



**Texas Bandmasters Association  
Convention/Clinic July 21-23, 2022**

**The Final Act: Policing Student Social  
Media**

**CLINICIAN:  
Holly Wardell**



**HENRY B. GONZALEZ CONVENTION CENTER - SAN ANTONIO, TEXAS**



# The Final Act: Policing Student Social Media

Presented by:  
Holly Boyd Wardell

July 21, 2022

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## Holly Boyd Wardell



**Holly** is a Shareholder in our Austin office.

Holly is licensed to practice law in all Texas state courts; the United States District Courts for the Northern, Eastern, Southern, and Western Districts of Texas; the United States Court of Appeals for the Fifth Circuit; and the United States Supreme Court.

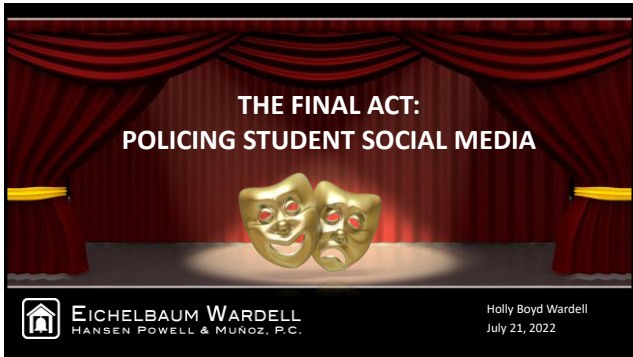
She is a member of the Austin Bar Association, National School Boards Association Council of School Attorneys; School Law, Litigation, Administrative and Public Law, and Labor and Employment Law sections of the Texas Bar, Texas Council of School Attorneys, and the Texas Association of Defense Counsel. Holly has also served on the State Bar's Disabilities Issues Committee and the Texas Education Agency's State Supervision Committee & Complaints Management System. Holly graduated cum laude from Texas Wesleyan University in 1992 and earned her Juris Doctorate from The University of Texas School of Law in 1996.

Holly has an impressive litigation background in whistleblower cases and civil rights cases including gender, race, and national origin, and disability discrimination claims. Her work on position statements, motions, and briefs has resulted in numerous victories for school districts at every level conceivable. Additionally, she regularly attends ARD and Section 504 Committee meetings and represents clients at due process hearings.

Holly's outgoing personality, enthusiasm, and thoroughness combine to make her a popular lecturer. She is a frequent guest speaker for school districts, regional education service centers, special education cooperatives, state organizations, and universities on a variety of topics related to school law, including special education, Section 504, education records, sexual harassment, student discipline, and search and seizure. Holly has published numerous articles for state and firm publications on special education and other issues.

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JV Cheerleader

Off campus

Not at school activity

Not in uniform or school insignia

Did not mention school by name

Message shared only with "friends"

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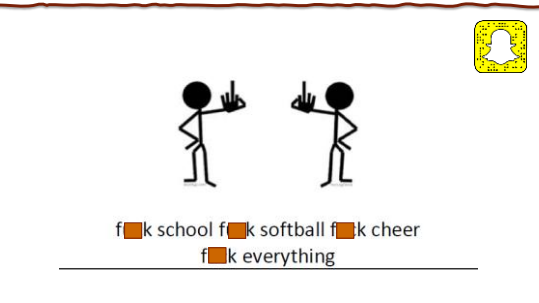
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f k school f k softball f k cheer  
f k everything

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**B.L. v. Mahanoy Area Sch. Dist.,  
964 F.3d 170 (3<sup>rd</sup> Cir. 2020)**

- May 28, 2017 – Sophomore posts
- Sept. 25, 2017 - Lawsuit filed
- Sept. 26, 2017 – TRO obtained
- Oct. 5, 2017 – Prelim injunction
- Mar. 21, 2019 – District court grants Plaintiff's motion for summary judgment
- Apr. 12, 2019 – Sch appeals to 3<sup>rd</sup> Cir.
- Nov. 12, 2019 – Argument at 3<sup>rd</sup> Cir. ★ Graduated 2019
- June 30, 2020 – Decision of 3<sup>rd</sup> Cir.




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## Supreme Court



- January 2021 – granted cert
- April 28, 2021 – oral argument
- Justices appeared sympathetic to Levy
- June 23, 2021 – 8:1 decision issued in favor of Levy (Justice Breyer)



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• **Justice Breyer** doubted that the Snap had been significantly disruptive to the school's operations, and that if it was, "*my goodness, every school in the country would be doing nothing but punishing.*"

• **Justice Kavanaugh**, a youth basketball coach himself, said the yearlong suspension seemed excessive. But he appeared to be expressing the views of several other justices when he said the Court's opinion should not be a "treatise" and that "the First Amendment does not categorically prohibit public schools from disciplining students for speech that occurs off campus, period."



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• The school district violated Levy's First Amendment rights in reprimanding her for her post.

• If Levy had been an adult, her Snapchat post would have been protected by the First Amendment.

• There was no evidence that the post created the type of disruption that *Tinker* addressed.

• Other aspects of Levy's case worked in her favor: the Snap was sent to a private circle of friends and it did not explicitly name the school nor targeted any individuals.



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*It might be tempting to dismiss (the student's) words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary.*



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The Court identified three factors related to off-campus speech that should be considered in future litigation:

1. off-campus speech is usually the responsibility of the student's parents;
2. off-campus speech covers virtually any activity outside of the school facility; and
3. the school has a responsibility to protect unpopular ideas by students.



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### Nurseries of Democracy

"The school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus," because "America's public schools are the nurseries of democracy."



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*We do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent ... substantial disruption of learning-related activities or the protection of those who make up a school community.*



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**However,**



Schools may have a legitimate interest to restrict off-campus speech, such as in relation to harassment and bullying.



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Doe v. Hopkinton Pub. Sch.

Keep your fights on the ice.  
Hockey bullies...  
Off Campus Speech  
490 F.Supp.3d 448 (D. MA Sept. 22, 2020)  
On appeal to 1<sup>st</sup> Cir.

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Suspension of two high school students for their participation in online social media chat group that engaged in bullying of other student did not violate students' First Amendment rights to free speech or association.




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Schools are generally permitted to step in and protect students from abuse or bullying, without violating First Amendment right of free expression.




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School officials reasonably found group chat targeted student, which caused target to suffer emotional harm, negatively impacted his performance on the team, and caused him to seek mental health treatment.




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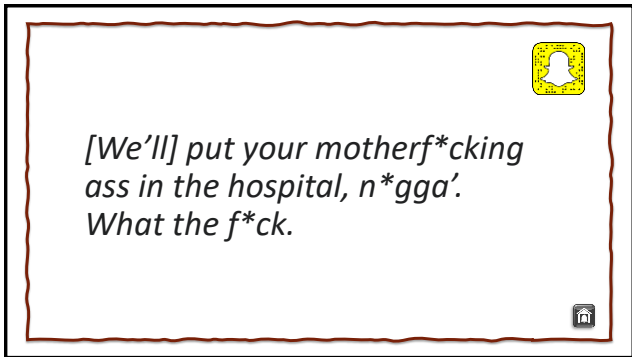
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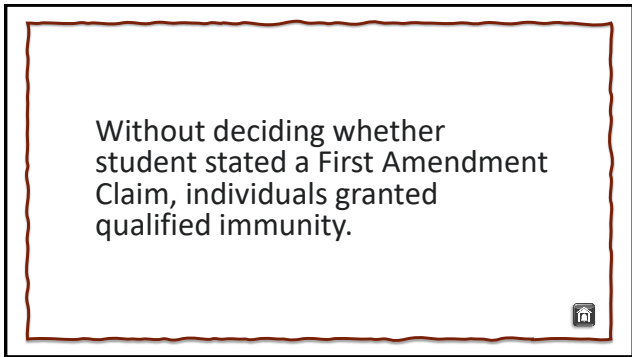
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**Cheadle v. North Platte R-1 Sch. Dist.**  
 Alcohol poisoning is not expressive conduct (nor funny), even when posted to Snapchat...  
 Off Campus Speech  
 \_\_\_ F.Supp.3d \_\_\_ (Aug. 16, 2021)

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- Parent challenged 45-day suspension from 8<sup>th</sup> grade girls' volleyball team.
- Recorded a video of herself drinking alcohol – shared in private Snap group.




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- Around 10:30 p.m., mother discovered girl “on her bedroom floor, incoherent and on the verge of losing consciousness.”
- EMS, hospital
- Dx – alcohol poisoning




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Mom posts:

*Hello...This is [NC's] mom. I wanted to let you all know that she is still alive. In her SC video she posted earlier – which some of you thought was funny. (I've read alllll of the messages) – you actually witnessed her having a life-threatening medical emergency. I found her on the bedroom floor, incoherent, and on the verge of blacking out. I called an ambulance and had her transported to the hospital. She had acute alcohol overdose and her levels were three times higher than an adult. We are finally back home and she will be recovering a while. A 13 yo's body is not designed for that. And for those of you who may have suggested, encouraged, dared ect. (sic) for her to do anything, just know I know who you are. And while you may not be getting a notification in your messages that says I've screenshot the chat – you won't – because I've screenshot them from MY phone instead.*



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Mom's second post:

*...it's pretty terrifying to find your kid on the floor who only keeps saying "help me" over and over but can't put the words all together in a straight sentence to tell you what's wrong or what happened. For a parent – It's traumatic. I'll never be able to wipe this from my mind. Learn from other people's mistakes and bad decisions, people, so you don't have to find out the hard way yourself.*



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- When a minor consumes alcohol, she is engaging in an illegal act, not pure speech. North Platte's statements indicate that it intended to punish NC's conduct, not her or [the mother's] speech, and its actions are consistent with that intention.
- North Platte did not ask NC to delete the video and it did not try to suppress the mother's messages.



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- The mother does not suggest the NC intended her video to convey any particularized message either through the use of language or other means. At best, the video depicted ill-fated drunken revelry to an audience of impressionable minors.
- Whatever the case, NC's intended message lacks the same level of First Amendment values as BL's criticism in Mahanoy because NC was engaged in illegal conduct, not pure speech, and was not engaged in criticism of her community, which is normally afforded stronger protection.




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## Oliver v. Arnold

Right to remain silent (and not pledge)  
 On Campus Speech  
 3 F.4<sup>th</sup> 152 (5<sup>th</sup> Cir. June 29, 2021)

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## Oliver v. Arnold

- Tex. Educ. Code §25.082(b)(1)
- EC (LEGAL)
- Once a day – recite pledges of allegiance to US and Texas flags
- Students may be excused with written request by parent
- Mari Oliver alleged she had been excused by her parent but was still required to say the pledge and harassed for not participating
- Sued the district and various individuals alleging violations of the First Amendment, equal protection, and due process




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## Oliver v. Arnold - Allegations

- Summary Judgment granted on most claims but denied summary judgment for the sociology teacher who, according to Oliver, tried to compel her to transcribe the pledge of allegiance and retaliated against her when she refused.
- Students were asked to write the pledge's words from memory within a set time period. This assignment followed one where students would ponder the lyrics of Bruce Springsteen's "Born in the USA."



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## Oliver v. Arnold



- Zero and extended diatribe



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## Oliver v. Arnold – The Diatribe

*Your assignment yesterday was to write the Pledge. If you have a math class and that teacher gives you 10 problems to do, and you say you don't wanna do 'em, tell me what your grade is. It's a zero. And you have the option to do that, but what you've done is leave me no option but to give you a zero. And you can have all the beliefs, and resentment, and animosity that you want. But I made it clear yesterday: Writing it is not something you pledge. But again, but I know the sticker's gone—I used to have it, and it said "America, love it, or leave it." And if you can tell me two countries you'd rather go to[,] I will pay your way there if they're communist or socialist. Most of Europe is socialist and it's crumbling. Or it's communism. But if you ever come back you have to pay me twice what it cost me to send you there. You know there's a lot of things I complain about. So when it comes time in November I go vote, or I protest in writing, in legal. Those are the ways we do it in America. Where a country will crumble is when people coming into a country do not assimilate to that country. That doesn't mean you forget Day of the Dead, and whatever cultures[,] you maintain your language. That doesn't mean that. But you're not gonna drive on the left side of the road, and you're not gonna impose Sharia law. Because it's not. This. Country. But what is happening, and I can say it a lot more than you because I've lived longer. It's almost as America's assimilating to THOSE countries.*



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Arnold's speech continued, discussing the Cuban Missile Crisis and the Pope's opposition to the construction of a wall at the United States' southern border before digressing into a discussion of a local sex offender in the news.

*Okay, so keep you[r] house when the guy next to you has to put a sign out saying that he's a sex offender. And welcome him to the neighborhood. That's fine. And maybe that person needs that kind of welcome. And if you didn't hear in Houston, there was a—he was a Mariachi teacher. And the Principal also got removed. She hired him, but she was paying him out of a different account. Illegal. The guy had about five counts of molestation, lewd exposure to young people, and there he was working in the school system. So you can say "Well, he needs a second chance." Tell that to the people that he abused. Tell that to those kids.*



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## Oliver v. Arnold - Allegations

- In the days that followed, Arnold continued to exhibit hostility toward Oliver and treat her more harshly than other students as a result of her refusal to transcribe the Pledge, including by repeatedly moving her seat, intentionally calling her by the wrong name, and making disparaging comments about her accomplishments in extracurricular activities.
- Although Arnold denies treating Oliver differently than other students and maintains that he enforced his classroom rules evenly, the district court again found that these facts are genuinely disputed, and we thus must assume that Arnold singled Oliver out for hostile mistreatment as a result of her opposition to the Pledge assignment.



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## Oliver v. Arnold

- It is well established that students have the right to not participate in recital of the pledge of allegiance. *W. Va. State Bd of Educ. v. Barnette*, 318 U.S. 624 (1943).
- Freedom of speech under the First Amendment includes the rights to refrain from speaking and to be free from government retaliation for engaging in protected speech.
- A genuine issue of material fact as to whether sociology teacher required students to write words of pledge as part of an assignment was attempting to instill patriotic beliefs in students, precluding summary judgment.
- A genuine issue of material fact as to whether the teacher exhibited hostility towards student precluded summary judgment.



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## STUDENT FIRST AMENDMENT CASES 2021

### OFF CAMPUS SPEECH

- Profane speech is protected. *B. L. v. Mahanoy*
- Illegal drug use, alcohol – speech not protected. *Frederic v. Morse (2007) & Cheadle v. North Platte R-1 (2021)*
- Bullying not protected. *Hopkinton*

### ON CAMPUS SPEECH

- Right to remain silent; not pledge. *Oliver v. Arnold*



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