Split among circuit courts raises questions on regulating disruptive off-campus speech

By the New York State Association of School Attorneys

According to the U.S. Supreme Court, neither students nor teachers "shed their constitutional rights to the freedom of speech at the schoolhouse gate" (*Tinker v. Des Moines Independent Community School*, 1969). However, the court said schools may regulate or discipline students for speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Several federal circuit courts have applied the school's authority under *Tinker* to off-campus speech when it creates a foreseeable risk of substantial disruption on campus.

In the age of social media, COVID-19 and an increasingly polarized society, it is easier than ever for off-campus speech to disrupt the school setting. To complicate matters further, remote learning has expanded the traditional definition of "on-campus."

In the Second Circuit, with jurisdiction over New York, the law is clear that schools can regulate and discipline students for off-campus speech that "foreseeably creates a risk of substantial disruption within the school environment." [See *Doninger v. Niehoff* (2008) and *Wisniewski v. Board of Educ. of Weedsport Cent. School Dist.* (2007).]

Similarly, in the Ninth Circuit, with jurisdiction over seven western states as well as Alaska and Hawaii, it must be "reasonably foreseeable the speech will reach the school community," and the speech must have a sufficient "nexus" to the school [See *McNeil v. Sherwood School Dist.* (2019).]

However, on June 30, 2020, the Third Circuit, with jurisdiction over Pennsylvania, New Jersey, and Delaware, issued a controversial ruling that surprised many school attorneys. In *B.L. by and through Levy v. Mahanoy Area School District*, the Third Circuit declared that a school's ability to regulate disruptive student speech under *Tinker* does NOT extend to off-campus speech. This view clashes with the standards adopted by the Second, Fifth, Eighth and Ninth Circuits. Such a sharp conflict between circuits makes Supreme Court intervention possible in the future.

This article will discuss the Third Circuit's reasoning as compared to that of the Second Circuit.

Third Circuit views off-campus speech as protected

In *B.L. by and Through Levy v. Mahanoy Area School District*, the plaintiff was a cheerleader at Mahanoy Area High School in Pennsylvania. After she failed to win a spot on the varsity team, she used Snapchat to post a photo of herself and a friend extending their middle fingers with a caption reading: "F--- school, f--- softball, f--- cheer, f--- everything." She also added a second text post bemoaning her placement on junior varsity. Upon becoming aware of the posts, Mahanoy school officials suspended B.L. from cheerleading. B.L.'s parents filed a lawsuit alleging violation of B.L.'s First Amendment rights.

Initially, the issue was whether this off-campus speech was disruptive enough to trump the student's right to express herself as guaranteed by the First Amendment and *Tinker*. The federal district court ruled in favor of B.L. and held that her "snap" was off-campus speech that had not created any foreseeable disruption in the school setting.

Mahanoy School District appealed and the Third Circuit affirmed, but not on the narrow grounds set forth by the district court. Rather, a divided panel held "that *Tinker* does not apply to off-campus speech…"

Generally, judges tend to favor settling cases on the narrowest grounds possible.

However, in *Mahanoy*, the Third Circuit offered not one but three rationales for its conclusion. First, it said *Tinker* makes sense inside a school where other students are a "captive audience." *Tinker's* application loses that rationale, said the court, when applied to off-campus speech. Second, the volume of student speech found on social media is prodigious. This may tempt school officials to regulate student speech that officials deem "inappropriate, uncouth or provocative," and not merely speech that is foreseeably disruptive. Third, a new bright-line rule will provide clarity to both students and school-officials trying to navigate the minefield of off-campus student speech.

The impact of the *Mahanoy* decision is substantial in Pennsylvania, New Jersey and Delaware. Districts in those states that impose discipline for off-campus speech because it is "disruptive" could pay monetary damages for violating student First Amendment rights.

While *Mahanoy* does not set a precedent for other jurisdictions, it could influence courts elsewhere. *Mahanoy* stands in sharp contrast to the positions adopted by other federal circuits, including the Second Circuit, and creates uncertainty regarding student discipline and off-campus speech.

Second Circuit precedents still apply in New York

In *Wisniewski v. Board of Educ. Of Weedsport Cent. School Dist.* (2007), the Second Circuit considered the suspension of an eighth grader named Aaron Wisniewski who had used a home computer to send online emojis of a gun firing into a person's head and blood droplets. The caption read, "Kill Mr. VanderMolen" (referring to the student's teacher). Upon its review, the Second Circuit upheld a one-semester suspension for Wisniewski because his conduct had created the "foreseeable risk" that it would "materially and substantially disrupt the work and discipline of the school." The court thereby allowed schools to discipline students for off-campus speech that created "a foreseeable risk of substantial disruption within" the school.

The Second Circuit reaffirmed this position one year later in *Doninger v. Niehoff*. Seventeen-year-old Avery Doninger was upset about the postponement of a "battle of the bands" concert at her high school. A member of the student council, she and three others widely distributed an email that urged members of the school community and public at large to contact the school principal and superintendent to restore the original date of the event. School officials received so many calls that the superintendent left an off-campus event and returned to school to deal with the issue. After being warned about the disruptive aspects of her activism, Doninger persisted. She blogged about the event and referred to school officials as "douchebags." As a form of discipline, the superintendent prevented her from being a candidate for senior class secretary, which she said violated her free speech rights.

The Second Circuit upheld the federal District Court's denial of a temporary restraining order. The Second Circuit found that the blog post had "foreseeably create[d] a risk of substantial disruption within the school." The court held that the language

See **SPLIT**, page 13

When is a student's speech protected? An analysis of hypothetical situations

Only a court can decide what forms of student speech are constitutionally protected. But here are three hypothetical scenarios and an analysis on how legal precedents including *Tinker v. Des Moines Independent Community School* would apply.

1. **A student wears a face mask with a political message that teachers and administrators think is controversial.** *Tinker* would support the student's right to express the political opinion on the mask unless it is reasonably foreseeable that such speech-related conduct will create a substantial disruption in the school setting. The mere fear of a disruption will not suffice. Only an actual disruption, or the reasonable likelihood thereof, would qualify (*e.g.*, physical fights were breaking out, classwork was being disrupted, etc.).
2. **A student creates a website that lampoons or attacks the character of the school principal.** This would probably be considered an example of off-campus speech. It could be subject of discipline if the district can show there was a foreseeable risk of substantial disruption (*e.g.*, the website became a popular topic of conversation among students, caused embarrassment to the principal, etc.).
3. **A hybrid-learning student uses a school-issued laptop to create a video that is highly critical of his school.** The student shares the video with few other students, and the next morning it soon becomes very widely shared. The mere fact that speech is critical of a school and its administration, in and of itself, is not enough to warrant regulation or discipline. However, assuming the student's conduct is considered off-campus speech, the district could still impose discipline if the video created a foreseeable risk of substantial disruption in school. If an investigation reveals that the video was created during class time, then this could be considered "on-campus" activity. If so, the district could impose discipline in accordance with the Code of Conduct and the standards set forth in *Tinker*. Furthermore, if the student used a district-issued device to post the content, there might be a violation of the district's acceptable use policy.

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Student's suspensions expunged based upon due process violations

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An eighth grader was suspended after he allegedly told a classmate that he had access to guns, planned to shoot students at school and also intended to harm himself. He was initially suspended for five days, and a 10-week suspension was imposed after a hearing. The board of education subsequently upheld the long-term suspension.

In *Appeal of M.P and T.P.,* the interim commissioner of education ordered the suspensions expunged because of due process violations in both the way school personnel handled the short-term suspension and decisions made by the hearing officer in the process that led to the long-term suspension.

Short term suspension requires notice of opportunity for informal hearing

When seeking to suspend a student for five days or less, the Education Law requires the school to provide the student's parents or guardian with written notice of the misconduct and an opportunity to participate in an informal conference prior to the initiation of the suspension unless the student's presence poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process.

The case record reflects that the assistant principal informed the parents orally of the suspension at a meeting on June 5, 2019. Also, the parents acknowledged receiving an undated suspension notice on June 6, 2019 that indicated that the suspension would begin "tomorrow." However, testimony from the school principal at the long term suspension hearing and other evidence indicated that the student was actually suspended beginning on June 6. Thus, according to the interim commissioner, the principal reached a decision to suspend the student before offering petitioners the opportunity for an informal conference.

The interim commissioner reminded the school district that an immediate meeting with the parents and the principal does not excuse the district from fulfilling the requirement for supplying a written notice explaining the right to an informal conference where complaining witnesses may be questioned. The interim commissioner also noted that the notice to the parents did not contain any statements that the student presented a continuing danger or ongoing threat of disruption. Therefore, the short-term suspension must be expunged.

Desiring to complete a student disciplinary hearing in one day, a hearing officer declined to issue subpoenas requested by the student's attorney. This was a denial of due process.

Need to issue witness subpoenas may require delay of hearing

The student's parents also argued that his due process rights were violated with respect to the conduct of the hearing that result in the long-term suspension. Pursuant to Education Law section 3214, a student is entitled to a hearing upon reasonable notice and may be represented by counsel, with the right to question witnesses against the student and to present witnesses on his or her behalf. To that end, the statute empowers the hearing officer to issue subpoenas in conjunction with the proceeding.

One issue the parents' attorney wanted to pursue was whether there was credible evidence that the student made the statements that his classmate attributed to him.

On the day before and at the hearing itself, the parents' attorney requested issuance of subpoenas for four individuals, including the local chief of police whose department investigated the incident and the teacher of the Social Inquiry class where the student allegedly made the statements. According to the parents' attorney, the police investigated the student's alleged conduct and determined no threats were made. As part of the subpoena the attorney also requested that the chief produce records related to the investigation of the alleged acts. Finally, the attorney sought an adjournment in order to serve the subpoenas and fully prepare the student's defense.

The hearing officer declined to issue the subpoenas or declare an adjournment, however. The interim commissioner rejected the hearing officer's rationale that a desire to expedite the hearing justified the denial of the subpoenas. The hearing officer appeared to assume the hearing must be completed in a single day. However, the Education Law does not contain a time restriction of that sort. What the law does require, however, is that a student be returned to school unless a hearing is held within the five days or an adjournment is requested by the student (or the student's parent or attorney).

Also, the interim commissioner found that the students' right to a fair hearing was violated because both the Social Inquiry teacher and the police chief could have provided relevant testimony or documentary evidence concerning the student's guilt. Specifically, the teacher could have provided testimony as to whether the two students sat together in the classroom and whether the teacher had heard any of the comments reported by the classmate.

Furthermore, the interim commissioner said the findings of the police department were relevant to the hearing. Any evidence uncovered during that investigation as to whether the student made the alleged statements would tend to prove or disprove his guilt. Therefore, the failure to issue the subpoenas was highly prejudicial, the interim commissioner determined. (In other cases involving student disciplinary hearings, the commissioner has ruled that failure to issue a subpoena was a harmless error; this has been the case when witnesses would only have testified as to penalty.)

The interim commissioner also rejected the district's argument that the attorney's request for the appearance of the Social Inquiry teacher came too late (one day before the hearing) to be practicable. The attorney determined that the testimony of the teacher was necessary after receiving, on July 3, revised charges that altered the time at which the misconduct allegedly occurred. The subsequent July 4th holiday impeded his ability to request such subpoenas immediately. Thus, the parents' attorney did not seek to delay the hearing in bad faith based upon the timing of the request, according to the interim commissioner.

The parents also complained that the school board received counsel from the same law firm which prosecuted the disciplinary hearing. The district denied the allegations and indicated that the board made its decision to uphold the suspension on the record. The interim commissioner determined the parents did not meet the burden of proof with respect to this claim but reminded the board to ensure there is appropriate separation between the district's prosecutorial function and the board's appellate capacity in connection with long term suspension hearings.

Read the case at http://www.counsel.nysed.gov/Decisions/volume60/d17937.

SPLIT, from page 11

in the post was offensive and had used misleading or false information to create a greater disturbance. Notably, the Second Circuit confirmed that school officials need not demonstrate an *actual* disturbance to prevail. Rather, they only need to show conduct that might "reasonably portend disruption" [quoting *LaVine v. Blaine Sch. Dist.* 9th Circuit, 2001)].

Moreover, the court noted that the punishment at issue was a ban from an extra-curricular activity. This was not the same as a prohibition of participation in the educational component of school, which might raise greater constitutional concerns.

Wisniewski and *Doninger* are in direct conflict with *Mahanoy*. Whether the "f---cheer" post of *Mahanoy* was foreseeably disruptive is a question of fact (certainly the District Court for the Middle District of Pennsylvania did not think so). Similarly, under the *Wisniewski* and *Doninger* standard, it could be argued that the speech created a foreseeable risk of substantial disruption. However, under the standard adopted in *Mahanoy*, all off-campus would be off-limits for school officials.

Such a disparate application of federal law could prompt the U.S. Supreme Court to review the *Tinker* standard in another case involving the First Amendment rights of students or teachers. In such case, the Supreme Court could apply *stare decisis* and uphold *Tinker*. Or, the court could find a justification for changing the standards set in *Tinker*, such as adopting the Third Circuit's view that *Tinker* has been become outdated in light of the sheer volume and nature of speech found on social media.

Many decisions by New York's commissioner of education have relied on the Tinker standard. Any change in that standard by the Second Circuit or Supreme Court would impact decades of administrative precedent.

It is also worth noting that school districts are obligated to investigate off-campus behavior that could violate the state's Dignity for All Students Act (DASA), as well as remediate any violations found (remediation can include discipline). So even if the Tinker standard changed, districts in New York State may still be obligated under DASA to investigate and respond to certain forms of off-campus speech.

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