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Dr. Kyle Kallhoff
Superintendent
Cullman City Board of Education
301 1st Street NE
Cullman, Alabama 35055

RE: Legal opinion concerning discipline of students for off-campus speech

Dear Dr. Kallhoff:

This letter provides further detail to the opinion I have previously provided concerning whether Cullman School District ("District") students may be disciplined for vulgar, off-campus speech that is not aimed at any specific student or faculty member and fails to cause a substantial disruption to the students' learning environment. The answer is that they cannot.

There is a video circulating on TikTok that depicts two African-American males holding a torch and saying "down with the n*****s" and "white power." This video appears to be a satire that has been widely circulated on TikTok.

A Cullman High School ("CHS") student was in his home playing video games with a friend. Unbeknownst to the student, his friend recorded him while the student mocked the TikTok video by repeating language similar to that in the original video and emulating the tone of the original video's speakers. Again, without the student's knowledge, the friend sent this recording to a small number of other CHS students via Snapchat.

The student's speech was not aimed at any person, and the video was shared only with friends of the recorder – not publicly. One of the recipients of the video eventually publicly released the video, but there is no evidence that the video caused any disruption at CHS in the week after its release.

The video of the CHS student was highly offensive and inappropriate. However, given the off-campus nature of the student's speech, the resolution of this matter turns on application of the United States Supreme Court's recent decision, Mahanoy Area School District v. B.L., 141 S.Ct. 2038 (2021). In Mahanoy, the student did not make varsity cheer or get the position on the softball team she wanted. During the weekend, she went with a friend to a convenience store and used her phone to post two photos to her Snapchat story. The images contained vulgar language and images referencing cheer and softball. The Snap was received by many other Mahanoy Area High School students including those on the cheerleading squad. However, the Snap images caused maybe 5 to 10 minutes of interruption in an Algebra class for a couple of days. The school district suspended her from the cheer team for a year. The student and her family challenged the punishment of the Mahanoy Area High School in federal court citing the First Amendment.

The Supreme Court ultimately ruled in favor of the student holding that the school district could not punish the student for her off-campus social media posts because the posts were protected speech under the First Amendment. In short, the Court ruled that schools may only regulate off-campus speech in limited situations. In its opinion, the Court identified three interests that school systems must consider prior to punishing off-campus speech.

1. **Interest 1: Is the school district standing *in loco parentis* when the student makes the speech?**

   This consideration asks whether the District is responsible for the student's actions ***when the speech is made***. If not, the District's ability to punish the off-campus speech is greatly reduced.

   The District must consider the ***"When, Where, and How"*** of the student's speech. The more closely tied the student's speech is to the school, the stronger the school's interest is in regulating the speech as the school is more likely to be standing *in loco parentis*. Here, the CHS student's speech has no ties to the school: it took place at a student's home and was transmitted via a non-school medium.

2. **Interest 2: Did the speech cause a substantial disruption to a school activity or threaten harm to the rights of school community members?**

   A mere likelihood of substantial disruption does not appear to be sufficient to punish off-campus speech. Instead, the Mahanoy Court discusses proof of an ***actual substantial disruption***.

   In the present case, the speech caused no disruption at CHS – like the facts of the Mahanoy case. Additionally, the facts do not show that the speech threatened any harm to the rights

of members of the school community. This case is consistent with the facts in Mahanoy where the Court said: "we can find no evidence in the record of the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's [punishing the student]." Mahanoy, 141 S.Ct. at 2047.

3. **Interest 3: Is the speech only being punished because of its unpopular character?**

   The mere unpopularity of the speech is insufficient to punish the student. In order to justify punishment, a school district is required to show something more concrete about the harm caused by the student's speech – such as a threat or disruption. Here, given the lack of disruption or threat from the student's speech, one of the main reasons for any potential punishment would be the unpopular nature of the vulgar and offensive speech. This is insufficient to meet the mandates of Mahanoy.

In addition to the interests described above, the Court also identified categories of speech that **may** – but will not necessarily – fall outside the First Amendment's protections:

- 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.

Mahanoy, 141 S.Ct. at 2045. None of the scenarios on the above list are applicable to the facts presented by the present matter. The only possible category from the above list that could apply would be "threats aimed at teachers or other students." However, to meet that category, the threat must be specific and targeted. Here, the statements of the student were not directed at the school and lacked necessary specificity to justify constitutional school discipline under the First Amendment. Rather, the statements were an attempt to mock a TikTok video and were not intended by the speaker to be released publicly. See A.F. by and through Fultz v. Ambridge Area Sch. Dist., 2021 WL 3855900 (W.D. Pa. Aug. 27, 2021) (holding that the school may implement discipline where a student made a direct, specific, and targeted threat towards another specific student via group chat); see also J.S. by M.S. v. Manheim Township Sch. Dist., 2021 WL 5350219 (Pa. Nov. 17, 2021) (holding school could not punish student who made Snapchat posts containing crude, inappropriate, and threatening language because posts were not an actual threat but more akin to an "inartful attempt at humor").

For all of these reasons, it is my opinion that the Cullman City Board of Education may not punish the students associated with the video without violating the United States Supreme Court's interpretation of the First Amendment as it relates to off-campus student speech.

Yours truly,

Taylor P. Brooks

TPB:cm