Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2021 Issue 2

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"Oh, Snap(chat)!" High Court Shakes Up *Tinker* Regarding Off-Campus Speech

by M. Scott Major

In our March issue of *Chalkboard*, Emily Krukowski discussed the United States Supreme Court's (the "Court") impending decision in *B.L. v. Mahanoy Area School District*, which addressed the question of whether or to what extent *Tinker v. Des Moines* remains relevant regarding off-campus student speech. On June 23rd, the High Court delivered its opinion, finding 8-1 in favor of a student who was suspended from the cheerleading team for creating a profanity-laden Snapchat post[1], or "snap", that was punctuated by vulgar hand gestures and which directed criticism toward her school, administrators, and coaches. She created the snap while at a convenience store, after school hours, outside of school-related activities, and despite signing a team rules agreement to refrain from such behaviors. After appealing her team suspension to the school board, the student filed a lawsuit claiming her First Amendment rights were violated.

In ruling against the school district, the Court analyzed three interests that the district offered to justify the suspension. First, the district asserted its interest in teaching good manners and consequently punishing the use of vulgar language directed at part of the school community, but the Court held *in this case* that this interest was not sufficient to overcome the student's interest in free expression. Second, the district proffered its interest in preventing disruption within the classroom or extracurricular activities; however, the Court

dismissed this interest as well because the district did not provide sufficient evidence to demonstrate a substantial disruption to a school activity or a threatened harm to the rights of others *in this case*. The little disruption actually experienced by the district was that the snap had been briefly discussed in an Algebra class and some students were upset. Third, the Court found that the district's interest in preserving team morale was likewise not supported with strong evidence, and it failed to prove a serious decline in team morale which created a substantial interference in, or disruption to, efforts to maintain team cohesion. The Court ultimately held that while "public school officials may have a special interest in regulating *some* off-campus speech," these special interests offered by the school district were not sufficient to "overcome [the student's] interest in free expression *in this case*." (emphasis added)

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By way of explanation, the Justices noted several characteristics of off-campus speech which diminish the leeway that the First Amendment grants to schools to regulate it: 1) off-campus speech typically occurs when parents, not school officials, are responsible for their children; 2) it typically occurs when school rules are not in force—otherwise, student speech would be regulated 24/7/365[2]; and 3) as "nurseries of democracy," schools have an interest in protecting student speech, even when it expresses unpopular ideas, especially off campus. Unfortunately, the Court declined to articulate a bright-line rule that school administrators could easily follow when deciding when or if they could censure off-campus student speech. But the Court did highlight several "special characteristics," based upon the speech's effect on the school, which may still grant districts the authority to regulate it. That non-exhaustive list includes 1) "serious bullying or harassment targeting particular individuals"; 2) "threats aimed at teachers or other students"; 3) the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities"; and 4) "breaches of school security devices, including material maintained within school computers."

The key takeaway from *Mahanoy* is that off-campus student speech is generally protected unless there is a clear adverse impact on school operations or the school community that can be substantiated. A student's criticism of the school (e.g., its

employees, programs, or policies) is likely no longer sufficient to warrant suspension or possibly even discipline, and this principle now extends to team or extracurricular rules. Furthermore, a district's mere discomfort and embarrassment or minor, non-disruptive discussions about a student's speech in classrooms or hallways is not sufficient evidence of a *Tinker*-like substantial disruption. Therefore, when deciding whether off-campus student speech is actionable, administrators should carefully consider whether the speech has caused a genuine substantial disruption, whether it is reasonably forecast to cause a substantial disruption, or whether it interferes with the rights of others. Absent one of these, school officials now run the serious risk of overstepping their authority and violating their students' rights.

If you have questions about when and how your district can discipline students for off-campus speech, your RFR attorneys are here to advise you and help you develop practices that comply with this and other applicable law.

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[1] Snapchat is an online instant messaging application that allows pictures and messages to be sent to others which are only viewable by recipients for a short time.

[2] The ACLU, in its amicus brief, likened this to students carrying the school on their backs.

Options to Address Disruptions of Board Meetings

by Adam S. Breipohl

In light of the ongoing controversy over how school districts can best address the current public health situation, many school districts across the state have been forced to respond to individuals who engage in conduct which disrupts meetings of the district's board of education. Boards and administrators should be aware of procedures made available under Oklahoma law to address these situations and enable the district to conduct its business in an orderly manner.

In the 2021 legislative session, the Oklahoma legislature enacted Senate Bill 403, which gives political subdivisions of the state, including school districts, new tools to deal with individuals who engage in disruptive behavior. SB 403 makes it unlawful "for any person who is without authority or who is causing any disturbance, interference or disruption to willfully refuse to disperse or leave any property, building or structure owned, leased or occupied by [a] political subdivision . . . after proper notice by a peace officer, sergeant-at-arms, or other security personnel." It further specifically provides that "[i]t is unlawful for any person, alone or in concert with others and without authorization, to willfully disturb, interfere or disrupt . . . the business of any political subdivision, which

includes publicly posted meetings." For purposes of this statute, conduct that "disturbs, interferes or disrupts" the business of a school district means "any conduct that is violent, threatening, abusive, obscene, or that jeopardizes the safety of self or others." Any violation of either of the above prohibitions constitutes a criminal misdemeanor offense subject to penalties that include up to one year in jail or a $1,000 penalty.

Administrators should also keep in mind that the existing law authorizing superintendents and/or building principals to issue "get out, stay out" letters can also be implicated in a situation where individuals disrupt the conduct of a board meeting. Those provisions state that a superintendent and/or principal shall have the authority and power to direct any person (other than a student or employee) to leave school premises if that person "[i]nterferes with the peaceful conduct of activities" at a school, commits an act which interferes with such activities, or enters a school for the purpose of doing so.

For purposes of that section, conduct that "interferes with the peaceful conduct" of school business is defined more narrowly, encompassing "actions that directly interfere with classes, study, student or faculty safety, housing or parking areas, or extracurricular activities; threatening or stalking any person; damaging or causing waste to any property belonging to another person or the institution of learning; or direct interference with administration, maintenance or security of property belonging to the institution of learning." However, some disruptions that may occur at board meetings may meet this standard, giving the principal/superintendent grounds to order the involved individual(s) to leave school property. An individual who is so ordered must stay off school premises for the next six months unless given written permission, and any violation of the order may also lead to criminal penalties.

While these statutes provide districts with helpful tools to address conduct that disrupts board meetings, districts should keep in mind that only relatively serious disruptive behavior at a board meeting will rise to the level necessary to allow their exclusion from school property. Districts that have questions regarding the applications of these laws to specific situations that have occurred or are likely to occur should consider contacting their legal counsel.

Boards and administrators should be aware of procedures under Oklahoma law to address these situations and enable the district to conduct its business in an orderly manner.

RFR has also developed a board policy which includes provisions addressing the issues discussed in this article and other topics related to individuals who attempt to disrupt school business, and is available for purchase.

More Skirts, More Problems: Are Dress Codes Subject to Title IX?

by Emily C. Krukowski

In an effort to maintain an environment that is safe and free from disruption, school districts have adopted dress codes regarding what students can and cannot wear. Although school districts often have the students' best interests in mind when adopting these policies, a recent federal court decision from the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") held that a charter school district's dress code was subject to Title IX's prohibitions on discrimination on the basis of sex in educational programs that receive federal funds. Although the Fourth Circuit opinion is not binding on Oklahoma, it is an interesting decision given the evolving Title IX landscape, and serves as a reminder to public school districts to be cognizant of dress codes in this ever-changing environment.

In *Peltier v. Charter Day Sch., Inc.*, 2021 U.S. App. LEXIS 23569, ___ F.4d ____ (4th Cir. 2021), the Fourth Circuit had to determine, among several issues, whether a charter school's dress code was subject to Title IX prohibitions. More specifically, the Fourth Circuit was concerned as to whether dress codes could be considered a "sex-based' discrimination. Here, the charter school had implemented a dress code that had different requirements for boys and girls. Of particular importance to this case, was the requirement that girls wear skirts, jumpers, or skorts, which could be paired with leggings for warmth (collectively referred to as the "skirt requirement"). The only "exceptions" to the skirt requirement were on days when girls had gym class or during certain special occasions, like field trips. A parent of a kindergarten student inquired about the skirt requirement, and was informed that the dress code was implemented to "preserve chivalry and respect among young women and men," and served to help "restore . . . traditional regard for peers." Ultimately, several parents, on behalf of their children who were students at the charter school, brought action in federal court, alleging Title IX and Equal Protection violations.

In analyzing the issue regarding the Title IX claim, the Fourth Circuit had to determine whether Title IX applied to sex-based dress codes, such as the one implemented by the charter school. The Fourth Circuit began by generally noting the Title IX prohibitions, which provide that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." The Fourth Circuit then mentioned the many exceptions, which include: certain religious and military

institutions, boys and girls conferences (i.e., Boys State or Girls State), and membership in certain social organizations like sororities and fraternities. There is no exception for dress codes and the Title IX statute does not expressly say the words "dress code" in any of its provisions. However, after analyzing rules of statutory construction and administrative deference, the Fourth Circuit concluded that dress codes "are not excluded from Title IX," noting that "'Congress gave the statute a broad reach' by writing a 'general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition.'"

Although this decision does not have binding authority over school districts in Oklahoma, it serves as an important reminder that school districts should be aware of their dress codes to ensure that they do not potentially discriminate in any way. The skirt requirement at issue in the *Peltier* decision was an extreme example, but given our changing society and courts' adherence to those changes, school districts should be aware of the Title IX implications with dress codes.

If you have questions about your school district's dress codes, your RFR attorneys are here to advise you and help you develop practices that comply with applicable law.

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[1] Several of the issues concerned whether charter schools were subject to certain federal laws, like the Equal Protection Clause of the U.S. Constitution. These issues would not apply to public school districts, and are not discussed in this article.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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