



July 2020

LATEST STUDENT “HIT LIST” CASE

Expelled student sued the district for violating his freedom of expression rights. (Ninth Circuit Court of Appeals - McNeil v. Sherwood School District.¹)

In this case, a high school sophomore created a “hit list” in his personal journal while he was at home. The journal itself did not leave the house. The hit list included the names of 22 high school students and one former employee, the statements “I am God” and “All These People Must Die,” and graphic depictions of violence. Apparently, his only purpose in creating the hit list was to “vent.” The federal Ninth Circuit Court of Appeals applied established precedent to after school, off campus conduct in concluding that the student’s free expression rights were not violated by the school when he was suspended and expelled.

A. Background

The student never intended to communicate these ideations to anyone and did not do so. However, four months later his mother discovered the hit list while she was cleaning his room. She then advised her son’s therapist, who informed the police, who told the school district. The police searched the residence and confiscated several weapons, including a small caliber rifle and 525 rounds of ammunition. The McNeil family lived close to the high school. However, the student was not planning to follow through by attacking the school or assaulting anyone.

Nevertheless, the local media and parents of the targeted students expressed great interest and concern. The school received numerous calls and emails requesting information and meetings. School personnel contacted the subject parents personally, as was required by Oregon statute, sent out a recorded message addressing all parents in the district, and issued a press release.

¹ (9th Cir. 2019) 918 F.3d 700.

Concerned parents demanded meetings. Others either had their children leave school early, kept their children home for several days, or transferred out of the district altogether. In light of the threat and corresponding disruption to the school environment, the student was suspended and then expelled for one year. During the period of expulsion, the student received an education via online courses and in-person tutoring, and attended community college courses, all arranged by the school.

The student and his family then sued the district in federal court.

B. Guidance Provided by the Ninth Circuit Court of Appeals as to a School’s Duty to Protect the Health and Safety of Its Students and Protect the Educational Environment at the School.

The Court recognized that generally, “... schools may not discipline students for the contents of their private, off-campus diary entries, any more than they can punish students for their private thoughts....” However, the Court also declared that “... schools have the right, indeed an obligation, to address a credible threat of violence involving the school community.” The Court reminded that, “[s]chools are permitted to act preventatively” and when doing so, take “... into account other students’ interest in a safe school environment.”

The Court further declared that “[t]he specter of school violence places a weighty social responsibility on school districts to ensure that warning signs do not turn into tragedy.... The number of reported tragic school shootings over the past two decades emphasizes the need for school districts to have the authority to take disciplinary action when faced with a credible threat of school violence.”

C. Guidance Provided by the Ninth Circuit as to When Expression Occurring Off Campus and After School May Be Addressed by School Discipline.

1. There must be a “nexus.” The Court explained that a school district may regulate off-campus expression by a student, to include imposing discipline, if there is sufficient nexus to the school.²

Applying its guidance to the case, the Court explained that:

a. Even though the student did not intend to follow through, it was nevertheless reasonable to conclude that the threat posed by the hit list was credible

² Relevant considerations for determining whether a “sufficient nexus” exists include: (i) the degree and likelihood of harm to the school “caused or augured” by the expression; (ii) whether it was reasonably foreseeable that the expression would reach, impact, and disrupt the school environment; and (iii) whether the content, context, or underlying circumstances of the expression involved the school.

because: (i) specific targets were identified; (ii) the student lived in a gun-owning household located near the school; (iii) the student had suicidal ideations; (iv) the student held some bizarre delusions, for example that he was “God”; and (iv) the diary contained graphic depictions of school violence.

b. Even though the student did not intend to tell anyone about the hit list, it was nevertheless reasonable to conclude that the student body and school staff would learn of it, thus disrupting the school environment because: (i) the school was obligated by statute to notify the parents of children targeted by the hit list; (ii) it logically follows that parents would notify their children; (iii) and the knowledge of the hit list would cause the targeted students to be fearful for their safety. The student’s lack of intention to disclose his journal entries is a factor to consider, but it is not dispositive.

c. It is obvious that the content and context is school related since students and staff were identified as targets. The hit list invaded the rights of others to be left alone. The Court added that “[t]here is always a sufficient nexus between expression and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence.”

2. Substantial Disruption or Material Interference Required. The Court advised that the *Tinker*³ case was the applicable standard for analyzing the factual scenario presented. The Court explained that discipline which is primarily a “punitive retrospective response” to student speech may be imposed when the continued presence of the offending student at the school site would have caused a substantial disruption or a material interference with school activities or would have interfered with the rights of other students to be secure and to be let alone.

This case provides important guidance when presented with a situation involving a student generated hit list and/or any other sort of pernicious student expression occurring off school grounds and after school hours. When presented with such a scenario, please call to discuss before acting.

Please contact our office if you have questions or concerns.

~ Alan B. Harris

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³ (1960) 393 U.S. 503.