Free Speech, Social Media and Student Discipline after the Mahanoy Area School District decision

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to the regulation of student speech in the wake of the United States Supreme Court's recent decision in Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038 (2021). This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. INTRODUCTION

The intersection between school discipline and student speech is an evolving, somewhat inconsistent area of the law, implicating both a student's First Amendment rights to free speech, as well as a school district's interest in avoiding a disruption of its educational environment and/or protecting school safety. One issue in particular that is at the forefront of this debate is the extent to which school administrators may regulate off-campus conduct, particularly with respect to social media. With the advent of instant messages, websites such as Facebook.com, and apps like Whatsapp, Instagram and Snapchat, internet communications have substantially increased. While the full extent to which school officials may regulate off-campus conduct, including speech, is unclear, as explained in more detail below, the U.S. Supreme Court has provided some clarity in a recent decision issued on June 23, 2021. See Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038 (2021)[1].

II. THE INTERSECTION BETWEEN DISCIPLINE AND SPEECH

A. General Framework for Analyzing a School's Ability to Regulate Student Speech.

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution, Amendment 1.

Not all speech is protected by the First Amendment. For example, "fighting words," which have been defined as "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" and "true threats," defined as "those 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," are not protected. Virginia v. Black, 538 U.S. 343, 359 (2003).

In the school setting, certain additional categories of speech may be regulated:

- Student speech may be limited, restricted, or punished provided that there are facts which may reasonably lead school authorities to believe that the speech will substantially disrupt the school environment or materially interfere with school activities or with the rights of others. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[1] Available at https://www.supremecourt.gov/opinions/20pdf/20-255_g3bi.pdf.

- Speech that is "vulgar, lewd, obscene and plainly offensive," may be limited, restricted, or punished by school officials. Bethel School District v. Fraser, 478 U.S. 675 (1986).

- Reasonable restrictions may be placed on school - sponsored speech, such as school-sponsored publications. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

- Schools may punish students who advocate illegal drug use while in school. Morse v. Frederick, 551 U.S. 393 (2007).

B. Bullying and Cyberbullying: Balancing First Amendment Rights with your Statutory Duty

a. State Law

RSA 193-F is the New Hampshire statute dealing with the prevention of bullying and cyberbullying in schools. "Bullying" is defined as "a single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:

1. Physically harms a pupil or damages the pupil's property;
2. Causes emotional distress to a pupil;
3. Interferes with a pupil's educational opportunities;
4. Creates a hostile educational environment; or
5. Substantially disrupts the orderly operation of the school."

RSA 193-F:3, I (a). Bullying includes "actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs." RSA 193-F:3, I (b).

"Cyberbullying" is also defined in this statute to include the above conduct "undertaken through the use of electronic devices…" such as "telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites." RSA 193-F:3, II-III.

Importantly, RSA 193-F:4, II limits the scope of bullying and cyberbullying to actions or communications (as defined above) which:

1. Occurs on, *or is delivered to*, school property or a school-sponsored activity or event on or off school property; or

2. Occurs off of school property or outside of a school-sponsored activity or event, *if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event*.

(Emphasis added). School boards were required by this statute to create policies aiming to combat bullying and cyberbullying, and these policies must include specific provisions outlined in RSA 193-F:4.

Practice Pointer: Districts should be careful to reconcile these standards with judicially created standards in cases involving the First Amendment. This reconciliation will be discussed in more detail below.

b. First Amendment Considerations

Schools may enact policies that are both content and viewpoint neutral, even if those policies result in the suppression of speech. Douglass v. Londonderry School Board, 372 F.Supp.2d 203 (D.N.H. 2005). To withstand constitutional muster, policies pertaining to speech, including harassment and bullying policies, should be limited to speech that is unprotected by the First Amendment (i.e., a "true threat"), and speech that falls into the categories set forth by the Supreme Court in Tinker, Bethel School District, Hazelwood, and Morse.

When determining whether speech may be regulated, ask:

1. Where did the speech occur? (On-campus, off-campus, both)

2. If the speech occurred on-campus, then ask:

    a. What type of speech is it? (Political, lewd, vulgar, offensive, etc.)

    b. What is the effect of the speech? (Was there a disruption? Could a disruption be reasonably anticipated?)

    c. Where was the speech communicated? (Assembly, classroom, hallway, etc.)

    d. Is the speech part of a school sponsored activity? (Assembly, newspaper, play)

3. If the speech occurred off-campus, then ask:

    a. Did it constitute a "true threat"?

b. If not a “true threat”, is there a sufficient nexus between the bullying and the school to consider the speech as occurring on-campus? Did the bullying cause a substantial disruption to the school? Could a substantial disruption be reasonably anticipated? Did the bullying substantially invade the rights of others?

The following cases address the intersection of bullying and permissible restrictions on student speech within the First Circuit:

Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12 (1st Cir. 2020)

Facts: A.M. was a high school student who was suspended for three days after anonymously posting a note in the girl’s bathroom stating ““THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS.” This note did not identify the alleged rapist or provide any details about the alleged rape. The note also did not identify the “YOU” the note was directed to. The note was taken down within minutes. Two other students then posted additional notes stating that the school should “kick out the rapist,” and another stated that the administration “is protecting him.” As a result of these notes, the school district undertook an investigation which uncovered that there had been earlier rumors among some members of the student body that Student 1 had committed sexual assault, which was later proven false. There was no allegation that A.M. started these rumors, but Student 1 then experienced ostracism and was out of school for over a week, which his mother attributed to the notes. A.M. denied that Student 1 was her intended target (which the district disputed) and instead asserted that the purpose of the note was to call out the school administration for handling various instances of sexual assault. She asserted that school administrators understood this prior to suspending her. The reason for the suspension communicated to A.M. was that her note constituted an act of bullying of Student 1.

A.M.’s parent then appealed the suspension decision through the school process with no success, after which she appealed to the district court, arguing that the suspension was in violation of her First Amendment rights. The district court then granted her a preliminary injunction against the suspension, finding that there was a likelihood that she would succeed on the merits of this claim. The school district then appealed to the First Circuit.

Held: For the plaintiff. While the First Circuit did not agree with the “precise reasoning” of the district court, the First Circuit held that the district did not abuse its discretion in granting the preliminary injunction. Specifically, the First Circuit held that A.M.’s speech was protected under the First Amendment, and that the school district was not justified in restricting her speech under the rule in Tinker.

As a preliminary matter, the Court rejected the district’s attempts at putting forth additional rationale for the decision to suspend A.M. which were not communicated to her at the time of the suspension, i.e., that the note was defamatory and/or was likely to

cause a substantial disruption at school. Rather, the school district was limited to the rationale of bullying. Interestingly, the Court held that bullying fits into a "governmental interest in protecting against the invasion of the rights of others," described in Tinker, and held that "schools may restrict such speech even if it does not necessarily cause substantial disruption to the school community more broadly. However, for a school to rely on that basis for restricting student speech, there must be a reasonable basis for the administration to have determined both that the student speech targeted a specific student and that it invaded that student's rights."

In this case, the Court found that the district court did not discuss or consider what, if any, deference was owed to the school district's justification or the speech restriction, noting that courts generally defer to school administrators' decisions regarding student speech "so long as their judgment is reasonable." However, it agreed with the district court that the school district did not show an apparent causal connection between A.M.'s note and the bullying for Student 1[2]; therefore, the district "had not shown it was A.M.'s note which caused any invasion of Student 1's rights sufficient to justify the punishment imposed on A.M. for her protected speech.

Impact: Although the First Circuit ruled in favor of the student in this case, its reasoning demonstrates that the First Circuit favors broad discretion for school districts to handle cases of bullying occurring within the school setting, so long as the school district can back up their determination that the bullying caused harm or otherwise invaded another student's rights.

Doe by & through Doe v. Hopkinton Pub. Sch., No. CV 19-11384-WGY, 2020 WL 5638019 (D. Mass. Sept. 22, 2020)

Facts: This case involved two students who were suspended from the school's hockey team after they were tangentially involved in bullying on that team. The bullying complaint alleged that members of the team were excluding the student from team events, recording the student without his permission, and that these recordings were circulating in a group chat on the Snapchat app. The suspended students were part of this group chat. The school gained access to the group chat and found "extremely derogatory" comments about the bullied student, to which the suspended students contributed (but to a lesser degree than others). The bullied student never saw the group chat until after the school's investigation was complete. After the investigation, the bullied student received formal mental health treatment, declined to try out for another sports team that spring, and left the school the following year.

As a result of the investigation, the school found that all eight students in the group chat had engaged in bullying as it was defined by school policies and

[2] The Court found particularly persuasive that the note was not widely distributed or viewed by members of the school community, that it was ambiguous as to who it was referring to, and that the rumor about Student 1 was circulating a month prior to the note.

Massachusetts law, and those students were suspended from the hockey team. Several students, including those who brought the lawsuit, were suspended from school for 1 to 5 days as well. The two plaintiffs brought an action alleging violation of their First Amendment rights in their suspensions, arguing that they were disciplined because of the contents of the Snapchat group, as opposed to their conduct directed towards the bullied student. Further the students argued that their conduct did not, and was not, likely to cause a substantial disruption under Tinker.

Held: For the school district. This case extensively discussed the First Circuit's ruling in Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist., noting that the First Circuit held that "an official is justified in finding that student speech constituted bullying so long as there is 'a reasonable basis for the administration to have determined both that the student speech targeted a specific student and that it invaded that student's rights…'" and that "[t]his standard is deferential to the school official's judgment." The reasoned that its review is "based on the objective reasonableness of the school's response rather than the intent of the student."

In this case, the Court again limited the school district's arguments to those which were communicated to the suspended students and their parents at the time of the suspensions. Therefore, the district could not rely on any argument that the bullying could have caused a substantial disruption at school, and instead, the district was limited to arguing that the bullying infringed on another student's rights. The Court emphasized that the group chat, while not directed at student, did not take place in isolation and that the members of the group were, in fact, bullying the bullied student in person as well. The Court reasoned that a reasonable official could have found that the bullied student suffered from the bullying, which was coordinated through the group chat. Therefore, it concluded that the bullying infringed on Student's rights and was consequently not protected speech, regardless of whether there was a substantial disruption. Interestingly, the Court stated that it did not matter whether any particular message was sent from an on or off-campus location, because it still contributed to in-school bullying of another student.

Note: This case is now up on appeal to the First Circuit; therefore, this case is subject to change and more First Circuit precedent may be on its way.

A. The Debate Surrounding the Scope of Permissible School District Regulation of Off-Campus Speech

Aside from the Third Circuit Court of Appeals (as discussed below), courts have generally held that schools may discipline students for off-campus conduct, including internet speech, if there is a nexus between the conduct and the school; however, they differ in the standards they use in determining whether speech may be restricted. See, e.g., Kowalski v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011) (considering the nexus between off-campus student speech on social media and a school's pedagogical interests in upholding disciplinary action taken by the school); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (holding that a school may restrict off-campus

speech where "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher…"); Wisniewski v. Board of Education of the Weedsport Central School District, 494 F.3d 34 (2d Cir. 2007), cert. denied, 552 U.S. 1296 (U.S. March 31, 2008) (asking whether it was reasonably foreseeable that the student's communication would cause a disruption within the school environment.)

The First Circuit has yet to specifically articulate a standard for if and when a school may restrict off-campus internet speech; however, it is likely that it will similarly look to the connection between the student's speech and the school, assessing whether it did, or was likely to, reach and impact the school environment. This is supported by the following case, where the First Circuit upheld a suspension based on off-campus conduct:

Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995)

Facts: On Sunday, September 18, 1994, a group of 15 students created a 9-page document entitled "The Sh[__] List." The document listed the names of 140 students, with each name "being followed by one or more lines of crude descriptions of character and/or behavior." A handful of freshman, more than 30 sophomores and juniors, and more than 60 seniors "were characterized by epithets that were not merely insulting as to appearance, but suggestive, often explicitly so, of sexual capacity, proclivity, and promiscuity."

The following Thursday, a high school senior and two other students made copies of the list and put them in a trash barrel. They were delivered to the school and discovered by a faculty member the following day. The Principal informed the school that the list was harmful and degrading and encouraged students to provide information as to the perpetrators. The following Monday, the three boys who had copied the list went to the principal's office and denied any involvement in the matter. The next day, they returned to the principal's office, said they photocopied the list, but denied knowing the contents of the list. They also indicated that they had photocopied the list off-campus. The principal informed them that they would likely face discipline.

In the meantime, the principal had discovered the names of the 15 students who were involved in creating the list. The principal sent a letter to those students and scheduled a meeting with them and their parents. During the meeting, the principal indicated that the list violated the school's rules against harassment and obscenity. After the meeting, the principal met with the high school senior who instituted this case and informed him that he was indefinitely suspended. Shortly thereafter, the principal wrote to the student and his parents and informed them that he was suspended for 10 days and was to be excluded from extracurricular activities.

The student brought suit against the school, seeking injunctive relief, compensatory and punitive damages, and attorney's fees, alleging that the District failed to follow required procedures prior to suspending him, and that the suspension violated

state law which prohibited the "suspension of a student for 'marriage, pregnancy, parenthood or for conduct which is not connected with any school-sponsored activities.'"

Held: For the district. The student's due process rights were not violated. The court found that the student's "admitted off-campus conduct led to the distribution of the list on school premises."

The following cases give further examples of how school districts in various jurisdictions have handled disciplining students for off-campus speech:

Wisniewski v. Board of Education of the Weedsport Central School District, 494 F.3d 34 (2d Cir. 2007), cert. denied, 552 U.S. 1296 (U.S. March 31, 2008)

Facts: Aaron W., a fifteen-year old eighth grader, created, and attached to the instant messaging feature of his family computer, an icon depicting a gun pointing to a head, a bullet leaving the gun, and blood splattering from the head. It bore the words "Kill Mr. VanderMolen," (Aaron's English teacher). The icon circulated from Aaron's home computer for approximately three weeks, until it was reported to school officials. School officials and a Lieutenant from the Sheriff's Department met with Aaron and his parents; Aaron was suspended for five days for making "threatening icons and language directed towards a teacher over a home computer and sent it to several students." A subsequent disciplinary hearing resulted in a finding that the icon was a "true threat" and that the District's reaction was reasonable, led to Aaron being suspended for one semester.

Following the meeting, the Sheriff's department determined that Aaron did not constitute a realistic threat to Mr. VanderMolen or any other school official and closed their investigation. In addition, a psychologist concluded that the student did not pose a threat to the teacher or other school officials.

Parents filed suit against the district, seeking damages under § 1983. The district court dismissed their suit on the basis that the icon was a true threat, and therefore, was not protected speech under the First Amendment.

Held: For the district. It was reasonably foreseeable that the student's communication would cause a disruption within the school environment. The fact that the icon was created and transmitted off of school property did not insulate the student from discipline because it was reasonably foreseeable that the icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. "The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of [the plaintiff's] classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." Thus, the school was permitted to discipline

the student, regardless of whether he intended the icon to be communicated to school authorities.

Practice Pointer: It is important to keep in mind that several of the cases discussed above have involved internet speech that originated off-campus. School officials may regulate on-campus internet usage and they may prohibit students from accessing websites such as Facebook.com while they are on-campus. Each district is required by State law to adopt an acceptable-use computer policy, "which outlines the intended appropriate and acceptable use, as well as the inappropriate and illegal use, of the school district computer systems and networks including, but not limited to, the Internet." See RSA 195:3-d, I. The policy should give students and parents notice of the consequences of violating the policy.

B. The United States Supreme Court's Input on the Scope of a School District's Ability to Regulate Off-Campus Speech, Including on Social Media

Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038 (2021)

The U.S. Supreme Court granted certiorari to this Third Circuit case addressing the extent to which a school district can impose discipline based on off-campus conduct on social media.

Facts: High school student who was dissatisfied with not making the varsity cheerleading team posted a Snapchat with her and another student giving the camera the middle finger, captioned ""F[__] school f[__] softball f[__] cheer f[__] everything." To that post, the student added: "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?" This post was provided to the coaching staff at the district, who determined the conduct violated team and school rules, which student had acknowledged before joining the team. Therefore, the coaches removed student from the team. Student and her parents appealed the decision through the school process, but the coaches' decision was upheld.

Student then sued the school district under 42 U.S.C. §1983, alleging that the district violated her First Amendment rights through the suspension, and that the school and team rules she allegedly violated were overbroad, vague, and viewpoint discriminatory. The District Court then granted summary judgment in Student's favor and the school district appealed that decision to the Third Circuit. The Third Circuit then found that Student's social media post was off-campus speech, rejecting the idea that online speech may be rendered "on campus" simply because "it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment." It then analyzed whether the district could restrict such off-campus speech, and in doing so, held that Tinker does not apply to "off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's

imprimatur." Therefore, the district could not regulate such speech. In doing so, the Third Circuit recognized that its decision may be different and implicate other lines of First Amendment law in a context where a student's off-campus speech threatens violence or harasses particular students or teachers.

Held: On appeal, the U.S. Supreme Court affirmed the Third Circuit's conclusion that Student's First Amendment rights were violated. However, it broke with the Third Circuit's reasoning, explaining that "we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances." The Court cited the following specific examples of such circumstances, including "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." In this case, the Court sided with Student, finding that her speech constituted a criticism of a community she was a part of (which would be highly protected if she were an adult) and that it did not fall outside of the protections of the First Amendment because it did not satisfy any exception, it did not amount to fighting words, and it was not obscene. Rather, the Court cited to the specific facts of this case where Student's Snapchat was posted "outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. [Student] also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends." The Court found these facts "diminish the school's interest" in disciplining Student for her speech.

Practice Pointer: This decision does not mean that a district may never regulate the social media posts of its students. However, it would be unwise for districts to overregulate true off-campus speech protected by the First Amendment. This case presents one example of where the school infringed upon a student's constitutional rights. Discerning whether it is appropriate to exercise authority over off-campus speech presents unique challenges to the educator. When examining whether to regulate or discipline for off-campus speech, a district should analyze the extent to which the speech has a connection to the school and/or is likely to cause a substantial disruption at school. They should also analyze whether the speech falls under one of the recognized exceptions discussed in these materials. As noted above, the Court in the Mahanoy case listed several circumstances where a district could potentially regulate off-campus speech, including:

- *Serious or severe bullying or harassment targeting particular individuals;*
- *Threats aimed at teachers or other students;*
- *The failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and*

- *Breaches of school security devices, including material maintained within school computers.*

While districts should still be careful to analyze whether it is appropriate to regulate off-campus speech in the above situations, they should be even more wary in regulating speech which does not fall into these categories. In most cases, it would be advisable to consult counsel prior to doing so.

III. IMPACT OF DECISION AND RECENT STATUTORY CHANGES ON A DISTRICT'S HANDLING OF BULLYING.

A. New Hampshire's Bullying Statute Creating Civil Liability for Violations of RSA 193-F

Another very important factor a district must consider in deciding whether to regulate student speech is the recent, significant change to New Hampshire's anti-bullying law, RSA 193-F, which has now created a private right of civil action against a district for violation of any provision of that chapter. Specifically, the new law states:

> 193–F:9 Private Right of Action Permitted. Any person aggrieved as a result of gross negligence or willful misconduct in violation of any provision of RSA 193–F:4 may initiate an action against a school district or chartered public school and may recover court costs and reasonable attorney's fees as the prevailing party. For the purposes of this chapter, "gross negligence" means deliberate indifference. Nothing in this section shall supercede [sic] or replace existing rights or remedies under any other law.

As a result of the recent changes in the law, a district could find itself liable under RSA 193-F:9 if its failure to address off-campus speech involving bullying is found to be deliberately indifferent and/or a willful violation of RSA 193-F. This is yet another reason why it is important to carefully analyze whether to regulate off-campus speech and involve legal counsel where appropriate.

*Practice Pointer: In analyzing whether to regulate off-campus student speech constituting bullying under RSA 193-F, precedent in the First Circuit appears to support intervention where bullying is concerned when the bullying substantially impacts the rights of other students. While this precedent came before the Mahanoy decision, the Mahanoy decision was under different factual circumstances and did not involve any bullying. Moreover, the Mahanoy Court cited "*serious or severe bullying or harassment targeting particular individuals*" as an example where regulation of off-campus speech is permissible. Therefore, the Mahanoy decision likely did not overrule Norris and Doe (both discussed above). The Doe case is currently up on appeal, and the First Circuit's decision in this case will likely provide much needed guidance to administrators trying to reconcile their statutory obligations with students' free speech rights as articulated in Mahanoy.*

B. Changes to New Hampshire's Student Discipline Law, RSA 193:13

As outlined above, student speech is one subset of a variety of negative behaviors which may merit discipline by a school district; however, these behaviors (in some circumstances) may be protected under the First Amendment. Thus, it is important to reconcile any state law pertaining to discipline with cases involving the First Amendment.

New Hampshire recently passed significant revisions to its law pertaining to student discipline, RSA 193:13, some effective July 29, 2020, and others which became effective on July 1, 2021. Notably, these revisions signify a shift in the State's approach to student discipline, now focusing on repetition of offenses and whether the behavior was detrimental to the health, safety, or welfare of pupils or school personnel. This is consistent with the trend in cases involving the First Amendment, which focus on the likelihood of a substantial disruption at school, threats against teachers or other students, and serious or severe bullying or harassment targeting particular individuals. See, e.g., Mahanoy.

It is important to note that the recent revisions also created a requirement for a "graduated set of age-appropriate responses to misconduct" and updated the particular standards for imposing short-term suspensions, long-term suspensions, and expulsions. Districts should familiarize themselves with the updated standards and graduated sanctions associated, as these will likely further limit the scope of discipline for student speech.

Finally, the changes to RSA 193:13 are consistent with RSA 193-F, the anti-bullying statute, which defines the scope of "bullying" and "cyberbullying" as conduct that "interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event." RSA 193-F:4. In both, there is an emphasis on the impact of the conduct on others. However, districts should be vigilant in ensuring that their regulation of student speech is also permissible under the First Amendment, as the state rules could be broader than the rules articulated in Mahanoy, which contemplated that off-campus bullying be "serious or severe" to merit regulation.

IV. IMPACT OF MAHANOY DECISION ON REGULATING OFF-CAMPUS SPEECH OF EMPLOYEES

A related issue is the extent to which a school district may regulate the off-campus speech of its teachers, administrators and other employees. New Hampshire law provides that:

> Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters

> concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.

RSA 98-E:1; see also RSA 98-E:2 ("No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee.") These provisions explicitly include any person employed by a school district. See RSA 98-E:1-a.

Importantly, any district employee aggrieved by regulation of their speech is able to seek injunctive relief and/or pursue a civil action to recover damages for any violation of this section. See RSA 98-E:4. Under certain circumstances, attorney's fees and costs may be recoverable by that employee.

Practice Pointer: While the Mahanoy case involved the regulation of student speech, not the speech of employees, districts should be aware that they have even less leeway in restricting the speech of its employees than with their students. Given the relief available to district employees for violations of RSA 98-E, districts should be wary in regulating their speech, consulting with counsel where appropriate.

V. CONCLUSION

The major takeaway from the recent decision in Mahanoy is that a school district's ability to regulate student speech does not extinguish when the student leaves school; however, it is limited to circumstances where the district has a sufficient interest in regulating the student's speech. Examples of such circumstances include "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." These examples indicate that the Court looks to the extent to which the speech impacts the educational environment, and at its connection with the school. Such inquiries are highly fact specific and should be dealt with on a case-by-case basis.