

## The Blur Between Student Misconduct and Free Speech

Pennsylvania courts have continued to clarify the intricate issues involved in limitations or restrictions upon free speech. The focus of this discussion is specifically on three recent decisions: (1) In re J.J.M.; (2) J.S. v. Manheim Township School District, and (3) In re G.S. The first case, In the Interest of J.J.M., is a decision by the Pennsylvania Supreme Court regarding constitutionally protected free speech and level of scienter (e.g., intent or knowledge of one’s own wrongdoing before committing the wrongful act). The second case, J.S. v. Manheim Township School District, is another decision by the Pennsylvania Supreme Court in which the Court grappled with (1) the interlude between protected free speech and public schools’ duty to maintain a safe, effective, and efficient educational environment and (2) due process in a public-school student disciplinary proceeding. The third case, In re G.S., is a decision by the Pennsylvania Commonwealth Court that considered the parameters of constitutionally free speech in a school setting, and serves as the most recent application of Manheim Township School District.

**In re J.J.M., J-84-2020 (Pa. Supreme Court Dec. 21, 2021)**

### Facts

The timeline for the present case began in the early months of 2018, at which time, J.J.M. was a fifteen-year-old student enrolled in vocational school at West Side Career and Technology Center, and described by other students as “a loner.” Another student, K.S., heard J.J.M. state he “doesn’t think

people deserve to live and everyone should just die.” K.S. did not initially report the incident to the school, but learned of another related statement by J.J.M. from her friends, which prompted her to report the initial incident “because it was a serious problem... I was nervous, I was scared.”

The second statement that prompted K.S. to report occurred on February 20, 2018, and was heard by M.W., another student, who was “only two or three feet” away from J.J.M. in the school hallway. M.W. heard J.J.M. indicate “[h]e wanted to beat the record of 19,” but M.W. was unsure if J.J.M. was talking to her, someone else, or said it aloud to no one in particular. The statement was made in apparent reference to the Stoneman Douglas High School shooting that left seventeen people dead and shook the entire nation only six days prior. M.W. reported her concerns because she “felt it was concerning due to past statements. I felt it needed to be taken seriously.” M.W.’s reference to “past statements” involved J.J.M. saying “[t]hings related to death and such,” and showing “signs of possibly being violent,” but no evidence was considered related to past statements.

The School expelled J.J.M. after it received the foregoing student reports. Thereafter, the

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Commonwealth charged J.J.M. with terroristic threats under 18 Pa.C.S. § 2706(a)(3) and disorderly conduct. The following adjudication hearing resulted in J.J.M. being found delinquent of one charge of terroristic threats by way of his actions “...having communicated indirectly, and having caused terror and serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience...”, and placed J.J.M. on probation. J.J.M. appealed his adjudication to the Court of Common Pleas and Superior Court, which both rejected his various arguments and upheld his adjudication.

### Decision and Analysis

The Pennsylvania Supreme Court held that one can be convicted or adjudicated for recklessly uttering a true threat, but also vacated J.J.M.’s criminal adjudication because the record did not establish his actions constitute such a true threat, beyond the protection allotted by the First Amendment. Specifically, the Court stated: “the First Amendment does not prohibit the States from criminalizing threats made in reckless disregard of the risk of causing fear...” but “requires proof of a conscious disregard of a substantial and unjustifiable risk of terrorizing or intimidating others.”

In applying the law, the Court lamented the dearth of evidence available in the record, characterizing it as “feeble” and incapable of supporting the delinquent charge: “[t]he entire record demonstrates only that [J.J.M.] expressed an opinion to one person, and then, weeks later, another person overheard him make a facially ambiguous statement either to himself or an unidentified third party...” Accordingly, the Court concluded that “[t]here is simply no evidence on this record from which to conclude appellant was aware the ambiguous remark he made might cause a serious public inconvenience or terror, and consciously proceeded to disregard that risk.”

The Court explicitly explained that its decision did not contemplate any aspect of the School’s decision to expel J.J.M., nor did the Court rely upon any of special considerations or characteristics involved with assessing free speech in a school setting. Rather, its decision focused upon the criminalization of speech and the corresponding criminal adjudication process. Despite this distinction and inapplicability to a school, the Court’s decision emphasized an inescapable truth: substantive policy is easily defeated by procedural failures or incomplete record development—regardless of whether that process is a criminal adjudication or school expulsion hearing.

### **J.S. v. Manheim Twp. Sch. Dist., 243 A.3d 971 (Pa. 2021)**

#### Facts

The Pennsylvania Supreme Court’s decision in J.S. v. Manheim Township School District decision marks the final resolution of a case featured in three previous Education Law Reports. In this case, J.S. and a Friend (“Friend”) privately mocked another student’s (“Student”) appearance while having a conversation on social media. Specifically, the pair “joked” that Student “looked like a school shooter” apparently due to the student’s long hair and frequent wearing of a “Cannibal Corpse” (a “death metal band” that often invokes graphic or violent imagery with their music) t-shirt. The conversation segued to J.S. creating and sharing two related memes with Friend through direct message on SnapChat. The first meme depicted “[Student] singing into a microphone while J.S. watched the ‘performance’ with a pair of comically oversized glasses” with the caption “I’m shooting up the school this week. I can’t take it anymore I’m DONE.” The second meme was a video that depicted Student playing a guitar with the caption:

“IM READY [Friend] AND MANY MORE WILL PERISH IN THIS STORM. I WILL TRY TO TAKE [Friend] ALIVE AND TIE HIM UP AND EAT HIM.”

Friend re-posted J.S.’s first meme on his

SnapChat Story (semi-public broadcast to friends). Thus, the private communication was made publicly available, and was viewed by at least twenty other SnapChat users before Friend removed it five minutes later at the request of J.S. However, one of these SnapChat users screenshotted the post and it continued to be spread, and eventually reached school administrators, who informed the local police. Following an interview with J.S., the police determined that the meme did not constitute a threat to public safety and informed the District of such. The District conducted its own investigation into the matter and suspended J.S., which preceded expulsion proceedings on the basis of violations to the District's terroristic threats and cyberbullying policies.

At the hearing, the District introduced testimony relaying the content of the school's investigative interview with Friend, over J.S.'s hearsay objection. The District declined to compel Friend to attend the hearing despite requests from J.S. citing that it "lacked subpoena power," but the District nonetheless introduced secondhand testimony that Friend indicated in his student interview that he "felt terrorized" by the memes, and shared the meme on SnapChat to alert others to the threat. The Board expelled J.S. for violating both its cyberbullying and terroristic threats policies. On appeal, the Court of Common Pleas reversed the adjudication and ordered the expulsion expunged because (1) the District violated J.S.'s constitutional rights to due process and free speech, and (2) the cyberbullying charge was not supported by substantial evidence. This decision was affirmed by the Commonwealth Court and now again by the Pennsylvania Supreme Court.

### **Decision and Analysis**

The Pennsylvania Supreme Court resolved the case based solely upon the First Amendment issue. The Court reflected upon nearly a century of First Amendment caselaw and devised an analytical framework that encapsulates the essence of the area of law. Specifically, the Court considered the use of a factor analysis regarding the context of speech and whether an analysis should utilize an objective or subjective standard. The Court analyzed the

interlude between precedential decisions, such as Tinker v. Des Moines (established "special leeway" is afforded to schools to regulate speech with corresponding limiting considerations), and relevant albeit distinguishable cases, such as J.S. v. Bethlehem Area School District (required an objective "true threat" analysis) and the more recent Commonwealth v. Knox (required a "true threat" analysis incorporate the subjective intent of the speaker, among other factors). Following its analysis, the Court appeared to harbor skepticism utilizing a rigid analysis where free speech is involved, and decided that the proper approach for "true threat" analysis in a school setting is "considering the totality of the circumstances," but "the primary focus must be on the subjective intent of the speaker."

Accordingly, the Court created a two-part analytical framework. First, the content of the speech is considered, then the context in which the speech occurred is considered. The Court provided a non-exhaustive list of factors for considering the context of speech, which included:

1. the language employed by the speaker;
2. whether the statement constituted political hyperbole, jest, or satire;
3. whether the speech was of the type that often involves inexact and abusive language;
4. whether the threat was conditional;
5. whether it was communicated directly to the victim;
6. whether the victim had reason to believe the speaker had a propensity to engage in violence; and
7. how the listeners reacted to the speech.

In applying its analytical approach to the present case, the Court determined that J.S.'s memes may have contained content that could be isolated and construed as threatening; however, a consideration of the meme in its totality, and the circumstances of its communication (individual communication, private setting, messages automatically delete on SnapChat, Friend's reaction, "inartful...sophomoric...attempt at humor" by the depiction accompanying potentially threatening statement, etc.) prompted the Court to find that J.S.'s speech did not constitute a true threat.

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Thereafter, the Court conducted a “substantial disruption” analysis to determine if the District acted appropriately under *Tinker*, which permits censorship of speech “...if the speech materially and substantially interfered with, or could be reasonably forecasted to interfere with, the necessities for discipline in the school...” To this end, the Court considered the extent of control a school may exert, with consideration of *Tinker* factors. Specifically, the content of the speech involved mocking another student, with the suggestion that this student is a “school shooter,” which would favor regulation. However, the offending speech was communicated on a personal device to an intended audience of one, who was not the subject of the ridicule. Indeed, the District has an interest in preventing bullying, but the interest is diminished by the fact that the school did not stand in loco parentis while J.S. was engaged in this off-campus speech. Thus, the school’s special leeway to restrict speech in this scenario is limited under *Tinker*. Moreover, the District described the substantial disruption as the time required to conduct the investigation and loss of educational time for the students who were interviewed, which the Court flatly states is insufficient under existing precedent.

The Court affirmed the decision to vacate J.S.’s adjudication, but empathized with administrators and school boards, as they are charged with the anxiety-inducing and potentially high stake “thankless task” of regulating student speech.

***In re G.S.*, 843 C.D. 2020 (Pa. Cmmw. Ct. Jan. 7, 2022)**

### Facts

The events at issue in the present case began on April 1, 2018, at which time, G.S. was a sixteen-year-old student in eleventh grade at Penncrest High School in Media, PA. G.S. made an off-campus SnapChat post from his personal device while on vacation. The content of the post was an excerpt of

song lyrics from a death metal band, which is a genre that often utilizes “dark, violent, or gory imagery”; the excerpted (and censored) lyrics are as follows:

Everyone, I  
despise everyone!  
F— you,  
eat sh—,  
blackout,  
the world is a graveyard!  
All of you, I  
will f—ing  
kill all of  
you! This is  
me, this is  
my, snap!

G.S.’s post was originally limited to an approximate audience of his sixty-five SnapChat followers, including a handful of other students enrolled in the District. However, containment was quickly broken, as other users screenshotted the SnapChat post and re-posted it on other social media applications – including an Instagram post that tagged “@penncrest\_students.”

A concerned parent contacted the Pennsylvania State Police and provided them a screenshot of G.S.’s SnapChat post. The Police initiated an investigation by attempting to conduct an in-person visit to G.S.’s residence, but the family was out of town for the weekend. The Police prepared charges against G.S., informed the District of the pending charges against G.S., and relayed the content of the SnapChat post shortly before 6:00 p.m.

Shortly thereafter, the Police contacted G.S.’s father and requested that he bring G.S. to the barracks for questioning. During the interview, G.S. acknowledged he made the SnapChat post, but also revealed the origin of the post to be song lyrics and indicated that he had not intended to harm anyone. Prior to this interview, the “true provenance” of G.S.’s post was unbeknownst to the District or Police, who “were operating under the presumption that it constituted a legitimate threat of violence.” The Police relayed this information to the District Attorney’s Office, which instructed the Police to

move forward with charges of terroristic threats and harassment. G.S. was subsequently arrested and held at a nearby juvenile detention facility.

While the aforementioned events were unfolding, the School District was contacted by several community members regarding G.S.'s SnapChat post and expressed their concern on the subject. As a result, the District viewed the issue as a District-wide concern and notified the community around 9:45 p.m., by means of a(n): (1) pre-recorded community telephone message, (2) update to the District's main webpage, and (3) e-mail to student parents. These notifications contained substantially similar content, expressing that the District was aware of G.S.'s SnapChat post, law enforcement was investigating the issue, and the District "considered [G.S.] to [have made] serious threats of violence towards others [through his post]."

These events corresponded with an additional police presence the following day and a 25% absence rate among students, and those who attended seemed anxious or fearful, seeking reassurances of safety. The District received what it deemed to be another terroristic threat (from another, independent source) early that day, which prompted the District to release a message stating, in part: "[w]e no longer have the luxury of trying to discern a credible threat from one that is intended to disrupt lives. Every threat is considered to be credible..."

G.S. underwent an individual psychological evaluation, in which the presiding psychologist concluded that G.S. was a low-risk individual, who does not appear to have any underlying anger or depression issues that could result in a crisis incident, and should be able to return to the community with only minor conditions. G.S. was released from the juvenile detention facility the following day, on April 3, 2018—and the District promptly issued a suspension on April 4, and ultimately supplanted the suspension by initiating expulsion proceedings.

The expulsion process segued to a final pre-expulsion hearing, in which G.S. established that the "SnapChat post only contained song lyrics... had not targeted or threatened specific people or groups...and... other than by virtue of G.S. being a Penncrest student, neither the timing of the post

nor its content had a clear connection to the School District community." Meanwhile, the District opted to rely upon the "plain wording of G.S.' post" relative to the public reaction and pending criminal charges to establish G.S. intended to harm District community members.

The Hearing Officer concluded that expulsion "was warranted due to the harmful and substantially disruptive effect the post had upon the [District] community," and thus did not constitute protected free speech, and the evidence supported each of the levied charges. The District adopted the Hearing Officer's report in its entirety and expelled G.S. on August 23, 2018. G.S. appealed the District's decision to the Court of Common Pleas, which held that the District's determination that G.S. made terroristic threats was not supported by substantial evidence. But, upheld the District's decision to expel G.S. on the basis that the District did not abuse its discretion by determining that G.S.'s post constituted harassment and disrupted the school environment. The decision resulted in an appeal by both G.S. and the District.

### Decision and Analysis

The Commonwealth Court of Pennsylvania decided that the expulsion of G.S., based upon charges of terroristic threats and substantial disruption to school operation or activities, constituted a violation of his constitutional rights under the First Amendment of the U.S. Constitution and Article I, Section 7 of the Pennsylvania Constitution.

The Court acknowledged the established precedent of Tinker v. Des Moines, which held that schools possess special characteristics that grant them a degree of leeway to restrict speech, including speech that occurred beyond the physical boundaries of the school. However, Tinker did not provide a clear limitation upon this leeway, but provided factors that diminish it:

1. schools "rarely stand in loco parentis" when the speech occurs off-campus, as off-campus activities are more likely to be within the sphere of parental control;
2. "[c]ourts must be more skeptical of efforts to regulate off-campus speech," as a combination

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of on-campus and off-campus regulations results in regulation of all speech; and

3. schools have “an interest in protecting a student’s unpopular expression, especially... off campus” to preserve the “marketplace of ideas” and continue to serve as “nursery of democracy” by developing an informed electorate. The Court acknowledged practical realities prevent a clear rule on the subject, but “[t]aken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished.”

Thereafter, the Commonwealth Court considered J.S. v. Manheim Township School District, which is the most recent authoritative decision on the subject within the jurisdiction. In J.S., the Court established a two-part test for assessing student speech that placed an emphasis on the totality of the circumstances. First, the content of the conduct or speech is considered, followed by the context in which it occurred. The Court was clear this analysis has a “primary focus... on the subjective intent of the speaker...” and that this approach considers individual characteristics of the student actor (e.g., age, maturity, lack of judgment, etc.). Moreover, the second factor necessarily creates a greater hurdle for regulation of off-campus speech, as it is more within the realm of parental control than in loco parentis.

The Court explained that schools have the ability to “mete out punishment” in situations where student speech “causes or foreseeably could cause a substantial disruption to the school environment” under Tinker. However, this exception is decidedly limited in scope, but not necessarily clear regarding its precise boundaries. Specifically, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression...” but “complete chaos” is also not required. This “substantial disruption” approach is applicable to off-campus speech, but the three aforementioned

diminishing control factors (e.g., lack of in loco parentis, judicial skepticism of regulation of off-campus speech, school interest in protecting unpopular speech) from Tinker appear to influence that calculation.

In applying this analytical framework to the present scenario, the Court does not need to consider whether the speech constituted an unprotected “true threat” because the District adopted the Hearing Officer’s report in its entirety, which avoided the “true threat” analysis. Instead, the Hearing Officer only applied the “substantial disruption” analysis, and concluded expulsion was warranted on that basis. To this end, the Court indicated its empathy for the District, as the content of the post appears “disturbing... facially” and indicative of “existential anger and homicidal intent,” the District’s purpose appeared to be in furtherance of school safety in a tumultuous time of school violence, and G.S.’s post seemed to initiate a chain reaction of events. However, despite all of those considerations, G.S.’s speech nonetheless remains protected and expulsion violated his rights.

#### The Court explained:

“schools cannot exert control over their students’ off-campus speech unless there is a strong nexus between a given student’s expressive conduct and their school, such that when properly contextualized, the offending speech is shown to have been clearly targeted at a [school community] member or members...or clearly pertained to school activities.”

The Court analyzed the record and determined that it established “in unrebutted fashion” that (1) the speech occurred beyond the bounds of schoolgrounds, school activities, and school hours; (2) the speech did not explicitly target or identify any other student or community member; (3) the speech “only contained lyrics from a song”; and (4) G.S. maintained he had no intent to cause any harm.

In contrast, the District adopted a position akin to “the action and public reaction speak for itself.” The Court resoundingly rejected this argument, characterizing an approach of emphasizing “societal response” and “disregard[ing] the context... [and] intent of the speaker” as “deeply problematic.”

The Court concluded its harsh criticism by not-so-subtly alluding to tyrannical overreach and draconian consequences:

Public schools would consequently become de facto full-time censors, preventing children from making their own decisions about what aspects of popular culture are worthy of consumption or what beliefs should be held, and interfering with parental authority, through a constant potential for punishment that would hang over students like the Sword of Damocles.

Accordingly, the Court determined that the speech was off-campus speech—and the District “markedly failed” to clear the “extremely high bar” set forth by constitutional protections.

**Practice Note:** As these cases demonstrate, caution must be taken when faced with factual patterns that involve potential free speech issues. Districts should review Student Disciplinary Codes of Conduct and provide professional development to administrators so they are prepared to handle these types of issues.

### **An Indirect Takeaway**

At the heart of these cases were the issues of free speech and limitations on restricting free speech. These cases all found that the charged individual had their free speech rights violated, but it is the manner in which they found it that is of particular significance. At least in In the Interest of J.J.M. and Appeal of G.S., the students were not successful due to any act of their own or profound argument, but rather the errors or oversights of those responsible for policy enforcement. Accordingly, these cases also serve as cautionary tale by emphasizing the necessity of adherence to proper procedure and establishing a robust record.

The discussed matters involve an overwhelming number of variables that are simply beyond our control. For this reason, it is even more critical to remain cognizant of the fact that the vehicle and mechanism for resolving these matters and withstanding scrutiny is within our control: the development of the record. The aforementioned cases may very well have turned out differently if the record had been more thoroughly developed. Accordingly, it is a categorical imperative to diligently

and appropriately develop a robust record, as it is our most valuable and immutable means of affecting the ultimate outcome of these cases. There are many instances in which a series of events may appear “clear,” “obvious,” or “common sense,” and thus extended explanation is redundant or unnecessary. This approach of appealing to intuition, inference, or implication is a self-defeating strategy, as evidenced by the outcomes in J.J.M. and G.S. The law and its application is typically unimaginative, which necessitates “spelling out” events and corresponding interpretations.

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## **Student Handbooks**

Every year in May or June, Districts ask their Principals to review their Student Handbook, Student Athlete Handbook and/or Student Code of Conduct and make revisions.

So, when is the last time those Handbooks had a thorough review?

In the last two (2) years, we have had no less than 15 to 20 significant court decisions from the Pennsylvania Commonwealth Court, Pennsylvania Supreme Court, various Federal Courts in Pennsylvania, Third Circuit Court of Appeals and even the U.S. Supreme Court on student free speech, student discipline and student participation in athletics issues.

In addition, for those participating in PSBA’s Policy Service, there have been significant changes in policy to include new mandates in a number of areas, including student threat assessments.

The big question is, are all your Handbooks up to date and would they pass legal challenges in state or federal court?

Districts should take proactive measures to ensure their Handbooks and Code of Conduct are consistent, properly reviewed, and updated for the start of the new school year.

As many of the cases we report upon demonstrate, poorly drafted or over-broad statements in Handbooks can result in student expulsions being overturned and otherwise winnable cases being lost on procedural grounds.

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### *Subsequent Issues*

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

Carl P. Beard\* [cbeard@beardlegalgroup.com](mailto:cbeard@beardlegalgroup.com)  
 Elizabeth Benjamin\* [ebenjamin@beardlegalgroup.com](mailto:ebenjamin@beardlegalgroup.com)  
 Ronald N. Repak\* [rrepak@beardlegalgroup.com](mailto:rrepak@beardlegalgroup.com)  
 Jennifer L. Dambeck [jdambeck@beardlegalgroup.com](mailto:jdambeck@beardlegalgroup.com)  
 Carl Deren Beard [cdb Beard@beardlegalgroup.com](mailto:cdb Beard@beardlegalgroup.com)  
 Krystal T. Edwards [kedwards@beardlegalgroup.com](mailto:kedwards@beardlegalgroup.com)  
 Joseph D. Beard [jbeard@beardlegalgroup.com](mailto:jbeard@beardlegalgroup.com)  
 Shelby S. Gawley [sgawley@beardlegalgroup.com](mailto:sgawley@beardlegalgroup.com)  
 Margaret R. Thompson [mthompson@beardlegalgroup.com](mailto:mthompson@beardlegalgroup.com)

\*Partner

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**LEGAL GROUP**

#### MAIN OFFICE:

3366 Lynnwood Drive P.O. Box 1311  
 Altoona, PA 16603-1311  
 814/943-3304 FAX: 814/943-3430  
[www.beardlegalgroup.com](http://www.beardlegalgroup.com)