

Thrun Law Firm, P.C.
2024 MASA Midwinter Conference
THREATS: Protected Speech or a True Threat?

MASA Mid-Winter Conference
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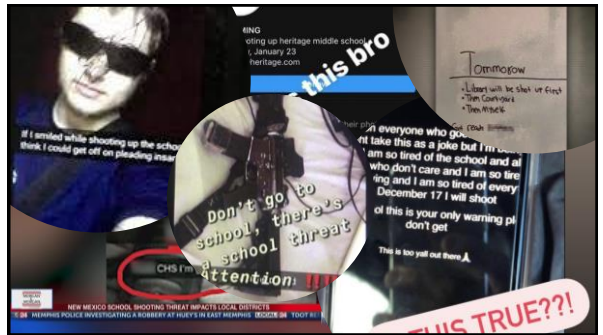
THREATS: Protected Speech or a True Threat?

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What is a Threat?



**SCHOOL
THREATS**

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"All threats are NOT created equal."



Federal Bureau of
Investigation
*The School Shooter:
A Threat Assessment
Perspective*

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More From the FBI

In today's climate, some schools tend to adopt a one-size-fits-all approach to any mention of violence ... [the] response to every threat is the same, regardless of its credibility or the likelihood that it will be carried out ... This reaction may be understandable, but it is exaggerated -- and perhaps dangerous, leading to potential **underestimation of serious threats, overreaction to less serious ones, and unfairly punishing or stigmatizing students who are in fact not dangerous.**

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School Specific Threats

- ▶ **Misdemeanor:** Threat to use firearm, explosive, or dangerous weapon to commit violent act **against students or school employees on school property** if threat can be reasonably interpreted as harmful, adverse or "dangerous to human life"
- ▶ **Felony:** Same as above with either: (1) specific intent to carry out threat; or (2) overt act toward carrying out threat

MCL 750.235b (eff. March 28, 2019)

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Verbal Assault/
Bomb Threat

Student in grade 6+ commits Verbal assault, or Bomb threat or similar threat directed at school building, event, or property

Board "**shall suspend or expel** the pupil from the school district for a period of time as determined in the discretion of the school board."

MCL 380.1311a(2), subject to 1310d factors

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Classifying a Threat

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Types of Threats

- ▶ **Direct:** Specific act against specific target and delivered in clear manner. Ex: "I am going to shoot up the school."
- ▶ **Indirect:** Vague, unclear. Ex: "If I wanted to, I could kill everyone at school."
- ▶ **Veiled:** Implies but does not expressly threaten violence. Ex: "We would be better off if the principal died."
- ▶ **Conditional:** Warns that violence will happen unless terms are met. Ex: "If Mr. Smith does not give me an 'A', I will shoot up the school."

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"Threat" Continuum

- ▶ Figure of speech
- ▶ Joke
- ▶ Fleeting expression of anger
- ▶ Attention-seeking
- ▶ Thrill of causing disruption
- ▶ Attempt to intimidate/frighten
- ▶ Warning of impending violence



High Level of First Amendment Protection

Not Protected

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SCOTUS: "True Threat"

"[T]hose statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

Virginia v Black
538 US 343 (2003)

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Sixth Circuit: "True Threat"

Whether reasonable person would:

- (1) Take statement as serious expression of intent to inflict bodily harm, and
- (2) Perceive such expression of intent to inflict bodily harm as being communicated to effect some change or achieve some goal through intimidation

U.S. v Landham
251 F3d 1072 (CA 6, 2001)

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Objective Test

- ▶ Would a "reasonable person" view the statement as a serious expression of intent to cause a present or future harm?
- ▶ Distinguish from hyperbole, jest, political views
- ▶ From whose viewpoint
 - ▶ Speaker?
 - ▶ Recipient?

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SCOTUS: "True Threat"

"True threats of violence are outside the bounds of First Amendment protection and punishable as crimes."

Counterman v. Colorado
600 US 66 (2023)

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Tinker v Des Moines Indep SD

393 US 503 (1969)


"Public school students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."



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Tinker Requirements

- ▶ School must prove that speech would "materially and substantially disrupt" schoolwork or discipline or have a "reasonable forecast" of disruption
- ▶ Cannot suppress speech due to "undifferentiated fear or apprehension of disturbance"



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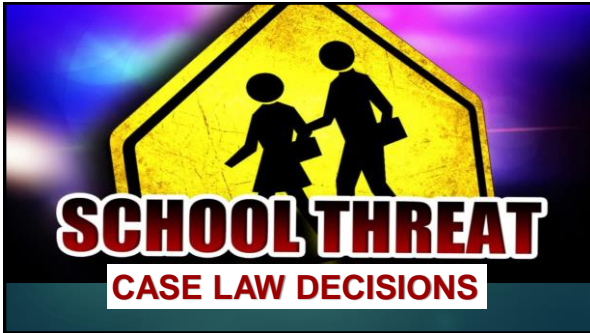
"Certainly where there is no finding and no showing that engaging in the forbidden conduct would '**materially and substantially interfere** with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

Substantial Disruption

Tinker v Des Moines Indep Sch Dist
393 US 503, 509 (1969)


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Mahaffey v Aldrich
 (ED Mich, 2002)



- ▶ Student listed names of -
 - “People Who Are Cool”
 - “People Who Should Die”
- ▶ Satan’s “Mission of the Week”


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Satan's Mission For You This Week

“Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do it unless I'm there to watch - Or just go to Detroit. Hell is right in the middle. Drop by and say hi.”

PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DONT GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?

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Is it a “True Threat”?

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Mahaffey Court Ruling

Expulsion proceedings began; student withdrew and sued



COURT RULED:

- ▶ First Amendment violated
- ▶ No nexus to school
- ▶ No “true threat” because there was no serious expression of intent to harm
- ▶ No Tinker substantial disruption

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D.J.M. v Hannibal Pub Sch Dist
 (CA 8, 2011)

DJM in 10th grade

Out of school and off campus

IM'd with friends on home computers

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DJM IM Exchange with Friend CM

DJM expressed frustration at having recently been spurned by romantic interest "L" and he named students he would "have to get rid of" including members of groups he did not like ("midjet[s]," "fags," etc.)

CM: what kinda gun did your friend have again?
 DJM: 357 magnum
 CM: haha would you shoot [L] or let her live?
 DJM: i still like her so i would say let her live
 CM: well who would you shoot then lol
 DJM: everyone else

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CM: what "might have been the reason for ... you wanting to like go shoot everyone?
 DJM: wtf how did me shooting people at school come up into that [conversation]? ... i still like [L] and I don't want to do anything hurting or wrong to her.
 DJM later said if he had a gun a named classmate "would be the first to die," but then said, "anyways I'm not going to do that ... not anytime soon i feel better than i did earlier today."
 CM told an adult friend that DJM's speech scared her and


- He had access to a gun
- He was depressed and on medication

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School Impact

- District suspended DJM
- Word spread, concerned parents called, wanted to know if their child was on "hit list"
- District increased security, increased staff at passing times, limited access to school
- DJM arrested and suspended for remainder of year (7 months)

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Is it a "True Threat"?

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True Threat with Substantial Disruption

- ▶ Court rules for school
 - Instant messages were "true threat"
 - Substantial disruption established


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Wynar v Douglas Co Sch Dist (CA 9, 2013)


- ▶ Student speech originated off campus
- ▶ Student communicated via MySpace instant messaging
- ▶ Wrote frequently about weapons, shooting, referred to Hitler as his "hero"
- ▶ Wrote of his social insecurity, unhappiness at home and school
- ▶ Messages became increasingly violent and disturbing.

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"It's pretty simple / I have a sweet gun / My neighbor is giving me 500 rounds / dhs [Douglas High School] is gay / I've watched these kinds of movies so I know how NOT to go wrong / I just cant decide who will be on my hit list / and that's totally deminted and it scares Even my self."

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"and ill probably only kill the people I hate? who hate me / then a few random to get the record"

"that stupid kid from vtch. He didn't do shit and got a record. I bet I could get 50+people / and not one bullet would be wasted."

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Is it a "True Threat"?

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Wynar Ruling

- ▶ Student expelled for threatening to shoot specific students and "take out" others on Virginia Tech anniversary
- ▶ Reasonable forecast of substantial disruption as school officials "reasonably could have predicted that they would have to spend considerable time dealing with [parents' and students'] concerns and ensuring that appropriate safety measures were in place."

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McNeil v Sherwood Sch Dist
(CA 9, 2019)

10th grade student wrote "hit list" in a personal journal

- Named 22 Sherwood High students and 1 former employee
- "I am God" and "All These People Must Die."
- Student admitted the hit list and that "sometimes he thinks killing people might relieve some of the stress he feels"
- Said he "uses the journal to vent" and "he would never carry out" such thoughts."


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McNeil v Sherwood Sch Dist

- ▶ Mom found journal 5 months later
- ▶ Mother informed therapist, therapist informed police, police informed school
- ▶ School expelled student
- ▶ No criminal charges

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Is it a “True Threat”?

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McNeil v Sherwood Sch Dist Ruling

CLM intended speech to be private, it was created and maintained off-campus, but *speech content, access to firearms, and proximity of home to high school* justified disciplinary decision

“We conclude that the School District could regulate CLM’s off-campus speech without violating his First Amendment rights. ... although CLM may not have foreseen his speech reaching Sherwood High, the School District, when informed of CLM’s hit list, reasonably determined that it faced a credible, identifiable threat of school violence. The speech bore a sufficient nexus to the school ... the School District could take disciplinary action consistent with Tinker.”

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Nexus to School Environment

▶ “[T]here is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence.”

McNeil v Sherwood Sch Dist (CA 9, 2019)

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J.S. v Manheim Twp (Pa. Sup. Ct., 2021)

Pictures of Student Two playing guitar/singing with text overlay:

- ▶ “I’m shooting up the school this week. I can’t take it anymore I’m DONE!”
- ▶ “I’M READY [Student One] AND MANY MORE WILL PERISH IN THIS STORM. I WILL TRY TO TAKE [Student One] ALIVE AND TIE HIM UP AND EAT HIM.”

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Evaluating Speech

Factors may include, but are not limited to:

- The language employed by the speaker
- Whether statement constituted political hyperbole, jest, or satire
- Whether the speech was of the type that often involves inexact and abusive language
- Whether the threat was conditional
- Whether the threat was communicated directly to the victim
- Whether the victim had reason to believe the speaker had a propensity to engage in violence
- How the listeners reacted to the speech

J.S. v Manheim Twp Sch Dist, 263 A3d 295, 317 (Pa, 2021)

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Consider All Facts

“[T]he actual words ... in the memes read in isolation plainly suggested a school shooting and violence, [but] the memes viewed in toto did not threaten Student One, or anyone else, but offered only J.S.’s opinion that Student 2 was a potential school shooter due to his penchant for the music of the band Cannibal Corpse, with J.S. pictured as looking on ...”

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No "True Threat" Totality of Circumstances

- ▶ Memes were "mean-spirited, sophomoric, inartful, misguided, and crude" but not intended to threaten anyone
- ▶ Memes were not perceived as threatening by the sole recipient, Student One.

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No "Substantial Disruption"


- ▶ Some impact on the school environment
- ▶ "[D]o not believe that they rose to the level of a substantial disruption required by Tinker..."
- ▶ "[I]t was the School District that created a disruption by sending an email to parents that a threat had been received..." after receipt of law enforcement's investigation and conclusions that J.S. did not present a threat and that it was safe to attend school the next day

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Doe v Portland Public Sch (Maine Dist Ct, 2023)

- 12th grade
17 yo
student
- High GPA
- Multi-sport
varsity
athlete

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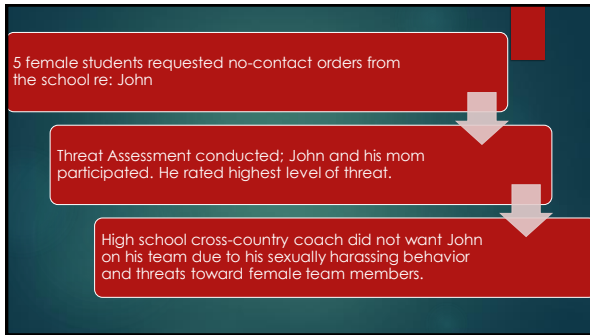
- ▶ Feb 2023 text message: "Watch bro. I will become the greatest to ever, or if all goes wrong you'll see me on the news for mass murder and rape. It seems like I'm joking, but trust me I'm not. Watch."
- ▶ March/April 2023 text messages: obsession with female classmate. "I have been obsessed with her for months" ... "I could put [her] out there on my snapchat story when I rape her."
- ▶ May 11, 2023: prom picture on Instagram showing him getting into a car with his face photoshopped to half angel half devil face with blood spattered on his car. 
- ▶ May 19, 2023: sent two music videos to female peer, one about a boy killing his girlfriend and one about killing cats.

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- ▶ Aug 2023: sent peer a "lengthy sexualized text message" about a female peer, "the object of his sexual desire."
- ▶ "With the increased risk of murder when around me, she is scared. I have shown her what I an[sic] capable of. I have given her ideas of what my free mind wants to do to her. With the sign of a pocket knife the last time I saw her, she is completely speechless."
- ▶ Message displayed on a phone, students passed around, viewed by every student in the room and later shared further between students.
- ▶ Mom claims "John mistakenly had a utility knife from his carpentry program in his bag at one of the spring track practices."

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Doe v Portland Public Sch Ruling

- ▶ Mom sought TRO to prevent district from placing John in a different high school
- ▶ "Having found that *Tinker* controls, and that PPS was justified in regulating John's speech under any of the ... *Tinker* factors, the Court concludes that PPS' regulation of John's speech was permissible and not a violation of John's *First Amendment* rights. Therefore, Ms. Doe has failed to carry her burden of showing a likelihood of success on the merits with respect to her claim that PPS violated John's *First Amendment* rights."

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REMEMBER

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Threat Assessment

- Student's age, discipline history, capability, and credibility
- Intended audience
- Credibility of witness accounts
- Evidence of
 - Specific, plausible details
 - Intent
 - Accomplices (or recruiting attempts)

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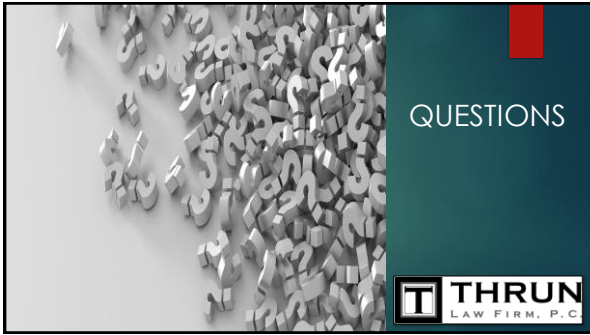
Revised School Code 1310d Factors

Before suspending or expelling a student, school "**shall consider**"

1. Student's age
2. Disciplinary history
3. Disability
4. Seriousness of behavior
5. Whether behavior posed safety risk
6. Restorative practices
7. Whether lesser intervention would address behavior

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