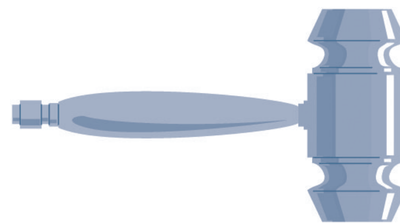
Legal Corner



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).
>
> ***
>
> "[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*

Continued on next page

> *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.

Continued on next page

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).

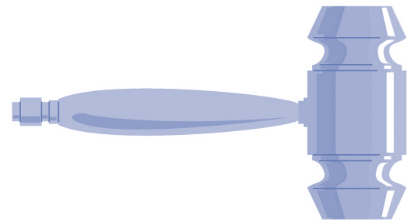
In *Mzamane v. Winfrey*, the U.S. District Court for the Eastern District of Pennsylvania outlined Pennsylvania defamation law. *Mzamane v. Winfrey*, 693 F. Supp. 2d 442 (E.D. Pa. 2010). The court noted that the purpose underlying defamation law is to compensate an individual for pecuniary harm to one's 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

Continued on next page

Legal Corner



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

Reacting to Teacher and Student Comments on Social Media

School administrators have had the unfortunate experience of hearing from a staff member or a parent that a student has made improper statements online, and they want to know what you are going to do about it. And plenty of school officials have dealt with the even more troubling experience of learning that a teacher has made troubling comments online.

Online statements – often made through social media such as Facebook, Instagram or Snapchat, among others – present a host of issues not seen with other forms of communication. While school officials want to control such social media posts in order to avoid disruptions to the school community, important First Amendment issues need to be taken into consideration. In this article, we will look at the issues in addressing social media comments by both teachers and students, and what schools can do about them.

TEACHERS AND STAFF

School district employees are arguably subject to greater speech restrictions than students. Many teachers believe they have the First Amendment right to post anything they want on social networking sites because they are on their own time and using their own computers or phones. In reality, their speech is only protected if they are speaking out as citizens on "matters of public concern" ***and*** their speech does not create a disruption at school.

The First Amendment rights of teachers were outlined by the U.S. Supreme Court in the 1968 case of *Pickering v. Board of Education of Twp. High School District 205, Will County, Illinois*. The court ruled that comments by teachers on matters of public concern that are substantially correct may not furnish grounds for dismissal even though they are critical in tone. Nevertheless, the court stated, "the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." So under the rule set forth in *Pickering*, a trial court must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." As the Supreme Court explained in the 1994 case of *Waters v. Churchill*, "the government as employer" possesses "far broader powers than does the government as sovereign."

The Third Circuit stated in 2014 in *Dougherty v. Sch. Dist. of Philadelphia*, "[T]he Supreme Court also aptly recognizes the government's countervailing interest – as an employer – in maintaining control over their employees' words and actions for the proper performance of the workplace." The Third Circuit has held that speech expressing a personal grievance limited to the "day-to-day minutiae" of employment does not address a matter of public concern and does not benefit from First Amendment protection.

Of course, professional educators in Pennsylvania can only be terminated as set out in Section 1122 of the School Code. However, it is not difficult to see that teachers' improper social media posts could potentially qualify as immorality, intemperance, cruelty or persistent and willful violation of or failure to comply with school laws of this commonwealth, including official directives and established policy of the board of directors. And in fact, courts have sided with school districts with regard to teachers posting negative information on social media.

Educators on Social Media

In 2006, Stacey Snyder was a college senior doing student teaching in the Philadelphia suburbs. She was dismissed from her student teaching position because of "unprofessional" postings on her MySpace site, which she urged her students to visit despite knowing a prior student teacher had been dismissed for similar actions. Her site included comments criticizing her supervisor and a photograph of her wearing a pirate hat and drinking from a plastic cup with the caption "drunken pirate." The lack of student-teaching experience also prevented her from applying for a Pennsylvania teaching certificate. Snyder filed a First Amendment lawsuit, but the court found no First Amendment violation. Applying the *Pickering* case, the court ruled that her MySpace postings dealt only with purely personal matters, not issues of public concern.

Courts in other states have also generally supported school districts over teachers. Connecticut non-tenured teacher Jeffrey Spanierman was fired because he maintained a MySpace page in which he communicated casually and jokingly with his students. Spanierman filed suit on numerous grounds, including alleged violation of the First Amendment. The court held that

Continued on next page

practically nothing on the MySpace page was a matter of public concern. The court further held that "it was not unreasonable for the defendants to find that the plaintiff's conduct on MySpace was disruptive to school activities. The above examples of the online exchanges the plaintiff had with students show a potentially unprofessional rapport with students, and the court can see how a school's administration would disapprove of, and find disruptive [the communications with students]."

A teacher at Central Bucks East High School got in trouble in 2011 for comments disparaging students in her personal blog. Natalie Munroe wrote, "My students are out of control. They are rude, disengaged, lazy whiners. They curse, discuss drugs, talk back, argue for grades, complain about everything, fancy themselves entitled to whatever they desire and are just generally annoying." She also made a list of things she would like to write on students' report cards, including: "Gimme an A.I.R.H.E.A.D. What's that spell? Your kid!"; "Dresses like a street walker"; and "There's no other way to say this: I hate your kid." In 2015, the Third Circuit held that even assuming Munroe's comments touched on matters of public concern, they created a major disruption in the school and thus failed the *Pickering* test.

School District Policy

For obvious reasons, it is recommended that school districts institute policies restricting teachers' online interactions with students. While teacher-student online communications are nearly universal today, casual conversation on social media sites poses numerous potential challenges. Even innocent communications can create the perception of impropriety.

The New York City Department of Education (DOE) specifically forbids social media communications between teachers and students, stating: "In order to maintain a professional and appropriate relationship with students, DOE employees should not communicate with students who are currently enrolled in DOE schools on personal social media sites. DOE employees' communication with DOE students via personal social media is subject to the following exceptions: **(a)** communication with relatives and **(b)** if an emergency situation requires such communication, in which case, the DOE employee should notify his/her supervisor of the contact as soon as possible."

The Pittsburgh School District's policy states: "District employees generally retain the right to free expression on matters of public concern when not acting in the scope of their district duties. The district reserves the right to limit employee speech or take disciplinary action against an employee when the district's interest in promoting the effective and efficient delivery of public education outweighs the employee's interest in commenting on a matter of public concern. In situations in which an employee is not engaged in the performance of his/her district duties, he/she shall: recognize that as a district employee his/her comments generally will be viewed as representative of the district; state clearly that his/her comments represent personal views and not those of the district; not make comments that would interfere with the maintenance of student discipline; not make public statements known to be false or made without regard for truth or accuracy; not make threats against co-workers, supervisors or district officials; not post images or information about students or other employees on social media sites. Violations of this policy may constitute cause for disciplinary action up to and including termination."

Teachers' online communications with students can even lead to criminal charges even though their specific actions would not otherwise break the law. In *Commonwealth v. Cerco*, a teacher violated his district policy by communicating online with a female student. The teacher, who engaged in cross-dressing but kept it a secret, asked the teen to let him borrow some clothes to try on and he asked her not to tell anyone. The teacher was arrested and charged with corrupting the morals of a minor and sentenced to three to 18 months in jail. The teacher appealed his conviction, arguing that asking to borrow clothes is not a criminal offense. In 2014, Pennsylvania's Superior Court held that the teacher's conduct was not confined to merely confiding in the student about his personal proclivities and asking her to keep them private, but rather that he encouraged the student to perform specific actions he had reason to know those in authority over her would not permit, and urged her to keep those actions secret.

Takeaways Regarding Social Media

Although courts generally support school districts' disciplinary action with regard to teachers' social media gaffes, administrators policing such actions should ask themselves the following questions when addressing issues of teachers' First Amendment Rights: Do the statements involve the teacher's duties as an employee or are they made as a citizen about matters of public concern? Does the teacher's right to discuss public matters outweigh the school's interest in promoting efficiency? Did the teacher's communications create a disruption in school among students, staff or parents? Was the teacher's speech a substantial or motivating factor in action against them? Would the administration have taken the same action even in the absence of the protected conduct?

STUDENTS

The first factor to consider when addressing student speech on social media is whether the comments can be deemed on-campus speech. This generally requires that the comments be created while on school property. Understandably, courts allow for stricter control of on-campus speech. As discussed in this section, off-campus speech can arguably only be restricted if it poses a potential for substantial disruption. Meanwhile, on-campus speech can be restricted for a risk of substantial disruption, as well as the use of profanity, speech promoting drug use and school-sponsored speech.

Continued on next page

Tinker Analysis

As with all student speech issues, the starting point for the analysis of student social media comments is the familiar standard set out by the U.S. Supreme Court in 1969 in the case of *Tinker v. Des Moines Independent Community School District*. In *Tinker*, three students wore black armbands to school to protest the Vietnam War, and they were suspended when they refused to remove the armbands. The students sued, alleging a violation of their First Amendment rights.

Seeking to find a middle ground between students' First Amendment rights and schools' need to maintain order, Justice Abe Fortas wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . On the other hand, the court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

In *Tinker*, the court held for the first time that students' First Amendment rights could not be violated unless disciplinary action is "necessary to avoid material and substantial interference with school work or discipline." Fifty years later, the rule of *Tinker* stands and applies equally to social media posts as it does to oral speech. So what constitutes a material and substantial interference?

Viable threats to school safety clearly constitute a substantial disruption. In the 1969 case *Watts v. United States*, the U.S. Supreme Court first announced that "true threats" fell outside of the protection of the First Amendment; however, "political hyperbole" is still protected.

Meanwhile, the Pennsylvania Supreme Court has held that threats to student safety can also be disciplined, even if the threats were unlikely to be acted upon. In *J.S. ex rel. H.S. v. Bethlehem Area Sch. District*, a student created a website titled, "Teacher Sux," consisting of a number of web pages that made derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher and principal. The most disturbing image was a drawing of the algebra teacher with her head cut off and blood dropping from her neck. Although law enforcement declined to press charges, the school district believed the threat to the teacher's safety to be real and expelled the student, who brought a First Amendment claim. On appeal in 2002, the Pennsylvania Supreme Court ruled that the website caused enough of a disruption to meet the *Tinker* standard, thus permitting discipline. The court noted that the algebra teacher became physically ill over the incident, and several students and parents expressed anxiety and concern about the contents of the site. In holding that the *Tinker* standard was met, the court stated, "Keeping in mind the unique nature of the school setting and the student's diminished rights therein, while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required for a school district to punish student speech."

> "While student speech can be restricted even if a threat is unlikely to be carried out, courts have held that there must be some inquiry into the student's intent."

While student speech can be restricted even if a threat is unlikely to be carried out, courts have held that there must be some inquiry into the student's intent. In the case of *In re T.H.*, a student was expelled when other students overheard him discussing bringing a gun to school, even though further investigation determined that he had been discussing how he would react to a "zombie apocalypse." Because the student had been expelled for making terroristic threats, Pennsylvania's Superior Court ruled in 2013 in favor of the student, holding that the school district was required to find that T.H. had the conscious objective to terrorize someone.

Protected Speech Under Tinker

Courts have also had opportunities to detail what actions do not constitute substantial disruption. The most common are websites created by students to mock teachers and/or administrators, but which do not pose any type of threat to safety.

In 2005, Justin Layshock was a high school senior in Hermitage, Pa. During non-school hours, Justin created what he would later refer to as a "parody profile" of his principal on the MySpace social networking site. Justin created the profile by giving bogus answers to survey questions including questions about favorite shoes, weaknesses, fears, one's idea of a "perfect pizza," bedtime, etc. All of Justin's answers were based on a theme of "big," because the principal was a large man. Justin gave other students access to the profile and used a school computer to access the profile. Word of the profile spread quickly and soon reached most, if not all, of the school's student body. The principal was concerned about his reputation and complained to police, although he was not concerned for his safety. Justin received a 10-day suspension and a ban from extracurricular activities and his graduation ceremony. In 2011, the Third Circuit Court of Appeals held that the profile created by Layshock was off-campus speech even though he accessed it on school computers and had used a photo of the principal from the district website. Accordingly, the court held that in order to discipline the teen, the district needed to show a substantial disruption of the educational process, which it could not do. The court's unanimous decision upheld a lower court's judgment against the district. In the decision, Chief Judge Theodore A. McKee said, "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control when he/she participates in school-sponsored activities."

On the same day in 2011 that the Third Circuit decided *Layshock*, the same court also issued its decision in a similar case, *J.S. v. Blue Mountain School District*. In that case, an eighth-grade student working at home created a parody of her principal on a social networking site. She depicted him as a married, bisexual man whose interests

Continued on next page

included "hitting on students and their parents" and designating his email address as "kidsrockmybed." She was suspended for 10 days and sued to lift the suspension. Again, the court sided with the student, but this time the court was divided, ruling 8-5 in favor of the student.

The majority held that "the profile was so outrageous that no one could have taken it seriously, and no one did." The court further held, "Neither the Supreme Court nor this court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school . . .. An opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion."

Restrictions on On-Campus Speech

Meanwhile, as noted above, on-campus speech is subject to greater control of the schools. One of the key differences is that the use of profanity in on-campus speech subjects a student to discipline. In 1986, the U.S. Supreme Court held in *Bethel School District No. 403 v. Fraser* that it is "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."

While hundreds of First Amendment cases analyze the *Fraser* case, we have found no cases that actually decide a case by citing solely to *Fraser*. This is because nearly all of the cases regarding social media involve situations in which students have made their postings outside of school hours and off campus, and many courts have held that *Fraser* is inapplicable to off-campus speech. Some cases question whether social media postings "aimed" at a school community – *i.e.*, harassing other students or teachers and administrators – can be considered on-campus speech, and courts around the country reach different conclusions on that question. However, in an abundance of caution, courts resort to the *Tinker* analysis.

One of the only cases where a court relied on both *Tinker* and *Fraser* was a federal district court's 2007 ruling in *Requa v. Kent School Dist. No. 415*. In that case, students surreptitiously recorded video of their teacher, primarily focusing on her buttocks. They then edited the video and posted it online set to a rap song titled "Ms. New Booty." After the students were suspended, one brought a First Amendment and due process claim. The court held that the video was lewd and offensive and could be punished under *Fraser*. However, the court also held that discipline was also permitted under *Tinker* even though no actual disruption occurred because "the work and discipline of the school includes the maintenance of a civil and respectful atmosphere toward teachers and students alike – demeaning, derogatory, sexually suggestive behavior toward an unsuspecting teacher in a classroom poses a disruption of that mission whenever it occurs."

Similarly, there are no reported cases where a court permitted discipline of students for social media posts based on Supreme Court cases permitting regulation of student speech for promoting drug use (as explained in the 2007 case of *Morse v. Frederick*) or because the speech is school-sponsored (as in the 1988 case of *Hazelwood School District v. Kuhlmeier*). Although, presumably the court could do so, there are no reported decisions of courts addressing such factual scenarios.

Regulating Off-Campus Speech

As noted, courts have split on the extent to which school district officials may regulate off-campus speech. The difficulty arises in different courts' interpretations of what constitutes on-campus speech as well as what constitutes substantial disruption under *Tinker*.

In the 2011 case of *Kowalski v. Berkeley County Schools*, a high school cheerleader created a MySpace group web page making derisive comments about a classmate, and she invited 100 friends to join the group. The next day, the parents of the offended classmate complained to the school. Administrators concluded that Kowalski had created a "hate website" in violation of school policy. They suspended her, removed her from the cheerleading team and issued a 90-day "social suspension," preventing her from attending school events. Kowalski challenged the discipline on the grounds that the speech occurred off campus. The Fourth Circuit held that there was enough of a nexus to the school community to discipline her because although Kowalski acted off campus, "she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment." The court further held that "the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."

At least one Pennsylvania school district has very recently taken an alternate approach to social media postings made outside of school. In *B.L. v. Mahanoy Area School District*, a cheerleader upset that she failed to make her high school's varsity team posted a photo through the Snapchat online application showing her and a friend sticking up their middle fingers. B.L. superimposed vulgar and explicit text over the photo. The post was shared with about 250 of B.L.'s friends, along with a second "Snap" complaining about the varsity selection process. Since many of those receiving the Snaps were fellow Mahanoy Area High School students, the Snaps quickly found their way into the possession of the team's two cheerleading coaches. After determining that the first Snap violated cheerleading team rules prohibiting disrespectful behavior and the posting of negative information about cheerleading on the Internet, the coaches suspended B.L. from cheerleading for one year.

Continued on next page

Legal Corner - Continued from previous page

B.L. and her parents brought suit on First Amendment grounds. On March 21, 2019, Judge Richard Caputo of the U.S. District Court for the Middle District of Pennsylvania, held that the district's discipline of B.L. violated her First Amendment rights. Relying primarily on the Third Circuit decisions in *Layshock* and *J.S. v. Blue Mountain School District* previously discussed, Judge Caputo held that B.L.'s Snaps were off-campus speech subject only to *Tinker* analysis. And because there was no anticipated or actual disruption, removal from the cheerleading team was inappropriate. The judge further held that the fact that B.L. was suspended only from an extracurricular activity was immaterial. Although the B.L. decision is not binding on Pennsylvania courts – federal or state – it carries the weight of persuasive authority for the time being. Mahanoy Area School District is currently weighing whether to challenge Judge Caputo's decision.

Another cheerleader-related case – *Johnson v. Cache County School District* – was decided last year in Utah. In that case, a cheerleader recorded herself and some friends singing along to the lyrics of Big Sean's song "I.D.F.W.U." She then posted an eight-second video to Snapchat of the girls singing the lyrics from the song. The cheerleader was then removed from the team. In rejecting the plaintiff's motion for a preliminary injunction on First Amendment grounds, the court stated, "By choosing to 'go out for the team,' students voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally and have reason to expect intrusions upon normal rights and privileges.

Courts' confusion over how to address restrictions on student speech can been seen in the differing decisions on a case arising in Mississippi. In *Bell v. Itawamba County School Board*, a teen wrote a rap song criticizing two athletic coaches at his high school who had allegedly acted inappropriately toward female students. The students created a video for his song and uploaded it to Facebook. The song suggested that the coaches were "going to get a pistol down your mouth; pow" and urged "middle fingers up." Upon investigation by the school district, Bell said that he did not mean to intimidate the coaches, but merely suggested that he thought family members of the victimized teens might potentially react violently. Bell was then suspended and placed in alternative education for the rest of the marking period. After Bell brought a First Amendment claim, the district court granted summary judgment in favor of the school district. On appeal, a Fifth Circuit panel reversed summary judgment, holding that the rap song was not a true threat and that the school district could not have predicted a substantial disruption, and none occurred. On rehearing, the full Fifth Circuit Court of Appeals held that although the song was not a true threat, Bell intended it to reach the school community, and that the school board's determination that Bell's threatening lyrics might have caused a substantial disruption was objectively reasonable. Accordingly, the court affirmed summary judgment in favor of the district.

Takeaways Regarding Social Media

Although the court rulings on students' off-campus speech, including the use of social media, are conflicting, there are some general lessons that provide guidance moving forward. Courts are deferential to school districts' disciplinary decisions with regard to any student comments or social media posts that can be interpreted in any way as a threat. While true threats (e.g., a student writing, "I will shoot everyone at school") bear no First Amendment protection, courts have routinely held that less obvious threats (e.g., a student writing, "Joe is a jerk and someone should do something about it") pose a risk of substantial disruption and can be restricted under *Tinker*. In fact, it seems likely that only the most outlandish threats might be deemed too farcical to be taken seriously.

Courts will also deem statements mocking or humiliating classmates to be likely to cause substantial disruption under *Tinker* even if the disruption is limited to disruption of the educational experience of one student being mocked. However, to the contrary, courts will not allow schools to discipline students for mocking school staff, teachers and administrators unless the comments can be deemed to pose some potential threat.

Policing Parents' Social Media Use

While schools have limited authority over students' out-of-school social media use, their ability to police parents' social media comments are much more limited. Issues with parents' social media use often arises in the context of criticism of teachers and/or athletic coaches or comments regarding their children's classmates. So what can schools do to attempt to rein in parents' inappropriate posts? Any social media posts by parents that can be reasonably interpreted as a threat to the safety of either students or staff is a potential crime and should be reported to law enforcement who will handle any prosecution. The question for school districts is whether or not they can restrict school access by the parents, and if so, to what extent. Unfortunately, there are few cases to offer guidance.

Under First Amendment analysis, schools are considered non-public forums, and as such they can place restrictions on expression so long as those restrictions are reasonable and content-neutral. Courts have held that a parent can be banned from school property during school hours for harassing school staff; however, until now those cases have involved primarily face-to-face contact. Based on the reasoning of such cases though, a parent could likely be banned from school property for social media comments if the harassing comments are not only offensive, but also pervasive and there is a likelihood that the parent's attendance on school property would disrupt the educational setting. Meanwhile, courts have also held that banning parents from attendance at events open to the public, such as athletic contests, generally requires a clear and present danger of disruptions such as disorder, riot, obstruction of the event or immediate threat to public safety.

Ultimately, absent a direct threat or an expectation of disruption of the educational setting when a parent is present on school grounds, schools are unable to police parents on social media. However, having a school board policy setting behavioral expectations for school district visitors and grounds for exclusion from school property can be useful in the event that banning a parent becomes necessary.