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CONNECTICUT ASSOCIATION OF SCHOOLS

Say What!?

Social Media, Student Speech, and Administration Rights in the Wake of Mahanoy v. B.L.

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Say What!?

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Why is it so difficult to address students' conduct on social media?

- It generally happens off school grounds.
- It can be difficult to know who wrote or disseminated threatening or offensive behavior.
- How does an administrator know whether it should take social media posts seriously?
- When does a social-media post require prompt action, even without first having obtained all the facts.

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Cases involving social media and student speech put school districts in the position of balancing their obligation to promote safety and prevent disruption with the students' rights under the First Amendment of the United States Constitution, which provides:

*"Congress shall make no law 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 a redress of grievances."*

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- Proving themselves – depending upon ones perspective – to be either champions of free expression or ***uber*** enablers, parents have on many occasions literally made a federal case out of disciplinary actions that school districts issued in response to student speech.

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Some of these cases have reached all the way to the United States Supreme Court, which prior to B.L. v. Mahanoy issued four landmark cases that established the legal contours of protected student speech.

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Tinker v. Des Moines Indep. Cmty. Sch. Dist., 309 U.S. 503 (1969)

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- School district suspended students for passively wearing black arm bands in protest of the Vietnam war. The Supreme Court ruled this was impermissible, using one of the most famous phrases from the annals of Supreme Court jurisprudence, specifically that **"students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."**

- The Supreme Court ruled that expressions of student speech were permissible unless they **"materially and substantially" disrupt the operation of the school and/or could be reasonably expected to do so**.

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Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)

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- Student gave a speech before 600 students, nominating another student for a class office, which speech was replete with sexual innuendo. The district suspended the student, which the Supreme Court affirmed, holding:

- "[I]t was perfectly appropriate for the school to … make the point to the pupils that vulgar speech and lewd conduct is **wholly inconsistent with the "fundamental values" of public school education**."

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Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)

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- School administration prohibited the students in a school journalism class from writing articles about teen pregnancy in the school – which actually included information about students in the school who were pregnant -- and about a divorced family.

- The Supreme Court ruled school districts' suppression of student speech in this regard was appropriate "so long as their actions are **reasonably related to legitimate pedagogical concerns**."

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Morse v. Frederick, 551 U.S. 393 (2007)

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- Student was suspended for unfurling a banner across the street from the school -- where students were assembled during a school-sponsored event related to the Olympic torch relay -- stating "BONG HITS 4 JESUS."

- The Supreme Court ruled that the suspension was justified. The district had a compelling interest in prohibiting speech that could reasonably be construed as promoting or endorsing the use of drugs.

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To Summarize

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- As reflected in this Supreme Court precedent, schools have the greatest ability to regulate speech that is violent or disruptive to the operation of the school, that is vulgar or lewd and occurs during the school day or at school-sponsored activities, or speech that is contrary to or at odds with the district's pedagogical mission.

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But . . . .

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- Have the courts permitted school district to regulate speech that occurs off campus?

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- Relying upon the Supreme Court's holding in Tinker, courts have generally allowed districts to regulate off-campus speech if such speech is **"reasonably foreseeable"** to cause **a substantial disruption** to the school environment.

- But, Tinker was decided decades before the advent of social media, which has taken speech to areas the Court could not have anticipated.

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Off Campus Speech -- Social Media and Unique Problems

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- Social media and the internet have created a means for students to swiftly and extensively promulgate threats and harassment of other students and school staff.
- These social-media posts are overwhelming created off school grounds and outside school hors. Nonetheless, drawing upon pre-social-media caselaw, school districts still have the power and the right to regulate such off-campus conduct **if it causes a substantial disruption to the educational process**.

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Connecticut's Expulsion Statute

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- This comports with Connecticut law. Specifically, Section 10-233d of the Connecticut General Statutes provides in relevant part that a student may be expelled for off-campus conduct if: (1) the conduct violated a publicized policy of the Board; and (2) the conduct was substantially disruptive to the educational process.

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As the following discussion of cases arising from social-media "speech" demonstrate, however, this right to discipline is not without limits.

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Identifiable Threats of Violence
Wisniewski v. Weedsport C.S.D.

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- Student sent an IM to a friend with a picture of a person firing a gun at his head and added pictures of splattered blood.
- Below the picture was a message that said “Kill [the name of his teacher.]”
- The message was sent to approximately 15 of his “IM” “buddies” and the word of the drawing ultimately reached the teacher and the school administration.
- Although the student subsequently claimed that it was meant as “a joke,” the student was suspended.

- **WHO WON?**

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- In upholding the student's suspension, the court held:

- "[W]e conclude that it crosses the boundary of protected speech and constitutes student conduct that poses **a reasonably foreseeable risk** that the icon would come to the attention of school authorities **and that it would materially and substantially disrupt the work and discipline of the school.**"

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Burge v. Colton BOE

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- Student who was angry at his teacher for giving him a “C” posted on his private Facebook account that the teacher should be “shot.”
- The posting was made on a day school was not in session.
- Only his Facebook “friends” could view the post.
- An anonymous student brought the post to the school administration and the student was suspended.
- The student meant the post as a joke, but the teacher who was the subject of the post was legitimately frightened.

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WHO WON?-THE STUDENT

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- In finding for the student, the court noted the lack of an actual disruption to the educational process. Specifically, the court held:

- "The comments did not cause a widespread whispering campaign at school or anywhere else. No students missed class and no CMS employees, including [the Teacher], missed work. Although [she] initially protested having [the Student] back in her class, she accepted the school's decision for him to return and did not discuss the comments with either [the student] or with any other students or teachers at CMS."

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Why The Different Outcomes?

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The disparate outcomes of the previous two cases underscores the fact that even cases that involve what appear to be student threats of violence have to be considered on a case-by-case basis.

In the Wisniewski case, there was a widely promulgated threat that reasonably posed the risk of a material and substantial disruption of the educational process.

In Burge, however, it was a more passive – and somewhat generic -- comment intended only for the student's friends, and the school was unable to adduce evidence of any actual disruption.

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Reasonably Perceived Threats of Mass Violence

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A.N. v. Upper Perkiomen School District

- Student posted on his private social media the video "Evan," which was developed by families of the victims of the Sandy Hook shooting.
- The video ends with a student pulling out a gun in the gym and shooting others.
- The video then replays, showing the shooter in the background being bullied and otherwise showing signs of being a shooter.
- School was closed for a short while after it came to the school's attention
- The Student who was suspended imposed violent lyrics over the video when he posted it on his website and was suspended.

- **WHO WON?**

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- In holding for the school district, the court held:

- "Students, parents and school officials reacted. Police became involved. . . . Additionally, the morning after the post, the School District was closed, buses in the school district were cancelled, and school district officials messaged all schools and parents of School District students."
- **[Now *that* is what I call disruption!]**

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Reasonably Perceived Threats of Mass Violence

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- ***Wynar v. Douglas Cty. Sch. District.***

- In another case upholding the school's suspension of student, the student at issue sent a string of increasingly violent messages to his friends that bragged of the weapons he owned. He further sent some messages that were threatening to shoot specific classmates, intimating that he would "take out" other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre.
- The court upheld the school's discipline of the student, stating:"[w]e can only imagine what would have happened if the school officials, after learning of [the] writing, did nothing about it" and [the student] did in fact come to school with a gun."

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Cyberbullying Cases

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Kowalski v. Berkley County Schools

- Student created a "Myspace" page called "S.A.S.H." that was directed towards a fellow female student.
- "S.A.S.H." stood for "Students Against Slut Herpes."
- One student uploaded a picture of the female victim student, where she was referred to as a "whore" and other hurtful comments.
- Approximately two-dozen students from school posted comments on the site.
- Parents of the victim complained to the school.
- School concluded that the student who created the page had created a "hate" website, which resulted in her suspension.

WHO WON?

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The School

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"This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about habits and manners of civility or the fundamental values necessary to the maintenance of a democratic political system."

FACTORS CONSIDERED BY THE COURT

- The dialogue on the webpage took place among students at school who the student invited to join.
- It was reasonable to conclude that the dialogue, being directed at a fellow student, would reach the school.
- Comments were made specifically about the victim student.
- "Given the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created actual or nascent substantial disorder and disruption in the school."

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Cyberbullying Cases

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J.C. v. Beverly Hills Unified School District

- Student recorded herself and her friends at a restaurant after school talking about a female victim student.
- The discussion included comments that the victim is a "slut," "spoiled" and that nobody liked her.
- One of the students said the victim was the "ugliest [profanity] I've ever seen in my whole life."
- The Student posted the video to "Youtube" and told other students from the school, including the victim. Students from the school viewed the video.
- The victim went to her guidance counselor crying and missed some of her classes.
- The school administration interviewed the students who were in the video and suspended the Student who made it. The Student sued the school.

WHO WON?

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The Student

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"[A]t most, the record shows that the School had to address the concerns of an upset parent and a student who temporarily refused to go to class, and that five students missed some undetermined portion of their classes…this does not rise to the level of substantial disruption."

"[T]o allow the School to cast this wide a net and suspend a student simply because another student takes offense to her speech, without any evidence caused a substantial disruption of the school's activities, runs afoul of Tinker."

FACTORS CONSIDERED BY THE COURT

- The video was not violent or threatening.
- The victim never feared any physical attack.
- The victim merely felt embarrassed, her feelings were hurt and she only temporarily did not want to go to class.
- The victim did not confront any of the students who made the video in school.
- "[I]t took the school counselor, at most, 20-25 minutes to calm C.C. down and convince her to go to class."
- Although the school administrators took time to investigate and counsel the victim, "that is what school administrators do."

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Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (June 23, 2021)

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- At the end of her freshman year, B. L. tried out for school varsity cheerleading team. She did not make the varsity team, but was offered a spot on the junior varsity team. She did not make a private softball team.
- "B. L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team."
- Over the weekend, B. L. used her smartphone to post two photos on Snapchat.
- First image showed B. L. and a friend with middle fingers raised; it bore the caption: "F*** school f*** softball f*** cheer f*** everything."
- Second image was blank but for a caption that 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?" The caption contained an upside-down smiley-face emoji. ☹

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What Happened Next

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- After discussions with the principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules.
- The coaches suspended B. L. from the junior varsity cheerleading team for the upcoming year. (B. L.'s subsequent apologies did not move school officials.)
- The school's athletic director, principal, superintendent, and school board all affirmed B. L.'s suspension from the team.
- In response, B. L and her parents filed a federal court lawsuit (**but of course!**)
- Both the United States District Court and the United States Court of Appeals for the Third Circuit rules in B.L.'s favor. Of particular, and alarming note, the Third Circuit essentially predicated its holding upon a sweeping assertion that schools could not regulate off-campus student speech!

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The Supreme Court Speaketh: The Good

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- Thankfully, the Supreme Court disagreed with the Third Circuit's blanket limitation on a district's right to regulate off-campus speech, holding:
- "Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus."
- "The school's regulatory interests remain significant in some off-campus circumstances."
- "These 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, including material maintained within school computers."

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The Not As Good

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- The Court, however, went on to observe that while a school district's disciplinary purview could extend to off-campus speech, it was more attenuated. The Court held:
- "Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: **Taken together, [for off-campus speech]] … the leeway the First Amendment grants to schools in light of their special characteristics is diminished.**
- **"We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. But they do decide this case."**

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"This Case"

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- **SOME CONSIDERATIONS**
- Putting aside the vulgar language, the listener would hear criticism of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part.
- This criticism did not involve features that would place it outside the First Amendment's ordinary protection (such as threats of violence).
- B. L.'s posts, while crude, did not amount to fighting words.

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"This Case"

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- **SOME CONSIDERATIONS**
- While B. L. used vulgarity, her speech was not obscene as the Court has previously defined that term. To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.
- Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends.
- These features of her speech, while risking transmission to the school itself, nonetheless diminish the school's interest in punishing B. L.'s utterance.

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B.L. – Additional Considerations

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- The Court considered and rejected the school's interest in teaching good manners and punishing use of vulgar language aimed at part of the school community.
- **The "strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time."**
- "B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities."
- "Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression."

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How About Disruption?

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- The Court considered the school's claim that it was trying to prevent disruption within the classroom and the bounds of a school-sponsored extracurricular activity.
- Court found no evidence in the record of a "substantial disruption" of a school activity or threatened harm to the rights of others that might justify action.
- Rather, the record shows that discussion of the matter took 5 to 10 minutes of an Algebra class "for just a couple of days" and some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats.
- When one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking ... about it," she responded simply, "No".
- From Tinker: "For the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." **NOT HERE!**

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More: "Team Morale"

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- School presented some evidence of a concern for team morale.
- One of the coaches testified that the school decided to suspend B. L. not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity put out there that could impact students in the school."
- "There is little else, however, that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion."
- As the Court observed: **"Simple undifferentiated fear or apprehension ... is not enough to overcome the right to freedom of expression."**

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General Thoughts

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- **United States Supreme Court**
- Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Tinker v. Des Moines Public Schools, 393 U.S. 503, 506 (1969).
- On the other hand, the Court noted in Bethel v. Fraser, 478 U.S. 675, 682 (1986) that "the constitutional rights of students at public school are not automatically, coextensive with the rights of adults."
- Rather, the rights of students are applied "in light of the special characteristics of the school environment." Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266 (1988).

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Student Free Speech

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- School districts may restrict the "free speech" rights of students in a more intrusive manner than in society as a whole.
- Schools may prohibit the use of **vulgar, lewd, indecent, or plainly offensive speech**. *Bethel v. Fraser*, supra. (Also, illegal drug related speech –*Morse v. Frederick*, 551 U.S. 393 (2007)).
- Schools may also restrict school-sponsored speech when the limitation is **reasonably related to legitimate educational concerns**. *Hazelwood School Dist. v. Kuhlmeier*, supra. For example, school sanctioned publications and activities.
- Otherwise, school districts may prohibit student speech only if it causes a **substantial and material disruption** of the school's operation. *Tinker v. Des Moines School Dist.,* supra

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What Can We Take Away From Social Media Caselaw?

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- Each case is fact intensive, and they often hinge upon some of the following considerations:
  - How many students from the school viewed the postings?
  - Did they include widely disseminated threats of specific violence?
  - Did the consequences of the conduct carry over into the school?
  - Was there a material and substantial disruption of the educational process or at least a reasonable expectation of such disruption?
  - Does the post result in the victim contacting the school?
  - Was the victim afraid to come to school?
  - Was there an obligation to contact the police and/or DCF?

In the end, which conversation would you rather have-the one where you must justify why you intervened or the one where you must apologize for why you did not?

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QUESTIONS?

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