Student Discipline and Enforcement of COVID-19 Protocols

VIRTUAL SCHOOL ADMINISTRATORS’ CONFERENCE

September 23, 2021

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Student Discipline & Enforcement of COVID-19 Protocols

Presented by: Zaria Udeh, Susan Nicholas, & Erin Ruth
School Administrators’ Conference | September 23, 2021
Face Covering Policy

| Adopt a policy following the current CDC, IDPH and ISBE guidance. |
| This will place the District and its staff in the best position to ensure a clear and consistent message to the school community. |
| Include language in the proposed Board policy authorizing the Superintendent to modify or even suspend the face covering requirements, in accordance with any changes to the CDC, IDPH, ISBE and Local Health Department guidance. |

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Parameters of a Face Covering Policy

| • Face coverings are not “health care services or medical care” for which a conscientious objection can be made. |
| • Courts have found repeatedly that public schools may impose strict dress codes without violating students’ rights, even though such policies may not impact student safety or public health. |
| • Moreover, there is public health guidance on face coverings from the CDC, IDPH, ISBE and Local Health Departments that schools are obligated to follow. |

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Communicate Expectations About Face Covering Policy

- Provide written notice about the importance of compliance with the face covering policy.
- Consider what interventions and supports will be available for students who are unable or unwilling to wear a face covering.

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Face Covering Violations

- The District has an obligation to enforce any policy adopted by the Board.
- Violations of the District’s face covering policy would need to be handled like any other violation of Board policy or school rules (absent a religious or medical exemption).

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Face Covering Violations

- Board Policy 7:190, Student Behavior/Discipline
  - Disobeying rules of student conduct or directives from staff members or school officials.
  - Engaging in any activity, on or off campus that interferes with, disrupts, or adversely affects the school environment, school operations, or an educational function.

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Interventions in Response to Face Covering Violations

- Less restrictive interventions should be attempted first.

- Repeated violations could ultimately rise to the level of warranting exclusionary discipline, including out of school suspension or, in more severe cases, alternative placement, or expulsion.

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Short-term Out of School Suspension

Suspension 3 days or less

Establish that the student poses: (a) a threat to school safety; or (b) a disruption to other student’s learning opportunities.

Long-term Out of School Suspension, Alternative Placement or Expulsion

- Suspension 4 days or more or to refer a student for expulsion or an alternative school
- Establish that the student: (a) poses a threat to the safety of other students, staff members or the school community; or (b) substantially disrupts, impedes or interferes with the operations of the school.
- Only if other appropriate and available behavioral and disciplinary interventions have been exhausted

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Threat to Safety Considerations During COVID

- When considering whether a student’s conduct is a threat to safety, schools may consider the added safety considerations caused by COVID
  - Use of face coverings
  - Ability to maintain social distancing and impact on close contacts
  - Disruption to orderly operations and staffing

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Exclusionary Discipline and Due Process

- 105 ILCS 5/24-24 Maintenance of Discipline
  - There is an obligation to maintain discipline in schools including a safe and orderly environment
  - A student may be excluded from school pursuant to behavior and discipline policies
  - A student must be afforded due process
    - Review meeting, suspension review hearing, expulsion hearing

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Health and Safety Obligations of Schools to Exclude Pursuant to Executive Order (E.O.)

- E.O. 2021-25, September 21, 2021
  - “Exclude” means a school’s obligation to refuse admittance to the school, regardless of whether an isolation or quarantine order issued by LHD has expired or been issued. Exclusion is not isolation or quarantine.
  - Schools must take safety measures to ensure the safety of students and school personnel concerning close contacts, confirmed or probable cases and who exhibit symptoms of COVID-19

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Use of Terminology is Important these Days:

- For Students Excluded Pursuant E.O.:
  - Health Dept. - Quarantine or Isolation
  - School District - Temporarily Transition to Remote Learning

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Free Speech

• 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.

• Public school students enjoy First Amendment protection.

• The Supreme Court has opined that public students do not “shed” their First Amendment rights “at the schoolhouse gate.”

• Tinker v. Des Moines Independent Community School District (1969)
Limits to Student Free Speech

- The First Amendment protects speech and expression from governmental interference.
- However, court decisions interpreting the First Amendment show that not all speech is protected.

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Regulating Student Speech

- There are a number of considerations in determining whether or not the School can regulate the expression of student speech.
  - Type of speech (i.e. is speech/expression non-violent, or are they using obscenity and making true threats, encouraging illicit drug use?)
  - Location of speech (on-campus vs. off, specific location on campus)
  - Disruption of speech
  - Whether the students are speaking in a manner that affiliates themselves with the School in a way that may conflate their belief with that of the School

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Regulation of Student Speech

- When does speech or a demonstration on campus cross the line and require intervention from the staff or administrators?
  - Disruptive conduct
  - Safety concerns
  - Known threats

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Disruptive Speech

- Educational authorities are not required to wait for harm or material disruption to occur before taking appropriate action.
- However, “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” or “an urgent wish to avoid the controversy which might result from the expression” are not sufficient to justify banning student speech.”


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Mahanoy Area School District v. B.L.

Facts

- A ninth grader at a Pennsylvania high school was punished for a message she posted to Snapchat one Saturday off-campus after discovering that she didn't make the varsity cheerleading team.
- She used a vulgar four-letter word to write, "f--- school f--- softball f--- cheer f--- everything."
- The student was subsequently suspended from the junior varsity team for her entire sophomore year.

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Mahanoy Area School District v. B.L.

Legal Framework

- The Court illustrated three “features” to consider in analyzing the school’s authority to regulate speech.

  1. Schools will rarely stand *in loco parentis* with respect to off-campus speech.

     - While school districts maintain the *in loco parentis* position during school hours, “off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.”

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2. Regulation of off-campus speech when coupled with regulations of on-campus speech, include all the speech that a student utters during the entire day.
   - Courts must be more skeptical of a school’s effort to regulate off-campus speech because otherwise a student would never be able to engage in the kind of speech the student here made.
   - A school will have a heavy burden to justify intervention where the off-campus speech is political or religious

3. Court cited the school’s interest in protecting a student’s unpopular expression as “public schools are the nurseries of democracy.”

Mahanoy Area School District v. B.L.

Legal Framework

- Student’s speech was outside of school hours, not on school property, did not name the school district or any individuals, and was made to a closed Snapchat group.

- Disruption in school was minimal, in that it impacted one class for a couple of days, and a few students were upset.

Mahanoy Area School District v. B.L.

Court’s Reasoning

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While public schools may have a special interest in regulating some off-campus student speech, the special interests offered by the school in this case were not sufficient to overcome the student’s interest in free expression in this case.

The Supreme Court ruled that the student’s speech was protected under the First Amendment.

The decision did not extend this protection to all off-campus expression, but the court suggested that the exceptions, to be worked out in future cases, would be limited.

A “school’s regulatory interests remain significant in some off-campus circumstances.”

Several types of off-campus behavior that may call for regulation by the school, 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.”
Practical Implications For Student Free Speech

- With regard to a school district’s authority to issue discipline to a student for off-campus conduct, the analysis remains substantially the same as it was before.
- Where the district can establish a nexus between the conduct and the school operations, it has authority to impose disciplinary consequences when warranted.

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Practical Implications For Student Free Speech

- Mahanoy may impact extracurricular codes of conduct or agreements, which have, in some jurisdictions, been provided broad discretion in imposing heightened standards and exacting sanctions for students even for off-campus conduct.
- The Court blurred any distinction between the authority of a district to discipline a student in the context of the “privilege” of participation in extracurricular participation versus the right to access academic instruction where First Amendment protected speech is at issue.

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Practical Implications For Student Free Speech

- School districts will continue to benefit from conducting a case by case analysis of student off-campus speech to determine whether it is protected speech and if it constitutes behavior that justifies regulation by the school.
- In light of this case, school districts may want to review and revisit the content of their extracurricular codes of conduct to ensure clear and well-reasoned standards with sufficient connection to the orderly operation of schools.

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Case Example Since Mahanoy

  - A.F.’s communications were markedly different from those of the student in Mahanoy. Hers were not fighting words.
  - His were not merely profane, but they were actual threats.
  - Much of the threatening language was directed, primarily, at one student
  - Threatened beat the student up at practice and cause him to be dead
  - Wished death upon the student and followed-up the SnapChat posts with a picture of himself with a gun
  - A.F.’s communications were found to be threats, fighting words, and the very type of communications that the Supreme Court recognized as falling outside the protective scope of the First Amendment and, conversely, within the right of a school to regulate regardless of whether made within or outside of school.

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Questions?

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Thank You
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Zaria practices in the area of education law focusing in the areas of special education and students issues. Zaria counsels school districts with respect to IEP meetings, 504 accommodations, OCR, ISBE, and IDHR complaints, due process hearings, residency and homeless dispute hearings, student discipline matters, board policy and student handbook review, FOIA requests, student record compliance and contract review. Zaria also counsels community colleges on student related issues.

Prior to joining Robbins Schwartz, Zaria worked for the Chicago Public School District, where she represented the district as a special education attorney in due process matters and special education disputes.

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Legal Update in Special Education, Superintendent Leadership Conference (June 2018)

Current Trends Related to Placement and LRE: A Review of Recent Guidance from the Courts, IAASE (February 2018)

“Free Speech” Issues on Public College Campuses, ICCSSO (January 2018)

PRACTICE AREAS
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J.D., DePaul University College of Law
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U.S. District Court for the Northern District of Illinois
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Chicago Bar Association
Susan E. Nicholas focuses her practice on serving employers, educational entities, municipalities and other public bodies in all aspects of labor and employment law and general student matters.

Susan is the former President and Treasurer of the Decatur Bar Association’s Executive Board. She also served as a Macon County Teen Court Moderator.

Prior to joining Robbins Schwartz, Susan practiced in a variety of areas including family law, criminal defense, estate planning, and civil litigation. Susan is also a former Assistant State’s Attorney in the Macon County State’s Attorney Office.

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RECENT PRESENTATIONS
Ethics and Conflicts of Interest for Municipal Elected Officials, Illinois Municipal League Newly Elected Officials Workshop (June 2017)

Navigating the FLSA: Compliance and Avoiding Common Pitfalls, Illinois Association of School Board Administrators Workshop (October 2017)

Erin focuses her practice primarily on special education and students’ rights law. She assists school districts in responding to complaints from the Illinois State Board of Education and Office for Civil Rights. Erin also advises school districts regarding 504 issues, student discipline matters, and the IEP process.

Erin was a First-Grade teacher before starting her legal career. Prior to joining Robbins Schwartz, Erin worked at a family law firm handling a variety of divorce and family law matters, including child-related issues, maintenance, property division, orders of protection, and post-divorce matters.