Federal Court in Oregon Weighs in on Student Discipline and Off-Campus Online Threats

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With the ever-increasing use of social media among students, and in the wake of school shootings occurring across the country, schools now, more than ever, face the formidable task of evaluating and responding to potential threats of violence without encroaching on their students' First Amendment rights. This daunting responsibility was described by one court as a feat "like tightrope balancing, where an error in judgment can lead to a tragic result."

And despite the fact that there are now several court decisions dealing with the issue, the circumstances under which a school can discipline a student for off-campus, online speech remain very situation-specific and somewhat unclear. Consequently, school administrators charged with imposing discipline in these situations are wise to take a measured approach and to make thoughtful, well-reasoned decisions.

To help them do so, this article describes the most-recent federal district court opinion – Burge v. Colton School District 53 – dealing with the issue of discipline and off-campus online speech, and provides some guidance to school administrators charged with walking the disciplinary tightrope in these kinds of cases.

Burge v. Colton School District 53

This case involved Braeden Burge, a 14-year old eighth grader in Oregon who, after receiving a "C" from his health teacher, Ms. Bouck, and a subsequent grounding from his mother, took to Facebook to vent his frustrations. Braedon initially posted, from his home computer, that he wanted to "start a petition to get mrs. (sic) Bouck fired, she's the worst teacher ever." But after a friend commented "what did she do?" Braeden responded "she's just a bitch haha" and then later said "Ya haha she needs to be shot." Less than 24 hours later, Braedon's mother, who regularly monitored his Facebook page, saw the comments and instructed Braedon to delete the entire post, which he did.

About six weeks after the post was written and deleted, the parent of another student left a printout of the exchange in the mailbox of Braedon's principal. The Principal questioned Braedon about the post, and decided to give him a three-and-one-half-day in-school suspension. Significantly, the school district never investigated whether Braedon was serious about shooting Ms. Bouck, whether he had made similar threats before, or whether he had access to a gun. Other than suspending Braedon, the district took no action in response to his comments. Although Ms. Bouck did ask the district to remove Braedon from her class, stating that Braedon's comments had made her "scared," "nervous," and "upset," the district declined to change Braedon's schedule. After his suspension, Braedon returned to his regular classes, including health, and finished eighth grade without incident.

As a result of Braedon's suspension, the Burges filed suit against the school district, claiming that the discipline violated Braedon's First Amendment right to free speech. A magistrate judge agreed, finding that neither the "true threat" exception, nor the Tinker exception applied to Braedon's speech. The magistrate reasoned that it was undisputed that Braedon never intended to threaten Ms. Bouck, because his post could only be seen by his Facebook "friends," none of whom were administrators or teachers in the district. In addition, Braedon had stated that he made the comments out of frustration about his grade, and to get a reaction from his friends, not because he wanted or intended to harm Ms. Bouck. The magistrate also concluded that the Tinker exception did not apply because the comments had not caused any "material and substantial" disruption to school activities: no staff or students missed class, students did not really discuss the event, and other than the short meeting Braedon's principal had with him, no administrators were pulled away from their ordinary tasks. Because neither of these exceptions applied, the magistrate found that Braedon's
speech was protected by the First Amendment, and thus the suspension was improper.

The school district appealed the magistrate’s decision, arguing that the magistrate had failed to account for Ms. Bouck’s reaction to Braedon’s post, and that she was sufficiently “scared,” “nervous,” and “upset” to meet the requirements of Tinker. Oregon’s federal district court, charged with reviewing the magistrate’s decision, disagreed with the district.4

The court compared Braedon’s case to two other cases, recently decided on similar facts. In one, a court held that a student could be temporarily expelled after he sent a number of messages from his MySpace account bragging about his collection of weapons, threatening to shoot specific classmates on specific days, and analogizing his imminent actions to the Virginia Tech massacre, in part because the school community took the threats very seriously; the district called the police and parents of students who were named as targets kept their children home from school.5 In the other, a court found that a student should not have been suspended after she created a fake MySpace page which parodied her Principal in a crude and sexually explicit manner, even though the profile created some talk around school, interrupted at least one teacher’s class, and caused the principal to feel “angry,” “upset,” and “humiliated,” because the disruption was not enough to warrant discipline under Tinker’s material or substantial disruption standard.6

Viewed in light of these two cases, the court in Burge determined that Braedon’s comments did not cause a substantial and material disruption. The court reasoned that not only had Braedon’s post failed to affect any of his peers, but more importantly, the district did not take any action that indicated they reasonably foresaw a threat to their ability to appropriately discipline students or operate their school. The district did not call the police, did not seek to have Braedon evaluated by a mental health professional, and never investigated whether Braedon had made similar threats in the past. Indeed, the district never even asked Braedon’s parents if he had access to guns or other weapons. Ultimately then, it was the district’s lack of response to Braedon’s post, other than requiring him to engage in an in-school suspension, that indicated they did not take his comments seriously. Without this, the district could not argue that Braeden’s comments posed a material and substantial interference with school activities, or a true threat against his teacher.

Conclusion

There is no doubt that courts have it right when they describe the business of responding to online, off-campus threats as being like “walking on a tight-rope.” On the one hand, schools must respect students’ First Amendment rights, while on the other, they have to protect the safety of staff and students, and avoid material or substantial disruptions to the school day. And while the Burge decision is not binding precedent here in the First Circuit, it does provide some useful guidance to school administrators tasked with walking this tightrope.

First, it is unlikely that the hurt, scared, or embarrassed feelings of the person who is the subject of the speech, in and of themselves, are enough to cause material and substantial interference with the discipline or operation of the school such that the Tinker exception would apply. As the magistrate in Burge noted, evidence of things like staff or students missing class, students discussing the event at school, and administrators being pulled away from their ordinary tasks are some of the pieces of evidence that courts may look to in deciding whether or not there is a material or substantial disruption. Consequently, it is important for schools to gather evidence related to these situations by doing a proper investigation before making disciplinary decisions.

Second, if a school determines that an off-campus threat is not serious enough to act on, that speech is probably not serious enough to discipline. It will be very hard to argue that a school considered an online statement to be a true threat if the school does not treat it as one.

Third, schools must not only examine the speech itself, but also the context in which it is made when deciding if something is a true threat. Complaining to friends in a closed forum may not be considered a “true threat” by a court, but schools will want to do a thorough investigation
to make sure that this is the case before dismissing such threatening statements, even if they are made only to a small group.

Finally, because of the fact-intensive nature of these cases, and the significant liability often associated with the outcomes, schools are usually well-served to contact their attorneys when faced with one of these difficult cases involving threatening off-campus, online student speech.

Endnotes


2. The Supreme Court has held that “true threats” do not receive protection under the First Amendment. *Watts v. United States*, 394 U.S. 705. “True threats” are “statements in which the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). Thus, usually, if a speaker means to convey a threat to a particular person or group, their speech is not protected.

3. *Tinker v. Des Moines Independent School District* is a seminal Supreme Court case which has been cited for the proposition that schools may discipline students for off-campus speech if that speech causes a material or substantial disruption to school activities, or if school officials can reasonably forecast such a disruption. 393 U.S. 503 (1969).


5. *Wynar*, 728 F.3d at 1069.