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LEGAL UPDATE

July 8, 2021

To: Superintendents, Member School Districts (K-12)
From: Carl D. Corbin, General Counsel *CDC*
Subject: U.S. Supreme Court Issues Decision on On-Line and Off-Campus Student Speech
Memo No. 19-2021

On June 23, 2021, the United States Supreme Court issued a decision in *Mahanoy Area School District v. B.L.*¹ This case focused on the authority of a school district to suspend a cheerleader from her cheerleading squad based on her use of profanity in a social media post that was critical of the school district and the cheerleading team, which she posted off-campus on a Saturday, while not engaged in a school-related activity.²

Citing to a previous Supreme Court decision that allowed districts to regulate student speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,”³ the *Mahanoy* decision held schools may regulate student speech that occurs off-campus in some circumstances. The Supreme Court declined to provide a detailed list of exceptions to the general rule that a student has a First Amendment right to free speech.

The decision held that the following student off-campus behaviors may be subject to school discipline:

[S]erious 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.

¹ 141 S.Ct. 2038.

² The decision in *Mahanoy* is distinguished from the Supreme Court’s decision in *Morse v. Frederick* (2007) 551 U.S. 393 (popularly referred to as the “Bong Hits 4 Jesus” decision), where the Supreme Court held the student could be disciplined by the school district as the student’s off-campus speech (holding a banner) occurred during normal school hours at a school sanctioned/approved event and referenced illegal drug use.

³ *Tinker v. Des Moines Independent Community Sch. Dist.* (1969) 393 U.S. 503, at 513.



However, because in this case the cheerleading student posted her comments off-campus, not during school hours, did not identify her school or target any community member with abusive or vulgar language, and sent her speech through a personal cellphone to her private circle of friends, the Supreme Court determined that the speech did not meet the standard set forth in *Tinker* for discipline of off-campus speech and the school district's action to discipline her violated her First Amendment rights.

Implications for California School Districts

While the *Mahanoy* and *Tinker* decisions provides students with a nationwide “floor” on student free speech, in California K-12 students have additional free speech rights by statute.⁴ In contrast, California also allows and, in some instances such as student bullying,⁵ specifically permits school districts to address the speech of students that occurs off-campus. Two previous decisions by the Ninth Circuit Court of Appeals, continue to provide useful guidance in alignment with the Supreme Court's decision in *Mahanoy* on when school administrators can discipline students for off-campus speech (which may or may not also be posted on the internet through social media):

- In one decision, the Ninth Circuit held that the school district had authority to discipline a seventh-grade student for his off-campus, sexually harassing speech towards two disabled sixth-grade students in a public park shortly after school let out.⁶
- In another decision, the Ninth Circuit held that the school district did not violate a student's First Amendment free speech rights by disciplining him for sending violent and threatening instant messages from his home to his friends about planning a school shooting.⁷

In summary, school districts may impose discipline on students for their actions off-campus and/or on the internet, but the school district will need to show a connection (“nexus”) to school and a detrimental effect such as disruption, invasion of the rights of other students, etc.

As this is a very fact specific area of law, we advise school district administrators consult with legal counsel when determining whether or not to discipline a student for off-campus conduct, including posting information on social media.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁴ Education Code § 48907.

⁵ Education Code § 48900(r).

⁶ *C.R. v. Eugene Sch. Dist.* (9th Cir. 2016) 835 F.3d 1142.

⁷ *Wynar v. Douglas County Sch. Dist.* (9th Cir. 2013) 728 F.3d 1062.