SCHOOL LAW

WITH WALSH GALLEGOS NEW MEXICO

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OUR NAME HAS CHANGED! We are pleased and excited to announce our name has changed to: **WALSH GALLEGOS TREVIÑO RUSSO & KYLE P. C.** Our new name reflects the firm's current leadership, honors our heritage, and celebrates our future as a firm. **Elena Gallegos**, a New Mexico native, is the second name partner in the firm in recognition of her service and dedication to school districts in New Mexico and Texas over the last 25 years.

"If a student has a serious emotional disturbance, along with ADHD, I'm guessing that any misconduct is going to be considered a manifestation of the student's disability. Right?"

Some educators have expressed the view that misconduct by a student with a serious emotional disturbance and/or ADHD is always going to be considered a manifestation of the student's disability. A recent case proves that is not so. The case involved a student who was charged with creating a "shooting list" in his English journal. The district treated this as a violation of the Code of Conduct and assigned the student to a disciplinary placement for 35 days.

The IEP Team met to make a manifestation determination on April 12, 2012. Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the IEP Team must review all relevant information in the student's file, including his or her IEP, any teacher observations, and any relevant information provided by the parent to determine:

1. If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
2. If the conduct in question was the direct result of the district's failure to implement your child's IEP.

If the student's IEP Team determines that either (1) or (2) above were met, the conduct is considered a manifestation of your child's disability.

The parents were present for the manifestation determination, along with an advocate and the boy's pediatrician, who produced a diagnosis of PDD-NOS, and argued that the behavior was a manifestation. The issue of autism came up, as it had before. The district offered to conduct an evaluation, but, according to the district, the parents declined to provide consent. The parties did not complete the process on April 12th, so they recessed and came back on April 23rd. However, the parents did not participate in the second session. The Team concluded that the making of the shooting list was not a manifestation of the boy's Other Health Impairment or Emotional Disturbance.

The parents requested a special education due process hearing. The hearing officer ruled in favor of the school district on all issues except for the manifestation determination. The hearing officer concluded that the boy created the so-called "hit list" as a direct result of his disabilities.

Both sides appealed to federal court.

The hearing officer cited the doctor's testimony in her ruling in favor of the parents. But the federal court overturned that ruling and concluded that the behavior was not a manifestation. As the court pointed out, the school's psychologist, "a member of the [IEP Team] *who actually observed Z.H. in a classroom setting*," rebutted the pediatrician's view. (Emphasis added). The parents failed to cite evidence in the record to overcome this.

There is no easy shortcut to a proper manifestation determination. Each one must be considered individually, taking into account all of the relevant information available. It is certainly not as simple as automatically attributing certain behaviors to disability; or automatically discounting a causal connection.

The case is *Z.H. v. Lewisville ISD,* decided by the U.S. District Court for the Eastern District of Texas on March 2, 2015. We found it at 65 IDELR 106.

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Facebook, an 8th grader, and a C in Health Class…here we go again!

Braeden Burge was bummed. It was bad enough that he got a C in Health class. On top of that, his mom grounded him for part of the summer. Apparently, Mom did not view a C in Health as anywhere close to acceptable.

What's an 8th grader to do? Go to Facebook, of course! Braeden vented a series of comments, starting with the suggestion that he wanted to "start a petition to get mrs. Bouck fired, she's the worst teacher ever." Mrs. Bouck would be the Health teacher. One of Braeden's friends asked (via Facebook post) what Mrs. Bouck had done, and Braeden responded with, "She's just a bitch haha." The friend's retort to this was: "XD HAHAHAHA!!" And this prompted the post that got Braeden in trouble:

"Ya haha she needs to be shot."

Braeden did all this from home (grounded, you know) on a day when school was not in session. He did not send it to Mrs. Bouck, nor was she one of his Facebook friends. In fact, it appears that no teacher or administrator at the school knew about the Facebook posts until a full six weeks later. That's when the parent of another student anonymously placed a printout of the posting in the school mailbox of the principal.

Now, what would you do? Imagine that this "she needs to be shot" comment shows up in your school mailbox, but you note that it was written six weeks earlier, and Mrs. Bouck appears to be in good health. What would you do?

Principal Kara Powell called Braeden in for a chat. The young man was respectful and compliant, quietly accepting the 3.5 day in-school suspension the principal ordered. The principal then called the mother. The mother objected to the school's jurisdiction over this incident, noting that it all took place at home.

The case ended up in federal court because the parent alleged that the school's disciplinary penalty infringed on the student's right of free speech. After all, this all took place off campus and there was nothing even close to a major or substantial disruption of school. But the school district's attorneys argued that "she needs to be shot" was a threat of violence. Threats of violence are not constitutionally protected.

The court ruled in favor of the student. The big problem for the school district was that it did not treat the "threat" like a real threat. The court enumerated five things the school did not do:

1. ask the parents if the boy had access to guns;
2. contact the police;
3. have Braeden evaluated by a mental health professional;
4. discuss the comments with other teachers who knew Braeden; and
5. investigate whether he had made similar, subsequent comments.

The reasoning seemed to be that if the school thought this Facebook comment was a serious threat, it would have done some or all of these things. Key Quote:

"Instead, Principal Powell simply required Braeden to sit in a school office near the teachers' mailboxes for three-and-a-half days. Without taking some sort of action that would indicate it took the comments seriously, the school can not turn around and argue that Braeden's comments presented a material and substantial interference with school discipline."

Once again, we see that being rude toward a teacher, when done off campus, does not usually justify disciplinary action.

Once again, we see that being rude toward a teacher, when done off campus, does not usually justify disciplinary action. If this had happened at school, the use of the word "bitch" alone would have been sufficient to justify a short stint in ISS. But since it happened away from campus, the school was left to try to show that it was a threat of violence. In New Mexico, "students whose presence poses a continuing danger to persons or property or an ongoing threat of interfering with the educational process may be immediately removed from school" after receiving the requisite due process. 6.11.2.12 (C) NMAC. In the Oregon case, since the school did not treat it like a real threat, the court was not convinced.

The case is *Burge v. Colton School District 53*, decided by the federal district court in Oregon on April 17, 2015.

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