

Defining a Hostile Education/Learning Environment Today

At the start of the 2019-20 school year, United States District Court Judge Denis R. Hurley in *Moore v. St. Mary School* issued a decision vindicating the rights of students whether in public or private schools to be free from threats and more significantly recognized a right to be free from a hostile education environment.¹

The *New York Law Journal* focused on the characterization by Judge Denis Hurley that this was a “Disturbing Racial Attack,”² and “[t]he pictures targeted the student’s race and referenced the KKK, Nazis and suicide, according to copies included with the complaint.”³ When white students sent an African-American/black student pictures of, among other things, a gun to his head, school administrators should have acted but did not—as counsel for the family, we would not wait until this young man was shot dead or lynched.

From emojis to gun gestures, school administrators know that images can convey physical threats and the images in this case certainly conveyed threats of physical harm. In *Virginia v. Black*,⁴ an appeal stemming from cross burning by Ku Klux Klan members, Justice Clarence Thomas stated

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in dissent, “cross burning subjects its targets...to extreme emotional distress, and is virtually never viewed merely as ‘unwanted communication,’ but rather, as a physical threat.” Justice Thomas reminds us that every African-American knows upon seeing images of white-sheeted Ku Klux Klan members, Adolph Hitler and a noose, that their life is being threatened because they are black.

While schools have gone from in-person to online⁵ for the duration of this school year, we live in an age where Klan members no longer need wood, matches, and gasoline to state their message of hate in front of someone’s home. Now all they have to do is click

“send.” In the age of COVID-19, it seems that school-age children will primarily interact through online and internet means.

Already reports of “Zoom-Bombing” have resulted in warnings from the Federal Bureau of Investigation⁶ and criminal prosecutions.⁷ “Law enforcement agencies across the country are trying to adapt and respond to reports of uninvited guests on video conferencing platforms who make threats, interject racist, anti-gay or anti-Semitic messages, or show pornographic images.”⁸ In the absence of the physical classroom, we must start to evaluate these attacks with 2020 vision.

In *Moore v. Diocese*,⁹ the complaint claimed that tolerating and facilitating a racially hostile environment effectively prevented the infant Plaintiffs from obtaining the Roman Catholic elementary school education their parents contracted for from St. Mary School and the Diocese of Rockville Centre. The Plaintiffs in *Moore* were unable to obtain any kind of protection by Order to Show Cause, and the Plaintiff children had to leave school to avoid the threats.

Judge Hurley’s ruling accepting the Hostile Educational Environment claim is extremely important in these unfortunate days of violent turmoil and school shootings. “The Second Circuit has indicated that discrimination claims under Title II are subject to the same analysis as discrimination claims under 42 U.S.C. § 1981.”¹⁰ “[T]he Second Circuit has made clear that there is no state action requirement to invoke the equal benefit clause of the section.”¹¹

The Plaintiffs in *Moore v. Diocese* alleged that both the Constitution of the United States and the New York State constitution protect persons against the harm caused by racial



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threats and intimidation. It should not and does not matter that the school was a private or a public school. The cyberassault images contained in Plaintiffs’ Amended Complaint leave no doubt that their purpose was intimidation by racial threats.

“A child, merely on account of his minority, is not beyond the protection of the Constitution.”¹² As society moves online and into the future, now more than ever,

we must be cognizant that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”¹³

Where prosecutors and publicly elected officials act upon such threats¹⁴ there are surely remedies but when, for whatever reason, prosecutors exercise discretion not to act, there is little recourse for private citizens aside from bringing such claims.

School-aged children mandated to participate in online courses must be afforded constitutional protections. “[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”¹⁵ “They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.”¹⁶ Recently, an appeals court had no trouble finding that “[r]acial slurs, swastikas and other offensive language spray-painted on a Maryland high school campus are not shielded from hate-crime prosecution under the First Amendment.”¹⁷ Where property damage is involved, it seems that there was no difficulty upholding a criminal conviction.

We should ask whether due process still protects the bodily integrity of a child¹⁸ if courses are exclusively online? Certainly, as schools require mandatory online education, we must evaluate what occurs when the bully moves from using a schoolbook to a Chromebook as the weapon of choice.¹⁹ As we continue to work with 21st Century problems perhaps it is time we address some of the limitations²⁰ of the Civil Rights Act and start to recognize that the due process rights of a child include the freedom from fear and

bodily integrity in not just one’s body but in one’s mind.

Basic minimum education is a fundamental right²¹ that we must safeguard as the new normal appears to be online education in 2020.²²

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1. Memorandum and Order; 2:18-cv-3099 (DRH) (GRB), ECF Doc. No. 79 (E.D.N.Y. Aug. 27, 2019).

2. *Id.*

3. Jane Wester, *Long Island Federal Judge Says Parents May Sue School, Classmates Over Alleged ‘Disturbing Racial Attack’*, *New York Law Journal* (Sept. 17, 2019), <https://bit.ly/2W3wxts>.

4. 538 U.S. 343 (2003)

5. Dana Goldstein, Adam Popescu and Nikole Hannah-Jones, *As School Moves Online, Many Students Stay Logged Out*, *NY Times* (Apr. 6, 2020), <https://nyti.ms/2K-TWtkG>.

6. Kristin Setera, *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, *FBI Boston* (Mar. 30, 2020), <https://bit.ly/2zZN8Wx>.

7. Associated Press, *Teen arrested after ‘Zoom bombing’ high school classes*, *NY Post* (Apr. 8, 2020), <https://bit.ly/2Sze0mo>.

8. *Id.*

9. Memorandum and Order, *supra* n.1.

10. *Guichardo v. Langston Hughes Queens Library*, No. 15-CV-2866 (MKB), 2015 WL 13227995, at *3 (E.D.N.Y. Nov. 20, 2015) (citing *Stone v. N.Y. Pub. Library*, No. 05-CV-10896, 2008 WL 1826485, at *3 (S.D.N.Y. Apr. 22, 2008)) (internal quotation marks omitted) (quoting *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969)).

11. *Bishop v. Toys “R” Us-NY LLC*, 414 F. Supp. 2d 385, 393 (S.D.N.Y. 2006), *aff’d sub nom.*, *Bishop v. Toys R Us*, 385 F.App’x 38 (2d Cir. 2010).

12. *Bellotti v. Baird*, 443 U.S. 622 (1979).

13. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

14. See, e.g., Jack Rodgers, *Maryland Court Upholds Conviction for Racist School Graffiti*, *Courthouse News Service* (May 1, 2020), <https://bit.ly/3c2TUc4>.

15. *In re Gault*, 387 U.S. 1 (1967).

16. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

17. Rodgers, *supra* note 14.

18. *Ingraham v. Wright*, 430 U.S. 651 (1977).

19. Kristopher L. Jiles, *Trigger Fingers Turn to Twitter Fingers: The Evolution of the Tinker Standard and its Impact on Cyberbullying amongst Adolescents*, 61 *Howard L.J.* 641 (2017).

20. Emily Suski, *The School Civil Rights Vacuum*, 66 *UCLA L. Rev.* 720 (2019).

21. E.g., *Gary B. v. Whitmer*, No. 18-1855 (6th Cir. Apr. 23, 2020).

22. Cathy Li & Farah Lalani, *The COVID-19 pandemic has changed education forever*. This is how, *World Economic Forum* (April 29, 2019), <https://bit.ly/2Wt2gmR>.

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