BEARD LEGAL GROUP

EDUCATION LAW REPORT

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School District Sued After Disciplining Student for Instagram Memes

A Tullahoma High School student, identified as "I.P.," filed a lawsuit against Tullahoma City Schools ("the District") and administrators in the Federal District Court for the Eastern District of Tennessee. The complaint alleged the District and administrator(s) violated the student's freedom of speech after the District issued the student a three-day suspension for "disruption." The purported disruption was the student's out-of-school speech satirizing an administrator on social media. The lawsuit was followed by a request for preliminary injunction to preclude the enforcement of the policies under which I.P. was disciplined.

The Complaint provides a general account and timeline of events. I.P. made three social media posts on Instagram—during the summer holiday—featuring edited and nonsensical photographs, or "memes," of then-Principal Jason Quick ("Quick"). The purported purpose of the social media posts was to satirize Quick's unnecessarily stern or serious demeanor. The original, unedited versions of Quick's photographs were taken from his public Instagram account.

The first Instagram post contained an image of Quick holding a box of vegetables, to which I.P. added the caption "[m]y brotha." I.P. made this social media post from his father's residence in Alabama. The second Instagram post contained an image of Quick's head transposed onto an anime-style maid with cat ears and floating hearts, with a caption referencing an anime series. I.P. made this social media post while on a family vacation in Italy. The third and final social media post contained an image of Quick's head transposed onto an "Among Us" video game character, with a sobbing cartoon character pleading him to stay.

The District learned of I.P.'s Instagram memes and had him summoned and escorted to the high school's administrative office. Assistant Principal Derrick Crutchfield ("Crutchfield") informed I.P. the social media conduct violates District policy and that he would be suspended for five days. One of the policies referenced prohibits students, "…whether at home or at school…" from posting social media images that "…result in the embarrassment, demeaning, or discrediting of any student or staff…". This prohibition does not consider whether the actions cause a disruption to education.

I.P.—who is diagnosed with clinical anxiety and depression, and has a Section 504 Plan to accommodate—became overwhelmed regarding the impending suspension and its consequences on his future. The episode was apparent to an extent Crutchfield noticed the symptoms and checked on his wellbeing—and then made inquiries for medical assistance. Crutchfield requested I.P.'s mother come to the office for the situation.

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At the time of her arrival, I.P. was purportedly "gagging, flushed, and having trouble breathing." I.P's mother attempted to calm I.P., but struggled to do so. To this end, I.P.'s mother called I.P.'s mental health counselor and doctor, as well as a crisis hotline, for guidance or assistance. Ultimately, I.P. was removed from the room via wheelchair by his mother, with the intent to seek medical assistance at a hospital emergency room, on the doctor's recommendation.

Following the incident, I.P.'s mother made inquiries with administration regarding the incident, as well as the precipitating events. During an August 12, 2022 meeting, Quick and Crutchfield informed I.P's mother that the District reviewed the case and reduced I.P.'s five-day suspension to a three-day suspension. Following this meeting, I.P.'s mother sent an email to Quick, which asked "[w]hat is the specific behavior for which [I.P.] was suspended . . . [and [w]hat specific rules worthy of suspension is [I.P.] alleged to have violated?". Quick responded with an affirmation the conduct at issue was the aforementioned Instagram posts, which violated the District's social media policy. To this end, I.P.'s mother provided Quick and Crutchfield with a letter demanding I.P.'s suspension be lifted due to the United States Supreme Court's decision in *Mahanoy Area School District v. B.L.* and for the District to preserve all relevant documents. The District did not lift the suspension and I.P. served the three-day suspension.

Nearly one-year later, the present lawsuit was filed on July 19, 2023, which the Complaint describes in its opening sentence as a "case about a thin-skinned principal defying the First Amendment," and later as an exposition of pride gone awry. The Complaint contained six charges:

1. Violation of First Amendment Rights under § 1983;
2. First Amendment Retaliation under § 1983;
3. Monell claim for First Amendment Rights Violation;
4. Declaratory and Injunctive Relief: Unconstitutionally Discriminatory District Policy;
5. Declaratory and Injunctive Relief: Unconstitutionally Vague District Policy; and
6. Declaratory and Injunctive Relief: Unconstitutionally Overbroad District Policy.

Based upon the facts of the Complaint, I.P. is likely to succeed in at least a portion of the lawsuit. The District appeared to acknowledge as much as the District voluntarily took official action a month after the lawsuit was filed to rescind the social media and Wildcat policies identified in the lawsuit, and remove and expunge the suspension from I.P.'s record. At the present time, the lawsuit is expected to move forward on I.P.'s First Amendment claims. More likely than not, a settlement will occur due to the fact these types of cases carry increasingly high risks and costs. An underlying issue of particular note is incorporated in the Complaint's § 1983 claims. Notably, the Complaint alleged that the District intentionally inflicted emotional distress, based upon the District's manner of issuing discipline with its knowledge of I.P.'s medical conditions—and seemingly in contradiction of I.P.'s Section 504 Plan. If the Complaint's allegation is true, the litigation risk is only exacerbated, as it would likely increase the chance of the court imposing punitive damages, in addition to compensatory damages.

In this case, I.P.'s mother cited the U.S. Supreme Court's *Mahanoy Area School District v. B.L.* (2021) decision in her request for the District to lift her son's suspension. The Beard Legal Group's Education Law Report has extensively covered existing and developing First Amendment precedent related to student, employee, and public official (Board) speech, including the *Mahanoy* decision.

The *Mahanoy* decision is a case with its roots in Pennsylvania, which has become popularly known as the "Snapchat case," in which the U.S. Supreme Court reaffirmed that while public schools may regulate student speech in limited circumstances, students do not "…shed their constitutional rights to freedom of speech or expression" upon entering a school campus. There have been numerous

niche additions to the precedent over time, but the principal consideration is derived from *Tinker*, which held that public schools have special interests in regulating speech that "materially disrupts classwork or involves substantial disorder or invasions of the rights of others." However, the extent of permissible regulation functions as a continuum, where the District has progressively less authority to regulate speech as it becomes more attenuated the speech is from the domain of the public school (e.g., public schools have more authority to regulate in-school speech than out-of-school speech).

The Supreme Court remarked on this diminished "special leeway" by identifying features that reduce it: (1) off-campus speech typically falls within the zone of parental responsibility, rather than school responsibility; (2) off-campus speech regulations in conjunction with on-campus speech regulations would result in a student being unable to engage in any type of unregulated speech; and (3) the school itself has an interest in the protection of unpopular off-campus expression, as a pillar of the market place of ideas.

Based upon the guiding principles enumerated or clarified in the *Mahanoy* decision, the present case would seem to be a recent addition to the cautionary tales that schools must tread carefully when considering regulation of off-campus student speech. Society has changed, in which all our voices can be exponentially magnified by technology with a mere tap of a smartphone, few keystrokes on a keyboard, or clicks of a mouse—but all present judicial indications are that the First Amendment remains wholly applicable and protectively encapsulates that magnified speech. This principle is particularly true in Pennsylvania, in which the Third Circuit Court of Appeals has had a more encompassing interpretation of protected student speech than some other Circuit Appeal Courts.

Accordingly, it is imperative to maintain a cautious or tempered approach in handling student speech, but particularly out-of-school speech. To this end, it may be advisable to review existing District policies regarding social media conduct, as a means of avoiding an incident resulting in legal action similar to the present case—especially if such policies have not been revisited since the *Mahanoy* decision in 2021. And, also, a commiserating reminder that service in public education is often thankless, and being the subject of irksome student speech on social media may simply be an unfortunate occupational hazard.

For further or extended reading on the subject, refer to the following prior editions of Beard Legal Group's Education Law Report, Volume XIII Number 4 of July 2018, Volume XVI Number 3 of July 2020, and Volume XVII Number 2 of June 2021.

Department of Education — A.I. Manual Notice

Artificial Intelligence (A.I.) has been prominent in the public domain since its widespread availability in late-2022. This prominence has resulted in both heightened scrutiny and anticipation for A.I.'s risks, as well as benefits. The latter was recently emphasized by the United States Department of Education, Office of Educational Technology, which published a guidance manual regarding the appropriate usage of A.I. in education.

The manual is titled "Artificial Intelligence and the Future of Teaching and Learning," which is a 67-page document that provides an approachable, data-driven educational tool for understanding and responsibly using A.I. Technology for educational purposes. This resource is available for free and electronically through the Department of Education's website. The following is a direct link to the material:

https://www2.ed.gov/documents/ai-report/ai-report.pdf

Supreme Court Decision Clarifies First Amendment True Threat Doctrine

The United States Supreme Court clarified the "true threats" doctrine in its recent decision in *Counterman v. Colorado* (2023). The facts of the case itself are rather unsympathetic, but the response to the decision has been largely positive as prior "true threats" precedent did not include a mens rea requirement; rather, it was previously sufficient for speech to be deemed a "true threat" if it was "objectively threatening."

In *Counterman*, Billy Ray Counterman ("Counterman") frequently contacted a woman over social media with "creepy" messages. Counterman utilized several accounts to send these messages to circumvent the "block" features on social media as the woman continuously blocked Counterman's profiles upon receiving the messages. The content of the messages varied, but at least some of the messages implied Counterman was personally observing or watching the individual, which raised the concern of stalking. Meanwhile, other messages implied that Counterman wanted the woman to die.

This behavior persisted for an extended period of time which culminated in the woman reporting Counterman to law enforcement, who subsequently arrested and charged him with stalking and harassment. Counterman argued the charges are an unconstitutional violation of his First Amendment rights, as applied to his social media messages, as the speech did not constitute a "true threat." However, under Colorado state law, individuals may be convicted if a reasonable person would perceive their words as threatening, without consideration of the speaker's intent. Accordingly, the trial court denied Counterman's motion to dismiss, Counterman was subsequently convicted at trial, and the Colorado Court of Appeals affirmed his conviction.

The Supreme Court granted certiorari and vacated Counterman's conviction while remanding the case for further proceedings consistent with the Court's opinion. The Court overturned its existing precedent that permitted a finding of true threats based upon an objective standard without consideration to *mens rea*. Now, under the *Counterman* decision, speech may only be criminalized as "true threats" upon the showing of a culpable mental state of at least "recklessness," or a defendant acted in reckless disregard of a substantial risk that their words could be perceived as threatening.

Despite the unsympathetic facts of the case, the decision has been widely praised from civil rights institutions and advocates, as well as constitutional scholars, from across the ideological spectrum. The general sentiment is prior precedent had the tendency to encapsulate speech that was inadvertently threatening, which unduly lowered the threshold for criminalizing speech in "fringe" cases or criminalized misunderstandings or misinterpretations. Brian Hauss of the American Civil Liberties Union (ACLU) issued a statement on the subject, much to this effect:

> In a world rife with misunderstandings and miscommunications, people would be chilled from speaking altogether if they could be jailed for failing to predict how their words would be received. The First Amendment provides essential breathing room for public debate by requiring the government to demonstrate that the defendant acted intentionally or recklessly.

This instance may be a poor example of such misunderstanding or misinterpretations based upon the facts, but it is not difficult to imagine scenarios in which it could arise, particularly in a setting in which there is a language gap.

In practice, the *Counterman* decision's revision of the true threats doctrine strikes a balance between offering leeway for free speech while not unduly sacrificing the ability to prohibit true threats, as well as enforce that prohibition. Moreover, the change is unlikely to affect most meritorious "true threats" claims as a showing of recklessness is a fairly attainable standard. For example, Counterman is due for a new trial as a result of the Court's decision, but based upon the facts—frequent messages to an individual who blocked him, creating alternative accounts to circumvent the social media anti-harassment mechanisms, and the "creepy" or hostile content of the messages—his behavior likely surpasses the recklessness threshold. Thus, resulting in a legal distinction without a difference in conclusion, at least in this instance.

Although this case arose from a criminal case, the Court seemed to address it generally as a First Amendment case. Accordingly, the Court's new "true threat" precedent is not limited to criminalization of speech, but rather fully incorporated into First Amendment protections. Thus, it is prudent to be aware of this development when handling potential "true threats" situations in relation to student speech. However, as stated previously, the decision may be a distinction without a difference as most speech that is "objectively threatening" (previous standard) is likely also made with a reckless disregard of a substantial risk that their words could be perceived as threatening. Instead, the Court merely added the additional step of requiring that reckless disregard must be proven. Therefore, it is advisable to review policies regarding "true threats" and recall or reflect the recklessness consideration in the recording of such incidences to preclude challenges.

The subject of true threats in the form of out-of-school speech under Pennsylvania law was recently addressed in *J.S. by M.S. v. Manheim Township School District*, 263 A.3d 295 (Pa. 2021). That case was extensively reviewed in Beard Legal Group's May 2022 Edition of the Education Law Report.

More States Push Toward Universal Free School Lunches

The Universal School Meals Program Act of 2021 is pending federal legislation, which would permanently provide "…free meals to all school children regardless of income." However, the legislation has remained in committee and unmoved due to partisan gridlock in the House of Representatives since its introduction. In the absence of federal legislation, several states have moved forward with similar legislation to accomplish the same objective.

As of this article, eight total states have implemented a program to provide universal school meals, while nearly twenty-five (25) others consider similar legislative action. The list of states with an implemented program includes: California, Colorado, Maine, Michigan, Minnesota, New Mexico, Vermont, and most recently Massachusetts. Meanwhile, Pennsylvania is among the states considering similar legislative action.

The sentiment is similar across each of these states while their approaches to account for the programs diverge. The general sentiment is the state is compelled to take action to confront an unfortunate reality: a substantial number of students lack home stability and school is the only semi-predictable portion of their day—which includes school meals functioning as their only predictable or "guaranteed" meal(s) each day. Thus, the action is championed as an investment in children by removing artificial stressors on schools and households. However, there remains vocal opposition to these measures which label the efforts as an imprudent use of limited funds and express frustration at the breadth of the program (e.g., students whose families can afford a student lunch receive a free lunch).

Meanwhile, the method to fund these universal school meal programs vary by jurisdiction. Some states increased property taxes to fund their program. For example, Vermont implemented a state-wide property tax increase with an average increase of approximately three cents ($0.03). Meanwhile, Massachusetts implemented a targeted income tax increase, which levies an additional 4% tax on income earned in excess of one-million dollars (e.g., the state's standard tax rate is in effect up to the one-million-dollar threshold, and thereafter each subsequent dollar earned is taxed at the increased 4% rate).

There is no estimated timetable for a similar state program in Pennsylvania, nor is there imminent federal legislation due to the aforementioned political gridlock. Despite the absence of greater state action, some of the Commonwealth's individual school districts have proceeded with district-level universal lunch programs, in recognition of the merits of such programs and concern for their students. But it is simply impractical—or even infeasible—for all school districts to individually establish and budget such a program.

Unfortunately, the macro-level state action is beholden to the legislative process. Accordingly, the primary action available for interested individuals is to communicate their views to their elected officials.

Education Law Symposium September 19, 2023

https://www.pssclawconference.org/home

In-Person and Virtual

The Pennsylvania School Study Council at Pennsylvania State University College of Education, and Beard Legal Group, will hold its second annual Special Education Law Symposium on Tuesday, September 19, 2023. Each year close to 1,000 due process complaints were filed with the Office for Dispute Resolution (ODR). Districts need to be proactive in an effort to minimize claims and costs associated with the delivery of educational programming to identified students. The conference is specifically designed for Pennsylvania administrators on important and timely topics impacting day to day operations. Superintendents, Assistant Superintendents, Directors of Special Education and Student Services, School Psychologists, Intermediate Unit Administrators, Building Principals and other educators tasked with overseeing the delivery of special education services.

8:30 to 9:30 Catherine Girton

The Art of Student Services: Keep Your Friends Close and Your Solicitor Closer

Challenges among administrators and/or with parents often arise when facing decisions about alternative educational placements, manifestation determinations and threat assessments involving students with disabilities. Join me as we lightheartedly apply some of Sun Tzu's famous quotes from 500BC to the modern day work in the field of special education. As potential conflicts surface it is important to rely on your expertise, facts, process and diplomacy.

9:30 to 10:30 Charles Jelley

Trending Issues: A Hearing Officer's Perspective

Who better to get the inside track from than those who are presiding over cases where these issues arise; Deficiencies in the Procedural Safeguards Notice; Insight on the new PDE issued Prior Written Notice/Reevaluation Form and what it means for School Districts

10:30 to 10:40 break

10:40 to 11:30 Dr. Steven Kachmar

Independent Educational Evaluations and Defensible School-Based Practice of School Psychology – What School Personnel Need to Know

This session will focus on Independent Educational Evaluations (IEEs) and strengthening school-based psychological services in order bolster the defensibility of those services. Emphasis will be placed on the evaluations of students suspected of having educational disabilities; the assessment areas, tools, and practices often utilized in schools and by independent evaluators; system issues that can undermine the defensibility of school-based psychological services; and strategies to bolster the defensibility of those practices. Time will be allotted for questions and answers.

11:30 to 12:30 lunch and networking

12:30 to 1:15 Jonathan Steele

Perspectives from the Other Side: A Parent Attorney's Insights into IDEA Proceedings

The session focuses on essential themes such as understanding parental perspectives, conflict resolution, effective IEP development and implementation, and adherence to procedural safeguards. Attendees will have the opportunity to engage with real-life scenarios to gain pragmatic insights to enhance communication, foster collaboration, and improve practices within their educational settings. The session will include an open-ended Q&A.

1:15 to 2:15 Carl P. Beard – Special Education Update: Everything But the Kitchen Sink

Trending cases and issues to watch out for; Hearing Officer and Appellate Court Decisions Impacting Special Education Programming in Districts since last year's program; Oldies and goodies will be included as well to insure minimized legal exposure to claims

2:15 to 3:00 Artificial Intelligence Panel Discussion

Panelists will discuss how AI could be able to assist school districts and students in meeting their programming goals/needs.

CONTINUING EDUCATION CREDITS. The PA School Study Council offers Act 48 professional development credit for those with Pennsylvania teaching or administrative certificates. There will be a total of 4.5 hours awarded for attending the full conference. If you are interested in receiving Act 48 credit, please check the appropriate box on the registration form and list your professional personnel ID (PPID) number. Act 48 credits will automatically be submitted on your behalf for all sessions that you attend.

REGISTRATION FEES - Live participation OR Zoom sessions. https://www.pssclawconference.org/register

MEMBER PRICING	**NON-MEMBER PRICING**
In-Person Attendance: $169.00	In-Person Attendance: $199.00
Virtual Attendance: $129.00	Virtual Attendance: $159.00

For questions about becoming a member or about this conference, please contact Danielle Nattermann at dns5077@psu.edu

Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carriers.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, *www.ed.psu.edu/pssc/* or contact the Executive Director Dr. Peggy Schooling *mxs284@psu.edu.*

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*
Elizabeth Benjamin* *ebenjamin@beardlegalgroup.com*
Jennifer L. Dambeck* *jdambeck@beardlegalgroup.com*
Carl Deren Beard *cdbeard@beardlegalgroup.com*
Krystal T. Edwards *kedwards@beardlegalgroup.com*
Joseph D. Beard *jbeard@beardlegalgroup.com*
Rachel O'Brien *robrein@beardlegalgroup.com*

*Partner

The information contained in the *Education Law Report* is for the general knowledge of our readers. The *Report* is not designed to be and should not be used as the sole source of legal information for analyzing and resolving legal problems. Consult with legal counsel regarding specific situations.

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BEARD
LEGAL GROUP

MAIN OFFICE:
3366 Lynnwood Drive P.O. Box 1311
Altoona, PA 16603-1311
814/943-3304 FAX: 814/943-3430
beardlegalgroup.com