Is It a True Threat?

By: Jill K. Osborne, Esq.

With the recent events in Tucson, many individuals began to scrutinize the alleged perpetrator’s behavior leading up to the tragedy and wondered if something could have been done to prevent what occurred. In the past twenty years, there have been several events that forced schools to look at how they addressed threats made by students.

In 1993, a 15-year-old California high school student had been trying to make changes to her class schedule. After being sent back and forth between the administrator’s office and the counseling office for the majority of the day, the student finally believed her schedule issues had been resolved. However, when she went to the counselor’s office, the counselor stated that she did not believe she would be able to make the requested changes to the student’s schedule. Upon hearing this, the obviously frustrated student claimed she said, “I’m so angry, I could just shoot someone.” The counselor, however, maintained that the student said, “If you don’t give me this schedule change, I am going to shoot you!” The student immediately apologized for her comment.

Later that day, the counselor reported the student’s conduct to an assistant principal. The counselor stated she felt threatened by the student and feared that the student would retaliate against the counselor in some way.

Two days later, a meeting was convened between the student, the counselor, and the assistant principal. After the student admitted to making one of the statements, although there is some debate to which statement she admitted to making, the assistant principal suspended the student for three days. The student then sued the school district alleging, among other issues, that the school district violated her First Amendment rights.

The court in this case found that the student’s First Amendment rights were not violated, and the school district had the right to discipline the student. The court held that generally threats were not protected by the First Amendment. The court further acknowledged that difficulty existed in distinguishing between a “true threat” and constitutionally protected speech. Consequently, the court developed the following test to determine whether a threat fell outside the scope of First Amendment protections:

"Whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."
The court also stated that “alleged threats should be considered in light of their entire factual context, including the surrounding events and the reactions of the listeners.” *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996). The question is, when taken in context, would a reasonable person believe that the individual to whom the statement was made would feel threatened? In this case, the court believed that the student should have known that the counselor would take her statement as a threat, and the court upheld the student’s suspension.

More recently, the Arizona Supreme sided with a student who was criminally charged for a profanity laced tirade hurled at a teacher after the teacher asked the student to put his cell phone away. The student was suspended for ten days.

The student was also criminally charged and found guilty of “abusing teachers or other school employees.” The student appealed his criminal conviction, and the Arizona Supreme Court found that the profanity was not “fighting words” that could lead to a physical altercation with the teacher and, therefore, was protected by the First Amendment. Consequently, the court held that the abuse charges should be dropped. *In re Nickolas S.*, --- P.3d --- 2011 WL55867 (Ariz.).

It is worth noting that this decision does not limit a school’s ability to discipline a student for inappropriate language, or that the prosecutors could not charge the teen under other statutes. In fact, the court ruled that the student could be charged with other crimes, such as disorderly conduct or disruptive conduct in schools.

While the Arizona Supreme Court did not explicitly address the student’s suspension from school, these cases only demonstrate the precarious balance schools have to maintain between the First Amendment rights of its students and the safety and welfare of its campuses. Unfortunately, there are no easy answers when it comes to protected speech and threats, and each case requires an individual analysis.

This article is intended to be a general discussion of student threats and violence in schools and is not intended to provide legal advice regarding a particular situation.

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