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Hysteria Trumps First Amendment: Balancing Student Speech with School Safety

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HYSTERIA TRUMPS FIRST AMENDMENT: BALANCING STUDENT SPEECH WITH SCHOOL SAFETY

I. INTRODUCTION

On April 5, 2000, Michael Demers was a 15-year-old eighth grader enrolled in Northwest School, Leominster, Massachusetts.¹ Mrs. Roselli, Michael's English teacher, ordered Michael to leave the classroom when he continued to talk after being told to stop talking to the other students.² Michael went to a classroom next door, where another teacher, Mr. Gendron, asked him why Mrs. Roselli had thrown him out of her class.³ Mr. Gendron then told Michael to draw a picture about how he was feeling.⁴

Feeling angry, Michael drew a picture of the school and the Superintendent surrounded by explosives.⁵ After finishing his picture, Michael handed it to Mr. Gendron.⁶ When Mr. Gendron asked Michael if he planned on carrying out what he drew, Michael said no; he was just expressing his anger.⁷ On April 7, 2000, the principal called Michael into his office and questioned him about the picture.⁸ Once again, Michael reiterated his intentions and reasons for drawing the picture.⁹ On April 7, 2000, the principal suspended Michael from school and subsequently, on May 1, 2000, the school board expelled him for the remainder of the school year because he refused to see a psychiatrist.¹⁰

Prior to expelling Michael, the school administration had not analyzed Michael's present intent or ability to carry out the act¹¹ depicted

¹ Plaintiff's Memorandum of Law In Support of Temporary Restraining Order at 1, *Demers v. Leominster Sch. Dep't* (D. Mass. filed May 23, 2000) (No. CA00-40082).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 2.

⁶ Plaintiff's Memorandum at 2, *Demers* (No. CA00-40082).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See MASS. GEN. LAWS ch. 275, §§ 2, 6 (2001). Section 2 states in pertinent part "if a complaint is made to any such court or justice that a person has threatened to commit a

in his artwork.¹² In Michael's case, the school administrators impermissibly abrogated his First Amendment rights in failing to properly analyze what they had perceived as a threat.¹³

II. STUDENT EXPRESSION IN PUBLIC SCHOOL POST-COLUMBINE

Since the school massacres in Jonesboro, Arkansas¹⁴ in March 1998 and in Littleton, Colorado¹⁵ in April 1999, school administrators have dramatically increased the number of students suspended and expelled for expressions perceived as threatening.¹⁶ Across the country, school administrators are implementing zero-tolerance policies when confronted with threatening behavior by students.¹⁷ Schools are suspending,

crime against the person or property of another, such court shall examine the complainant and any such witnesses who may be produced" MASS. GEN. LAWS ch. 275, § 2. Section 6 states in pertinent part, "[i]f upon such examination, it is found that there is no just cause to fear that such a crime will be committed by the person complained of, he shall be forthwith discharged." MASS. GEN. LAWS ch. 275, § 6.

¹² Plaintiff's Memorandum at 2, *Demers* (No. CA00-40082).

¹³ See U.S. CONST. amend. I; MASS. GEN. LAWS ch. 275, § 2.

¹⁴ See Kenneth Heard, *Killer's Essay Haunts Westside Teacher*, ARK. DEMOCRAT-GAZETTE, June 6, 1999, at A1. On the morning of March 24, 1998, thirteen-year-old Mitchel Johnson and eleven-year-old Andrew Golden broke into the home of Golden's grandfather, stole rifles and handguns, and drove a van that belonged to Johnson's mother to the woods behind their middle school. *Id.* Johnson hid fifty yards from the school while Golden went into the school, pulled a fire alarm and raced back to meet Johnson. *Id.* As students and teachers left the school because of the fire alarm, Golden and Johnson opened fire, killing four students and teacher Shannon Wright. *Id.* Authorities believe Johnson hoped to kill a teacher who had disciplined him in the past. *Id.*

¹⁵ See Mark Obmascik, *Bloodbath Leaves 15 Dead, 28 Hurt*, DENVER POST, April 21, 1999, at A1. Eighteen-year-old Eric Harris and seventeen-year-old Dylan Klebold, seniors at Columbine High School, were associated with a group known as the "Trench Coat Mafia" and were known admirers of Adolf Hitler and the white supremacy movement. *Id.* On April 20, 1999, the anniversary of Hitler's birthday, Harris and Klebold executed a plan they spent a year creating. *Id.* Armed with guns, knives, and pipe bombs, Harris and Klebold murdered twelve students and one teacher, wounded twenty-three students, and ultimately killed themselves. *Id.*

¹⁶ See John Kass, *Fear of School Violence Getting Best of Common Sense*, CHI. TRIB., Nov. 4, 1999, at A1. In Denton County, Texas, a 13-year-old's teacher asked him to write a "scary" Halloween story for a class assignment. *Id.* Following the assignment, the student wrote a story about shooting up a school. *Id.* The student received an "A" for his assignment and his teacher was so entertained by it that she asked the student to read it aloud to the class. *Id.* The teacher reconsidered and determined that the story was inappropriate and reported the student to the principal's office. *Id.* The police were contacted and the child was jailed for six days before the court confirmed that the student had not committed a crime. *Id.*

¹⁷ See Kim Brooks et. al., *School House Hype: Two Years Later*, May 31, 2000, available at <http://www.cjcg.org/schoolhousehype.ssh2>.

expelling, and even arresting students for drawing, discussing, and planning acts of violence against their fellow classmates, teachers, and schools.¹⁸

Over the last two years, there has been a drastic increase in expulsions and suspensions for behavior or speech that occurs on school grounds but is neither criminal nor violent.¹⁹ Over three million children

Six months after a school shooting in Edinboro, Pennsylvania, a Juvenile Court Judge in Dauphin County issued a Memorandum regarding 'ZERO TOLERANCE' to School Violence, and noted that the Juvenile court was therefore adopting a 'Zero Tolerance' policy to violence or threats of violence, of any kind, occurring in school. Under this policy, any student who commits or threatens to commit any act of violence is to be immediately prosecuted, with consequences being 'SERIOUS' to 'SEVERE' for the first offense and 'CATASTROPHIC' for subsequent offenses.

Kim Brooks et. al., *supra*. The judge also stated, "second chances would not exist for this type of antisocial behavior." *Id.*

¹⁸ See *Boston Schools Drop Suspension of Chain-Saw Story Teller*, ASSOCIATED PRESS, May 18, 2000, at <http://www.freedomforum.org/news>. In April 2000, Charles Carithers, a junior at Boston Latin Academy, wrote about a fictional student's chain-saw attack on his English teacher. *Id.* Although his teacher told him that no subject was off-limits, the teacher and school administrators considered the essay "a threat to do bodily harm" and suspended Charles for three days. *Id.* Following a hearing before the school appeals board, the board overturned the suspension on May 16, 2000, finding that Charles's essay did not constitute a threat. *Id.*; see also *Ohio District, Student Journalist Settle Lawsuit Over Satirical Column*, ASSOCIATED PRESS, Nov. 11, 1999, at <http://www.freedomforum.org/news>. On April 23, 2000, in Macedonia, Ohio, three days after the shootings at Columbine High School, Mark Guidetti, co-editor of the school newspaper, published a column that school administrators felt suggested violent acts relieved stress. *Id.* Mark wrote: "Feel free to go commando." *Id.* "Administrators took 'go commando' literally; Mark said it was teenage slang for not wearing underwear." *Id.* Mark was suspended from school for ten days, but because of the media attention his suspension had received, the school allowed him to return after serving only two days of the suspension. *Id.* His father filed a lawsuit with the U.S. District Court in Cleveland accusing the school district of violating Mark's right to free speech. *Id.* On November 5, 1999, Mark received \$18,500 to settle his lawsuit. *Id.*; see also *Student suspended for doodles sues Louisiana School District*, ASSOCIATED PRESS, August 22, 2000, at <http://www.freedomforum.org.html>. In February 2000, Daniel Allen was suspended from Haughton High School in Louisiana after school officials confiscated papers containing his doodles and drawings. *Id.* The school claimed that some of Allen's doodles represented gang symbols or white supremacy slogans, and that Allen repeatedly outlined his signature with the shape of a gun. *Id.* Allen brought an action claiming that the school violated his First Amendment rights. *Id.* Allen claimed his drawings related to music lyrics, were not intended to convey violent messages, and that the lines around his signature were just lines. *Id.*

¹⁹ See Brooks et. al., *supra* note 17, at 12. Although national statistics exist, a look to individual states is more demonstrative of what is occurring across the country. *Id.* Suspension and expulsion data is collected by the Maryland State Department of Education in order to provide insight into the "nature and scale of the problem." *Id.* (citing INFO. MGMT. BRANCH: MD. STATE DEP'T OF EDUC., SUSPENSIONS FROM MARYLAND PUBLIC SCHOOLS (2000)).

are suspended or expelled in a given year.²⁰ National research suggests that the largest number of suspensions have been for expression and acts not involving violence.²¹

As schools across the country react to the Columbine killings with zero tolerance policies for any student expression perceived as threatening, some courts are reminding administrators that public school students do have free speech rights.²² School administrators are excluding students for their expressions in drawings, writings, artwork, or interpersonal speech that the administrators “perceive” as threatening because of the countervailing public interest in the security of educational settings. This Note proposes that the First Amendment rights of public school students across the country are being violated when students are suspended or

The total percentage of students who were expelled or suspended did decline between school years 1997-1998 and 1998-1999 (from 9.1% to 7.8%), but the number of suspensions issued for non-violent acts increased from the previous year. Suspensions for physical attacks on students were down 13.0%, and firearm possession suspensions and expulsions were down 49.2% but suspensions for false alarm/bomb threats were up 44.2%.

Brooks et. al., *supra* note 17, at 12 (citing INFO. MGMT. BRANCH: MD. STATE DEP’T OF EDUC., SUSPENSIONS FROM MARYLAND PUBLIC SCHOOLS (2000)). The number of expulsions in Massachusetts increased by 35.0% between school years 1993-94 (958 students) and 1996-97 (1498 students). Brooks et. al., *supra* note 17, at 12 (citing 1996-1997 MALDEN, MASSACHUSETTS: DEP’T. OF EDUC.: STUDENT EXCLUSION IN MASSACHUSETTS PUBLIC SCHOOL (1996-1997))

After possession of weapons and illegal substances, youth in Massachusetts’ schools were most often expelled for ‘other’ non-violent unenumerated offenses. . . . Like Maryland, Massachusetts’ largest city, Boston, had one of the lowest expulsion rates (1.7 per 1000 students), and only the third-highest total number of expulsions (109). By contrast, the City of Springfield had 399 expulsions with a rate of 16.8 per 1,000 students—nearly ten times the Boston rate. In total, sixteen other school districts in Massachusetts had higher expulsion rates than Boston. With suburban and smaller district expulsion rates outstripping the state’s largest urban area, such rates clearly have little to do with overall juvenile crime rates.

Brooks et. al., *supra* note 17, at 12 (citing 1996-1997 MALDEN, MASSACHUSETTS: DEP’T. OF EDUC.: STUDENT EXCLUSION IN MASSACHUSETTS PUBLIC SCHOOL (1996-1997)).

²⁰ See Brooks et. al., *supra* note 17, at 12.

²¹ See *id.*

²² See, e.g., *Boman v. Bluestem Unified Sch. Dist. No. 205*, No. 00-1034-WEB, 2000 WL 297167 (D. Kan. 2000) (holding school violated student’s First Amendment rights by expelling her for posting artwork on wall); Order Granting Plaintiff’s Summary Judgment Motion and Denying Defendant’s Summary Judgment Motion, *LaVine v. Blaine Sch. Dist.*, No. C99-1074 (W.D. Wash. filed Feb. 24, 2000) (holding school authorities wrong by expelling student who wrote poem depicting massacre in school); *Ohio District, Student Journalist Settle Lawsuit Over Satirical Column*, ASSOCIATED PRESS, Nov. 11, 1999, at <http://www.freedomforum.org/news> (noting Cleveland court’s finding suspension violated student’s First Amendment rights).

expelled prior to an assessment of the perceived threat.²³ This Note will highlight the history of a student's First Amendment rights in the educational setting and will analyze, in a Post-Columbine light, the effect the climate of fear has placed on a student's First Amendment rights. Moreover, the Note will propose a two-prong analysis of student expression prior to the imposition of school exclusion. In discussing the two-prong analysis, the Note will focus on the Massachusetts threat statute and the Supreme Judicial Court's recent decision in *Commonwealth v. Milo*.²⁴

III. STUDENT EXPRESSION AND THE LAW

According to the Supreme Court, "education is the most important function of state and local governments," and "suspension or expulsion is a serious event in the life of the suspended or expelled child."²⁵ For over forty years, the Supreme Court has held that First Amendment rights are available to teachers and students in a school environment.²⁶ Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁷ Concomitantly, the Court has affirmed the inherent authority of the States and school administrators to establish and enforce rules of permissible conduct within an educational setting consistent with constitutional principles.²⁸ When students exercise their First Amendment rights, conflicts may arise with the policies of school authorities.²⁹

When grappling with a student's expression that does not intrude ostensibly upon the school's operation or the rights of other students, the Court has held that forbidden conduct must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collide with the rights of others."³⁰ An administrator's

²³ See U.S. CONST. amend. I.

²⁴ 433 Mass. 249, 740 N.E.2d 967 (2001); MASS. GEN. LAWS ch. 275, § 2, 6 (2001).

²⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Goss v. Lopez*, 418 U.S. 565, 576 (1975).

²⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (holding school officials violated students' First Amendment rights by suspending them for wearing armbands to protest Vietnam). The Court held that student expression is constitutionally protected unless school officials have a reasonable belief that the expression will cause a substantial disruption of the school environment. *Id.* at 514.

²⁷ *Id.* at 506; see also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding students in public schools not compelled to salute the flag under First Amendment).

²⁸ *Tinker*, 393 U.S. at 507 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

²⁹ *Id.*

³⁰ *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (enjoining high school authorities from enforcing regulation that forebode students from wearing freedom buttons).

foreboding pandemonium cannot trump a student's freedom of speech.³¹ The Constitution protects student speech that incites an argument, sparks a protest, or causes a disturbance, purveying the principle that the benefits of expression outweigh the risks of suppression.³² School authorities cannot stifle or prohibit the expression of a student's opinion based on a wish to avoid controversy that may result from such expression.³³

The Court opines that a student should be taught constitutional freedom by example.³⁴ There is no better laboratory in which to experiment with the models of expression than within the safe environs of the classroom.³⁵ Here, the thought processes given rise to expression may be challenged, analyzed, and tested in robust debate.³⁶ Based on this reasoning, school officials should not have absolute authority over their students.³⁷ In the school environs, students are not merely receptors of the State's message; their education encourages them to challenge, analyze, and test the message and to express their own message.³⁸ Administrators cannot confine students to only officially approved expressions.³⁹ Students are entitled to freedom of expression of their views unless school officials show a constitutionally valid reason for the regulation of speech.⁴⁰ School officials cannot conduct their schools so as to "foster a homogenous people."⁴¹ The Court upholds a student's right to engage in non-disruptive expression but distinguishes speech or actions that intrude upon the work

³¹ See *Tinker*, 393 U.S. at 509 (criticizing court's conclusion school authorities' acted upon reasonable fear of disturbance from wearing armbands).

³² *Id.* at 508 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

³³ *Id.* at 515 (White, J., concurring) (noting "distinction between communicating by words, acts or conduct significantly impinging on some valid state interest").

³⁴ See *id.* at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 480 (1960)) (reasoning classroom is the "marketplace of ideas").

³⁵ See *Tinker*, at 512.

³⁶ *Id.* at 512.

³⁷ *Id.* at 511; see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 690 (1986) (Brennan, J., concurring) (concluding school officials do not have limitless authority or discretion in applying notions of indecency).

³⁸ See *Tinker*, 393 U.S. at 511; see also *Fraser*, 478 U.S. at 690 (Marshall, J., dissenting). The dissent recognized that the school administration "must be given wide latitude in determining forms of conduct inconsistent with school's educational purpose, but Justice Marshall argued that where speech is concerned we cannot unquestioningly accept teacher's or administrator's assertion that certain pure speech interferes with education." *Id.*

³⁹ See, e.g., *Tinker*, 393 U.S. at 511; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting) (reasoning using "yardstick" less than *Tinker* test results in school curtailing speech at slightest disturbance); *Shanley v. Northeast Indep. Sch. Dist. Bexar Cty. Tex.*, 462 F.2d 960, 972 (5th Cir. 1972) (indicating need to teach children Constitution "living reality, not 'parchment' preserved under glass").

⁴⁰ *Tinker*, 393 U.S. at 511; see also *Hazelwood*, 484 U.S. at 287 (Brennan, J., dissenting) (arguing speech left uncensored by school administrators because speech addresses topics deemed potentially sensitive).

⁴¹ *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

of the schools or the rights of the students.⁴² When school expression obstructs the State's duty to teach or thwarts a student's right to learn the lessons the State seeks to teach, school administrators may take measured control to ensure that learning proceeds.⁴³

IV. CHARACTERIZING STUDENT SPEECH

The Court distinguished the First Amendment's requirement that a school tolerate a particular student's speech from the promotion of that student's speech.⁴⁴ The Court allows schools greater deference in their decisions to censor a school-sponsored publication inasmuch as there is a "valid, articulable, educational purpose."⁴⁵ Judicial intervention is required to protect students' constitutional rights if the regulation is not reasonable and is not based on legitimate pedagogical concerns.⁴⁶

The Supreme Court has not yet addressed the question of whether school officials can punish students for advocating violence or other unlawful conduct.⁴⁷ Moreover, the Court has not established the extent of

⁴² See *Fraser*, 478 U.S. at 680. The Court held that the school district did not violate First Amendment rights of a high school student when the school imposed a two-day suspension on him for giving a lewd speech at a school assembly. *Id.* at 685. The Court concluded that it was "appropriate for the school to disassociate itself from the student to make the point to the pupils that vulgar and lewd conduct is inconsistent with the 'fundamental values' of public school education." *Id.* at 685.

⁴³ See *id.* at 681.

⁴⁴ See *Hazelwood*, 484 U.S. at 260. The Court held that the standard for determining when a school may punish student expression occurring on school premises is not the standard for determining when a school may refuse to lend its name and resources to dissemination of student expression. *Id.* at 271. The Court held that the school did not violate the First Amendment rights of students when they exercised editorial control over the style and content of the student's speech in the school newspaper. *Id.* The Court concluded that educators "can exercise greater control" over school-sponsored activities in order to ensure that the readers or listeners learn whatever lessons the activity is designed to teach, and that "the views of the individual speaker are not attributed to the school." *Id.*

⁴⁵ See *id.* at 273.

⁴⁶ See *id.* "Education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials." *Id.* "But when the decision to censor a school-sponsored publication or other vehicle of student expression has no valid educational purpose," federal judges share a role in the responsibility of protecting students' constitutional rights. *Id.* Student's free expression oftentimes interferes with the effectiveness of the school's pedagogical function. *Id.* at 280 (Brennan, J., dissenting). "If mere incompatibility with the school's pedagogical message is constitutionally sufficient justification for censoring student expression," school officials could suppress any student expression that offends them. *Id.* School officials should not act as "thought police" assessing those topics and viewpoint that should be censored. *Id.* at 284.

⁴⁷ See *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1393 (D. Minn. 1987). First Amendment case pre-Columbine in which the district court wrestled with a student's First Amendment rights in educational setting. *Id.* The court only had *Tinker*, *Bethel* and *Hazelwood* to rely on as precedent. *Id.*

a student's First Amendment rights in the context of drawings, artwork, or interpersonal speech that is perceived as threatening.⁴⁸ As a result, lower courts wrestle with the standard of acceptable expression versus unacceptable expression in a school environment.⁴⁹ Particularly since Columbine, the lower courts disagree about the amount of discretion allotted to school administrators in proscribing and disciplining a student's perceived threatening speech.⁵⁰

In addressing the issue of whether school administrators are trampling upon a student's First Amendment rights, the lower courts assess the factual circumstances in which the student's expression occurred.⁵¹ Relying on the test established in *Tinker*, the lower courts reasoned that a student's speech should be protected, even if it is unpopular, provided it does not substantially interfere with the mission of the school.⁵² Suspending or expelling a student based on either fear, perception of disruption, or interference with school discipline is never an acceptable justification for limiting student speech under *Tinker*.⁵³

⁴⁸ See, e.g., *Boman*, 2000 WL 297167, at *4 (holding student's First Amendment rights violated when student expelled for posting artwork on school wall); *LaVine*, No. C99-1074 at 8 (holding school authorities wrong to expel junior who wrote poem depicting school massacre); *State Appeals Court: First Amendment Doesn't Protect Boy's Essay*, ASSOCIATED PRESS, June 5, 2000, at <http://www.freedomforum.org/news> (ruling essay eighth-grade boy wrote about an upset student beheading teacher not protected by First Amendment).

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *LaVine*, No. C99-1074 at 2. In October 1998, school officials expelled *LaVine*, an eleventh grade student, for writing a poem entitled "Last Words." *Id.* at 2. The student's poem, "a first person account of a student who kills numerous classmates and then anguishes over his deeds," was not an assigned project, but rather an extracurricular activity by *LaVine*. *Id.* Ironically, the school expelled *LaVine* after a licensed psychologist and the local Sheriff's department investigated the writing and informed the school that *LaVine* was not an immediate threat. *Id.* at 3. The court held that poetry fell within "the core speech protected by the Constitution under the First Amendment." *Id.* at 6. In reaching the conclusion that the school district did not act reasonably, the district court reviewed the poem in light of the factual circumstances that existed in October 1998. *Id.* at 8. The court reasoned that there was "no overt act, violent demeanor or other threatening behavior manifested by *LaVine*" and pointed out that his teacher was not concerned about anyone's safety; rather she was only concerned for *LaVine's* well-being. *Id.* at 9.

⁵² *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp.2d 1175, 1180 (E.D. Mo. 1998). The court granted a preliminary injunction to a high school student who claimed his rights under the First Amendment were violated when the school district suspended him for ten days for posting a homepage on the Internet that was critical of the high school and included crude and vulgar language. *Id.* at 1177. The court reasoned that the student's homepage did not "materially or substantially interfere with school discipline." *Id.* at 1180 (citing *Tinker*, 393 U.S. at 509). Further, there was no evidence to support a reasonable fear of such interference. *Id.* The court enjoined the school from restricting the student's "use of his home computer to repost his homepage" and also from enforcing any sanctions arising from the student's homepage. *Id.* at 1182.

⁵³ *Id.* at 1180.

Public school students are not a suspect class under the Equal Protection Clause.⁵⁴ Where there is a legitimate government interest, a school may ban specific expression without eviscerating constitutional principles.⁵⁵ Lower courts differ, however, as to the application of this analysis.⁵⁶ While courts acknowledge that school administrators have a compelling interest in ensuring the safety of the students and staff, some courts have concluded that an administrator's actions must be sufficiently refined to achieve their permissible goals while not infringing on First Amendment freedom of speech.⁵⁷

The courts are aware of the extreme concern for student safety in the wake of recent episodes of violence throughout the country.⁵⁸ Upon learning of a specific threat, administrators have not only a right, but also a duty to investigate the pupil and the peril.⁵⁹ While the school district understandably wants to be certain that no actual threat to student safety exists, lower courts conclude that the school official should thoroughly investigate the threats prior to the long-term suspension or expulsion of a student.⁶⁰

⁵⁴ *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1365 (10th Cir. 2000).

⁵⁵ *Id.* As a result of racial tensions in the school district, the school had reason to believe that "a student's display of Confederate flag might cause disruption and interfere with rights of other students to be secure and left alone." *Id.*

⁵⁶ *See id.* at 1365 (holding "rationally related to legitimate governmental purpose" sufficient). *Compare LaVine*, No. C99-1074 at 8 (reasoning school cannot preemptively silence student unless reasonable person would conclude poem constitutes threat of violence).

⁵⁷ *See LaVine*, No. C99-1074 at 10, 11 (concluding even if concerns about poem reasonable, less restrictive ways of ensuring school's safety besides emergency expulsion).

⁵⁸ *See Elissa Haney, Lessons in Violence: A Timeline of Recent Shootings*, June 14, 2000, available at <http://www.infoplease.com/spot/schoolviolence1>. On February 2, 1996, in Moses Lake, Washington fourteen-year-old Barry Loukaitis killed two students and one teacher in his algebra class. *Id.* On February 19, 1997, in Bethel, Alaska, Evan Ramsey, a sixteen-year-old boy, killed his principal and one student at his high school. *Id.* On December 1, 1997, in West Paducah, Kentucky, "as students participated in a prayer circle at Heath High School," a fourteen-year-old boy killed three students and wounded five. *Id.* On April 24, 1998, in Edinboro, Pennsylvania at James W. Parker Middle School, a fourteen-year-old boy killed one teacher and wounded two students at a dance. *Id.* On May 21, 1998, in Springfield, Oregon at Thurston High School, a fifteen-year-old Kip Kinkel killed two students and wounded twenty-two others in the cafeteria. *See Elissa Haney, Lessons in Violence: A Timeline of Recent Shootings*, June 14, 2000, available at <http://www.infoplease.com/spot/schoolviolence1>. A day earlier, school officials discovered that Kinkel had a gun at school. *Id.* Kinkel was arrested for possession of a gun at school. *Id.* The police released him into his parents' custody and his parents were later found dead at home. *Id.*

⁵⁹ *Boman*, 2000 WL 297167, at *4; *Tinker*, 393 U.S. at 507.

⁶⁰ *See Boman*, 2000 WL 297167, at *1. In January 2000, school administrators suspended Boman, a senior in high school, for five-days and subsequently suspended her for the rest of the school year for creating a poster while at school and then hanging it in the doorway. *Id.* The poster contained questions and statements written in first person, asking

V. APPLICATION OF MENS REA AND THE CURRENT STATE OF MASSACHUSETTS' LAW

Two fundamental factual questions must be addressed with regard to student speech in the course of artwork, classroom writing assignments, and expressions.⁶¹ First, the fundamental question involves the intent and state of mind of the student while creating the disputed writing.⁶² The second and independent question is whether the student's conduct substantially disrupts the operation of the school or invades the rights of others.⁶³

Chapter 275 of the Massachusetts General Laws requires two elements to establish a threat against the person or property of another: (1) an expression of intention to carry out the threat on another and (2) an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.⁶⁴ The statute further states, "[i]f, upon such examination, it is found that there is not just cause to fear that such crime will be committed by the person complained of, he shall be forthwith discharged."⁶⁵ Only when the elements of intention and ability are met "is there 'just cause' to fear that such crime will be committed by the person complained of."⁶⁶ The Massachusetts' Courts have required that the fear of the threat be tested objectively rather than subjectively.⁶⁷

In an educational setting, a student who expresses a threat deserves no less than this two-prong analysis prior to the imposition of discipline.⁶⁸ A student's expression ought to be analyzed to assess both the present intent and the ability to carry out the threat.⁶⁹ Based on a survey of the

"who killed my dog?" and asking what do "you" know about it. *Id.* It included statements that "I'll kill you if you don't tell me who killed my dog" and "I'll kill you all!" *Id.* The court granted the student a preliminary injunction, which was made permanent, reasoning that the school district did not demonstrate any evidence that suggested that the student acted with "a bad or willful purpose." *Id.* at *3. The court also reasoned that the student was able to justify the context of her poster and that there was "no factual basis for believing that she threatened to harm other students or that her return to school would constitute a threat." *Id.* at *4.

⁶¹ See *id.* at *3-4.

⁶² See *id.*

⁶³ See *Fraser*, 478 U.S. at 680.

⁶⁴ MASS. GEN. LAWS ch. 275, §§ 2, 6 (2001).

⁶⁵ MASS. GEN. LAWS ch. 275, § 6.

⁶⁶ *Robinson v. Bradley*, 300 F. Supp. 665, 668-69 (D. Mass. 1969).

⁶⁷ See *Commonwealth v. Milo*, 433 Mass. 149, 740 N.E.2d 967 (2001) (citing *Commonwealth v. Sholley*, 48 Mass. App. Ct. 495, 497, 739 N.E.2d 236 (2000)) (noting lower court judge tested threat objectively); see also *Commonwealth v. Strahan*, 39 Mass. App. Ct. 928, 930, 657 N.E.2d 234 (1995) (holding threat assessed by determining whether defendant's statements reasonably caused apprehension).

⁶⁸ See MASS. GEN. LAWS ch. 275, §§ 2, 6.

⁶⁹ See *Boman*, 2000 WL 297167, at *1.

reported cases, it appears that the second element, present ability to carry out the threat, would substantially eliminate most of the cases of suspensions and expulsions occurring in school districts across the country.⁷⁰ Failure to establish a two-prong test has resulted in a number of students being excluded from school for expressions that they had neither the present intention nor the ability to carry out.⁷¹

The Supreme Judicial Court of Massachusetts (SJC) in *Commonwealth v. Milo*⁷² applied a two-prong analysis in upholding a lower court's ruling that a drawing depicting a student pointing a gun at his teacher constitutes a threat.⁷³ In applying the analysis, however, the SJC did not apply an objective standard in determining whether a threat to commit a crime occurred.⁷⁴ Although the drawing may have appeared to be offensive, there was no direct evidence in the drawing or presented at trial of the juvenile's present ability or intention to commit the alleged threatened crime.⁷⁵ At trial, the teacher testified that she did not want the

⁷⁰ See *id.* at *4; see also *LaVine*, No. C99-1074 at 8-9.

⁷¹ See Plaintiff's Memorandum at 2, *Demers* (No. CA00-40082); Ted Flanagan, *Parents Not Told of Pupil's Threat: Event Didn't Cause Real Concern*, WORCESTER TELEGRAM & GAZETTE, June 17, 2000, at A2. During the week of June 12, 2000, a fifth-grader threatened to shoot his classmates on the last day of school. *Id.* Although an investigation by school administrators demonstrated that the threat would not be carried out, the student was suspended in order to send a message to the student and his classmates. *Id.* Therefore, they suspended the boy for the last two days of school. *Id.*

⁷² 433 Mass. 149, 740 N.E.2d at 967. In *Milo*, a twelve-year-old juvenile sat outside his classroom waiting to be disciplined by the principal. *Id.* at 150, 740 N.E.2d at 968. Sitting there, the juvenile drew two pictures. *Id.* The first picture depicted the juvenile shooting Mrs. F., his teacher. *Id.* A teacher confiscated this picture and showed it to Mrs. F. *Id.* The juvenile then drew a second picture and brought it to Mrs. F.'s classroom. *Id.* The juvenile stood in the doorway with the second picture, which depicted the juvenile pointing a gun at Mrs. F, and "said in a defiant tone," "[D]o you want this one too?" *Id.* Mrs. F. was unable to see the drawing, but because she did not want the juvenile to approach her, she told him to give the drawing to one of his classmates. *Milo*, 433 Mass. 150, 740 N.E.2d at 968. The juvenile's classmate handed the picture to Mrs. F. *Id.*

⁷³ See *id.* at 152, 740 N.E.2d at 970. The SJC held that the juvenile court judge's finding that "it was reasonable to fear that the [juvenile] had the intention and ability to carry out the threat" did not create a substantial risk of a miscarriage of justice in the absence of any other references to an objective standard. *Id.* The SJC also concluded that there was enough evidence to support the judge's findings that the "juvenile expressed an intent to commit the threatened crime" and an ability to do so in certain circumstances that would justify apprehension on the part of the juvenile's teacher. *Id.* at 154, 740 N.E.2d at 972.

⁷⁴ See *Robinson v. Bradley*, 300 F. Supp. 665, 668 (D. Mass. 1969); *Commonwealth v. Ditsch*, 19 Mass. App. Ct. 1005, 475 N.E.2d 1235 (1985) (holding legal interpretation of threat requires more than mere expression of intention). A threat has been interpreted to require "both the intention and ability in circumstances which would justify apprehension on the part of the recipient of the threat." *Id.*

⁷⁵ *Milo*, at 156, 740 N.E.2d at 973. The SJC concluded that there was no direct evidence that the juvenile possessed an immediate ability to carry out the threat at the time he communicated the drawing to Mrs. F. [his teacher], however the court reasoned that did

juvenile to approach her, yet she “prefer[ed] he give this picture [second picture] to this girl who would then give it to me.”⁷⁶ Arguably, even if the alleged threat was directed toward her, if the teacher truly felt frightened of the juvenile’s ability and intention to commit the crime, the teacher would not have placed the risk on a twelve-year-old student in her classroom.⁷⁷ Actually, the teacher testified, “I couldn’t really see it,” in reference to the drawing that the juvenile had shown to her.⁷⁸

The juvenile’s second drawing did not constitute a threat because the threat could not have been communicated.⁷⁹ Rather than being a substantive communication of intent to perform the act depicted, the juvenile’s drawing expressed his anger.⁸⁰ By holding otherwise, the SJC’s

“not mean that [the juvenile] could not have carried out his threat at a later time.” *Id.*

⁷⁶ See Defendant’s Corrected Brief at 17, *Commonwealth v. Milo*, 433 Mass. 149, 749 N.E.2d 967 (May 5, 2000) (No. SJC-08269).

⁷⁷ See *Milo*, at 150, 740 N.E.2d at 969; *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 236, 694 N.E.2d 2, 4 (1998) (reasoning threats are “acts or language by which another is placed in fear of injury or damage”); see also Defendant’s Brief at 17, *Milo*, (No. SJC-08269).

⁷⁸ See *Milo*, at 150, 740 N.E.2d at 969.

⁷⁹ See *id.* at 151 n. 2, 740 N.E.2d at 970 (noting lower court found first drawing not threat because never communicated by juvenile). The juvenile walked into his teacher’s classroom and asked, “Do you want this one, too?” in reference to his second drawing. See *Milo*, at 150, 740 N.E.2d at 969. From where she was standing, the teacher was unable to see what the picture depicted, so she told one of the juvenile’s classmates to take the drawing from the juvenile and bring it to her. *Id.* The juvenile handed the picture to his classmate and left his teacher’s classroom without any “further verbalization or unusual conduct.” Defendant’s Brief at 4, *Milo*, (No. SJC-08269). At trial, the Commonwealth’s *only* [emphasis added] witness was the teacher who testified that she felt apprehensive and characterized the juvenile as having spoken to her in a defiant manner when he asked her, “Do you want this one, too?” *Id.*; see also *Commonwealth v. DeVincent*, 358 Mass. 592, 595, 266 N.E.2d 314, 316 (1971) (stating “the state of mind of person threatened is not controlling”). Arguably, in *Milo*, the Juvenile Court focused on the subjective state of mind of the juvenile’s teacher in stating, “it was reasonable to fear that the Defendant had the intention and the ability to carry out the threat.” *Milo*, at 150, 740 N.E.2d at 969 (quoting Juvenile Court judge’s finding and noting correct application of the law). Moreover, in the SJC’s decision in *Milo*, the court relies on merely circumstantial evidence in determining that the juvenile had the ability to commit this crime. See *Milo*, at 155, 740 N.E.2d at 972. The only evidence the SJC relies on are the following facts: (1) the drawings were violent and according to the juvenile’s teacher were held out in “an angry and defiant manner;” (2) the juvenile was sitting in the hallway, which “usually [means] [the student] had done something to cause that situation;” (3) the juvenile was loitering near the teacher’s car later that same day; (4) and the court’s taking judicial notice of recently highly publicized, school-related shootings by students. *Id.* at 155-157, 740 N.E.2d 973-974. From these facts *alone* [emphasis added], the SJC concludes that in light of the “‘climate of apprehension’” concerning school violence in which this incident occurred, the teacher’s fear that the juvenile could carry out the threat was quite reasonable and justified.” *Id.* at 157, 740 N.E.2d at 974 (citing *Sholley*, 432 Mass. at 726, 739 N.E.2d 236 (2000)).

⁸⁰ See MASS. GEN. LAWS Const. Pt. 1, Art. XVI (2001) which provides: “[T]he right of free speech shall not be abridged.” See also MASS. GEN. LAWS ch. 71, § 82 (2000) which states: “[T]he right of students to freedom of expression in the public schools of the

decision causes a chilling effect on the exercise of the juvenile's First Amendment rights.⁸¹

VI. CONCLUSION

The SJC's decision sets an unenforceable and dangerous precedent for juveniles in Massachusetts.⁸² Although a student's drawing may succeed in offending his teacher, a drawing cannot objectively be said to be a threat to commit a crime.⁸³ There needs to be something more to

commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views" *Id.* The drawing does not depict an act of violence that rises to the level of a threat; rather arguably the drawing is a form of expression. *Id.* The picture at issue depicts a teacher smiling while the juvenile is pointing with what appears to be a toy gun at her. *See Milo*, at 161, 740 N.E.2d at 977 (Appendix B). Although the drawing may arguably appear to be offensive, no direct evidence was presented at trial of the juvenile's present ability to commit the alleged threatened crime. *See, e.g., Milo*, at 156, 740 N.E.2d at 973; *Boman*, 2000 WL 297167, at *4; *LaVine*, No. C99-1074 at 8-9; *see also* Defendant's Brief at 14, *Milo*, (No. SJC-08269). Moreover, the drawing must be looked at in the context in which it was written. Arguably, the student was angry. The juvenile was sitting in the hallway for disciplinary issues that had arisen the previous day. *See Milo*, at 150, 740 N.E.2d at 969. *See also* Eileen McNamara, *Fright of Fancy was Misjudged*, THE BOSTON SUNDAY GLOBE, Apr. 30, 2000, at B1. "It's quite a leap from creative writing to criminal design, even for those who find [themselves spending] these perilous times in America's classrooms." *Id.*

⁸¹ U.S. CONST. amend. I

⁸² *See* Commonwealth v. A. Juvenile, 368 Mass 580, 334 N.E.2d 617 (1975) (holding Massachusetts's threat statute should be reviewed under strict scrutiny standard); *see also* Fogelman v. Chatman, 15 Mass. App. Ct. 585, 590 n. 4, 446 N.E.2d 1112 (1983) (citing Commonwealth v. A Juvenile, at 586 n.4, 334 N.E.2d at 621-22 (1975)) (holding courts should resolve ambiguities in statute in favor of holding it unconstitutional). The *Fogelman* court reasoned that holding a law unconstitutional would prevent the statute from having a "deterrent or chilling effect on the exercise of First Amendment rights due to the threat of the statute's possible application." *Id.*; *see also* Supreme Judicial Court reviews drawing, WORCESTER TELEGRAM AND GAZETTE, Nov. 29, 2000 at B1. Chief Justice Marshall of the SJC actually stated during the *Milo* case, "statistics show schools are among the safest places for children. There are thousands of schools where shootings have never taken place." *Id.*

⁸³ *See* Commonwealth v. A. Juvenile, at 589-590, 334 N.E.2d at 623-624 (quoting *Colder v. California* 403 U.S. 15, 23 (1971) stating "[v]ulgar, profane, offensive, or abusive speech is not, without more, subject to criminal sanction"); *see also* Commonwealth v. Sholley, 48 Mass. App. Ct. 495, 497, 739 Mass. N.E.2d 415, 418 (quoting Commonwealth v. Elliffe, 47 Mass. App. Ct. 580, 582, 714 N.E.2d 835, 837 (1999)). Drawings and words "must be interpreted in the context of the actions and demeanor which accompanied them." *Id.*; *see also* Lisa Pisciotto, Comment, *Beyond Sticks and Stones: A First Amendment Framework For Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635 (2000). In determining whether to punish a threat of violence, school officials must consider "within which what context or circumstances was the student threat uttered? . . . [and] what was the reaction of the person to whom the threat was directed, and if the

transform the drawing from offensive speech to a threat to commit a crime.⁸⁴

School shootings have generated a climate of fear, but that fear does not provide a rational basis for curtailing a student's First Amendment rights or excluding them from education.⁸⁵ A student's drawings and words "must be interpreted in the context of the actions and demeanor which accompanied them."⁸⁶ First Amendment issues involving students that are being brought into the justice system, could be, and have previously been, handled by school administrators.⁸⁷ To avoid the courts being further enmeshed in the administration of the nation's schools, school administrators should be guided by the two-prong analysis: the student's present intent and present ability to act upon the threat.⁸⁸

Michael Demers would not have been expelled for drawing on April 7, 2000 had Northwest School utilized a two-prong analysis prior to

reaction was fear, was that fear a reasonable and foreseeable reaction?" *Id.*; see also MASS GEN LAWS ch. 71, § 82.

⁸⁴ See *Tinker*, 393 U.S. at 508; *LaVine*, No. C99-1074 at 8-9; see also Eileen McNamara, *Fright of Fancy was Misjudged*, THE BOSTON SUNDAY GLOBE, Apr. 30, 2000, at B1.

⁸⁵ See *Tinker*, 393 U.S. at 508; see also *In re B.R.*, 732 A.2d 633, 639 (1999). The court stated that a threat by a student to bring a gun to school can "in no way be treated as a joking statement which can be casually disregarded." *Id.* However, the statement or arguably the school's belief that an inference is being made by a drawing must be assessed prior to the student's suspension or expulsion. See *Tinker*, 393 U.S. at 508. "Acting with a conscious disregard for a student's First Amendment rights and his right to an education violates a student's constitutional rights." *Id.*

⁸⁶ *Sholley*, at 497, 726 Mass. N.E.2d at 218 (quoting *Elliffe*, at 582, 714 N.E.2d at 837).

⁸⁷ See Brooks, *supra* note 17, at 20-22; see also DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL: *THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE*, available at http://www.resultsproject.net/FBI_Report (discussing use of systematic procedure for threat assessment and intervention); see also COOK COUNTY STATE'S ATTORNEY: *CHICAGO TO PARTICIPATE IN MOSAIC-2000 PILOT PROGRAM: DEVELOPED AFTER COLUMBINE SHOOTINGS*, January 12, 2000, available at <http://www.statesattorney.org/aweb/presmosa>. According to Cook County State's Attorney's Office in Chicago, MOSAIC-2000 provides a step-by-step evaluation on a computer of a student's threat. *Id.* This adds another component to violence prevention and potentially enables a young, non-violent offender to be diverted out of the court system. *Id.* See also Scott Greenberger, *Threat Led School to STARS*, THE BOSTON GLOBE, April 4, 2000 (discussing analyzing threats and manner in which to respond). In the wake of Columbine shooting, Massachusetts police departments have devised a proactive approach to school violence. *Id.* STARS-School Threat Assessment Response System has a team of law enforcement, school officials and mental health specialists ready to respond when a school crisis cannot be handled through normal channels. *Id.* The System is supported by State funding and is used to analyze threats rather than just react to them, thereby, "keeping education from grinding to a halt." *Id.*; but see John Kass, *Now, a High-Tech Witch Hunt For 'Dangerous' Students*, at <http://www.freedomforum.org> (questioning and criticizing reliability of Mosaic-2000 and intrusion Program has on students).

⁸⁸ See *Boman*, 2000 WL 297167, at *4; see also *LaVine*, No. C99-1074 at 8-9.

acting.⁸⁹ Michael unequivocally stated that yes, he was angry, but no, he did not have the intention or the ability to carry out the act he drew on paper.⁹⁰ On June 5th, the school allowed Michael to re-enter Northwest School and gave him permission to attend graduation with his classmates.⁹¹

The Northwest School administrators may have believed that by suspending Michael they were acting in the best interest of the school in protecting the safety of their students. The school's decision appears, however, to have been made without rationally assessing the threat.⁹² Administrators violated Michael's First Amendment rights with the full knowledge that Michael had neither the intention nor the ability to carry out the act.⁹³

In the wake of school violence across the country, schools, such as the facility in *Milo*, are justified in being concerned for the safety of their student body, but the subjective fear or apprehension of a teacher or administrator is not sufficient to curtail a student's First Amendment rights. Closing the doors of an educational facility to a student by disciplining or punishing his expression prior to analyzing the circumstances under which the student expression occurred is not consistent with the goal of education or the First Amendment. In future cases, Massachusetts' schools must assiduously ensure the safety of their schools and scrupulously safeguard the constitutional rights of their students.

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⁸⁹ See Plaintiff's Memorandum at 2, *Demers* (No. CA00-40082).

⁹⁰ See *id.*

⁹¹ See Matt Brun, *Ousted Pupil to Return to School, Leominster Oks Attendance, Tutor*, WORCESTER TELEGRAM & GAZETTE, June 3, 2000, at A2.

⁹² See Plaintiff's Memorandum at 2, *Demers* (No. CA00-40082).

⁹³ See *id.*

