the court must apply a two-step approach when presiding over a defamation action. The court must determine: "'**(1)** whether the defendants have harmed the plaintiff's reputation within the meaning of state law; and **(2)** if so, whether the First Amendment nevertheless precludes recovery.'" *Id.,* 693 F. Supp. 2d at 476, citing *Marcone v. Penthouse Int'l Mag. For Men*, 754 F.2d 1072, 1077 (3d Cir. 1985) (quoting *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 270 (3d Cir.1980)). What this means is that in addition to determining whether such comments are defamatory as provided under the aforementioned state law, the federal court will also analyze whether the comments are protected by the First Amendment.

Moreover, the court in *Mzamane v. Winfrey* offered the following guidance:

> A statement is deemed to be defamatory, "if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession." … "When communications tend to lower a person in the estimation of the community, deter third persons from associating with him, or adversely affect his fitness for the proper conduct of his lawful business or profession, they are deemed defamatory." … "It is not enough that the victim of the [statements] ... be embarrassed or annoyed, he must have

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