



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

Bradford A. King, Attorney at Sands Anderson

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When Is a Student Threat Against a School Truly a Threat?

School divisions increasingly face threats from many sources, including from their own students while off campus. In their efforts to protect schools from such threats by disciplining threatening students, administrators also increasingly face First Amendment challenges. How then, do school administrators strike the appropriate balance?

A panel of the United States Court of Appeals for the Ninth Circuit, in a case called *McNeil v. Sherwood School District 88J*, recently affirmed an Oregon school division's authority to discipline a student for his off-campus speech. The Court applied the well-rehearsed legal principle that a school district may constitutionally regulate a student's off-campus speech when, based on the totality of the circumstances, the speech bears a sufficient nexus to the school and it is reasonably foreseeable that the speech will cause school disruption. The panel held that a sufficient nexus between the speech and the school exists when the school division reasonably concludes that it faces a credible, identifiable threat of school violence.

In *McNeil*, high school sophomore CLM created in his personal journal, a hit list of students that "must die." The list named 22 Sherwood High School students and a former employee. It stated: "I am *God*" and "All These People *Must Die*." CLM's mother discovered the hit list some four months after he created it

while cleaning his room, soon after CLM began his junior year. The journal also included graphic depictions of violence. CLM's mother made copies of some of the journal entries, including the hit list, and promptly sought guidance from a therapist. The therapist was alarmed by the entries and believed they triggered her duties as a mandatory reporter. She informed the Sherwood Police Department. She also advised CLM's mother to contact a local crisis hotline, which she did. The hotline's social worker also called the police.

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The Sherwood Police searched the McNeil's residence, which was near Sherwood High School. They found and confiscated several weapons, including a .22 caliber rifle and 525 rounds of ammunition belonging to CLM. The police found nothing to indicate any planning had gone into following through with the hit list. CLM and his parents voluntarily went to the police station and provided a copy of the hit list. CLM admitted that he created the hit list and that "sometimes he thinks killing people might relieve some of the stress he feels," but also that "he uses the journal to vent" and "he would never carry out" such thoughts. The Sherwood Police did not charge CLM criminally. Police advised the school district regarding what they obtained.

Under Oregon law, the school district's policies required school faculty to notify the parents of students found on a hit list within 12 hours of discovery. The media began contacting

the school district before the calls were completed. The school district also learned that CLM's picture was posted on social media accounts. Realizing how widespread the knowledge of the hit list was becoming, the school district sent a recorded voice message to all parents of students in the school district and issued a press release referencing the hit list, noting that it contained no specific threats and advising that the student's home was safe. Thereafter, Sherwood High received numerous calls and e-mails from parents, media outlets, and the public requesting information about the hit list, CLM's identity, and whether CLM posed a threat to others. Some parents had their children leave school early, miss several days, or transfer out of the district. One student was caught on campus with a knife, claiming he needed it to protect himself.

The school district, utilizing its required student discipline procedures and applying its code of student conduct, expelled CLM for one year because news of the hit list "significantly disrupted the learning environment at school," which it determined would only be increased by CLM's return. Following his expulsion, the school district provided CLM alternative forms of education: online courses, in-person tutoring, and courses at a community college.

The family filed suit in the United States District Court for the District of Oregon, alleging violations of the Free Speech Clause of the First Amendment and of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Both parties filed motions for summary judgment. Relying on Ninth Circuit precedent, the District Court concluded that the school district could regulate CLM's off-campus speech because: (1) the hit list had a sufficient connection to Sherwood High; and (2) school officials could have reasonably foreseen that the effects of the hit list would spill over into the school environment. The District Court also granted the school district's motion on the substantive and procedural due process claims.

On appeal, CLM and his family asserted that the school district could not constitutionally

regulate student speech *that the student never intended to communicate to any third party*. The Court of Appeals rejected that argument based on the particular facts of the case, emphasizing the nature of the hit list, CLM's access to firearms, and the close proximity of CLM's home to Sherwood High School.

Referencing its own precedent, the Ninth Circuit Court of Appeals Panel held that even when a student does not intend to bring his speech to the school campus, his expulsion may be constitutional. "When faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech." The Court recognized the need for flexibility given the "myriad of circumstances" schools face. The Panel even cited *Kowalski v. Berkeley Cty. Schools* (a Fourth Circuit Court of Appeals decision, which is controlling in Virginia) for the proposition that to support student discipline, the off-campus speech must have a sufficient nexus to the

school and the administration must determine it was reasonably foreseeable that the speech would reach and impact the school. The "student's intent, although relevant, does not necessarily define the threat of violence." The court noted that any information school officials have regarding the intent of the speaker may bear on whether the threat is credible. "The intent to keep a threat private, however, is not determinative—it would be absurd to suggest that secret threats or planning cannot give rise to reasonable concerns of school violence." The Court held that the evidence here was sufficient to render the school district's determination reasonable and give it authority to regulate CLM's speech.

Although students "do not forfeit their free speech at the school house gates," school administrators may discipline students for threatening speech when the totality of circumstances reveals that the speech presents a credible threat to the school environment. School administrators should confer with the division's legal counsel to evaluate the factors supporting such discipline in each case.