BATH COUNTY SCHOOL BOARD

AGENDA ITEM: INFORMATION { X } ACTION { } CLOSED MEETING { }

SUBJECT: ITEMS FOR BOARD MEMBERS/CORRESPONDENCE

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Student Threats By Instant Messaging

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A few months ago, the United States Court of Appeals for the Eighth Circuit wrote:

> The widespread use of instant messaging by students in and out of school presents new First Amendment challenges for school officials. Instant messaging enables student messages to be rapidly communicated widely in school and out. School officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech. When a report is brought to them about a student threatening to shoot specific students at school, however, they have a "difficult" and "important" choice to make about how to react consistent with the First Amendment (647 F.3d at 765) (citation omitted).

This statement was made as part of the Eighth Circuit's discussion, in *D.J.M. v. Hannibal Public School District No. 60*, 647 F.3d 754 (8th Cir. 2011), of the application of the First Amendment and the Supreme Court's *Tinker* decision (393 U.S. 503) to threats made by a student in out-of-school instant messages.

D.J.M., a high school student, sent instant messages from his home computer to several friends, including student C.M., who was using her home computer. C.M. eventually became concerned about some of D.J.M.'s statements, so she sent portions of his messages to a trusted adult, Leigh Allen. D.J.M.'s instant messages included statements about a friend who would give him access to a "357 magnum," the names of specific students whom he would "have to get rid of," and threats to members of groups he described as "midget[s]," "fags," and "negro bitches." After C.M. confided to Allen that she was "kinda scared," Allen contacted Principal Darin Powell. C.M. later sent Powell excerpts of her conversations with D.J.M. (647 F.3d at 757-759).

After seeing the information from Allen and C.M., Powell and district superintendent Jill Janes notified the police. The police interviewed D.J.M. and took him into custody. The juvenile court referred D.J.M. to a regional hospital for a psychiatric examination. Upon his release from the hospital, he was returned to juvenile detention. A week after D.J.M. was placed in detention, Powell suspended him from school for ten days, and Janes later extended the suspension to include the rest of the school year. Powell and Janes testified at a school board hearing that D.J.M.'s threats had a disruptive impact on the school. Powell said that word of the threats had spread in the community, alarming parents and requiring him to increase campus security. The school board affirmed Janes's suspension of D.J.M. (647 F.3d at 759).

D.J.M.'s parents brought suit in Missouri circuit court, alleging that his suspension violated his First Amendment right to free speech. The District removed the case to the federal district court, which granted summary judgment in favor of the District. On the parents' claim under 42 U.S.C. § 1983, the court ruled that D.J.M.'s speech had been an unprotected true threat and alternatively that the district could properly discipline him for his speech because of

"Here, it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment."

D.J.M. v. Hannibal Public School District No. 60, 647 F.3d 754, 766 (8th Cir. 2011)

its disruptive impact on the school environment (647 F.3d at 759-760).

Before the Eighth Circuit, D.J.M. argued that he had not intended to make any true threats and "that his speech was not student speech because it was on line outside of school." He claimed that the decision to suspend him was a content-based restriction violating the First Amendment. In response, the District argued that D.J.M.'s statements qualified legally as true threats. It said "it had not been required to wait for an actual attack on others to notify the police, that his messages had been disruptive to the school community, and that it was justified in suspending him after he was placed in juvenile detention" (647 F.3d at 760).

On the question of whether D.J.M.'s speech constituted a true threat, the Eighth Circuit cited its earlier decision in *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002) (en banc) (see *Developments in School Law*, Vol. 23, No. 4 - February 2008).

> *Doe* defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." The speaker must in addition have intended to communicate his statement to another. That element of a true threat is satisfied if the "speaker communicates the statement to the object of the purported threat *or to a third party*" (emphasis added).
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> Here, the district court concluded that D.J.M. "had the requisite intent to communicate his threat because he communicated his statements to [C.M.]," and that he "should have reasonably foreseen that his statements would have been communicated to his alleged victims" since a reasonable person should be aware that electronic communications can now be easily forwarded. Although D.J.M. did not communicate any threatening statements to the teenagers targeted in his messages, he intentionally communicated them to C.M., a third party. Since C.M. was a classmate of the targeted students, D.J.M. knew or at least should have known that the classmates he referenced could be told about his statements (647 F.3d at 761-762) (citations omitted).

The Eighth Circuit affirmed that true threats are not protected under the First Amendment.

> [H]ere the District was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school. In light of the District's obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as Columbine and the Red Lake Reservation school, the district court did not err in concluding that the District did not violate the First Amendment by notifying the police about D.J.M.'s threatening instant messages and subsequently suspending him after he was placed in juvenile detention (647 F.3d at 764) (citations omitted).

The Eighth Circuit also approved the district court's application of *Tinker* in this case.

> The [Supreme] Court in *Tinker* explained that "in class *or out of it*," (emphasis added) conduct by a student which "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" is not "immunized by the First Amendment." ... The Court has subsequently described its holding in Tinker as prohibiting school officials from suppressing student speech without reasonably concluding that the speech "materially and substantially disrupt[s] the work and discipline of the school."
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> In D.J.M's case, the District's alternative argument before the district court was also based on *Tinker*. It argued that its actions had not violated the First Amendment because D.J.M.'s instant messages had caused substantial disruption in the school. Parents and students had notified school authorities expressing concerns about student safety and asking what measures that school was taking to protect them. They asked about a rumored "hit list" and who had been targeted. School officials had to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place. The district court concluded that the school had been "substantially disrupted because of Plaintiff's threats," citing *Tinker*, and granted summary judgment to the District on this basis also. After thoroughly reviewing the record, we agree with that conclusion. Here, it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment (647 F.3d at 765-766).

The Eighth Circuit affirmed the district court's decision and commented that the Supreme Court:

> has not yet had occasion to deal with a school case involving student threats or one requiring it to decide what degree of foreseeability or disruption to the school environment must be shown to limit speech by students. These cases present difficult issues for courts required to protect First Amendment values while they must also be sensitive to the need for a safe school environment (647 F.3d at 767).