Is NC's Disorderly Conduct at Schools Statute Unconstitutionally Vague?

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I started wondering about that question after reading last month's decision by the Fourth Circuit Court of Appeals in *Carolina Youth Action Project v. Wilson*, 60 F.4th 770 (4th Cir. 2023) (summarized here). There, the court struck down two South Carolina state laws aimed in large part at regulating conduct and speech in and around schools. The laws at issue there are similar to our version of disorderly conduct by disrupting schools. This post examines the holding of *Carolina Youth Action Project* and its potential implications for North Carolina law.

The Challenged South Carolina Laws. One of the laws at issue in the case prohibited (among other things) "disorderly or boisterous" conduct in any public location, as well as the use of "obscene or profane" words in public or within hearing distance of any school or church. S.C. Code Ann. § 16-17-530(A)(1) & (2). The other challenged law prohibited "disturbing or interfering with" teachers or students at any school, as well as "obnoxious" behavior on school grounds. S.C. Code § 16-17-420(1). (Note, this second law was amended in 2018 to apply only to non-students, but this case concerned the earlier version of the law, in place from 2010 to 2018, which applied equally to students and non-students alike.)

When a student was accused of violating one of these laws, the matter was referred to the South Carolina Department of Juvenile Justice ("DJJ"). That agency would make a recommendation to the local prosecutor, who would ultimately decide if the case should move forward. Whether the case was prosecuted or not, records of the referrals were kept by both the prosecutor's office and DJJ. There were no small numbers of such referrals. More than 3,700 schoolchildren were referred for violations of the disorderly conduct law between 2014 and 2020. More than 9,500 schoolchildren were referred for violations of the disturbing schools law between 2010 and 2016.

The Lawsuit. After some initial procedural wrangling (including an earlier visit to the Fourth Circuit), plaintiffs obtained class certification to challenge the two laws. The class consisted of all school-aged children with a record of referral to DJJ (and any records of subsequent proceedings) under the disorderly conduct law or the disturbing school law before its amendment. The district court determined that the laws were unconstitutionally vague under the Fifth and Fourteenth Amendments and granted the plaintiffs relief at the summary judgment stage, prohibiting future enforcement of the laws against class members. Additionally, South Carolina was ordered to cease retaining any records relating to DJJ referrals, charges, adjudications, dispositions, or placements into custody stemming from enforcement of either law against class members during the relevant time frame, except as otherwise allowed under state expungement law. The South Carolina Attorney General appealed, asserting various arguments for reversal. A divided panel of the Fourth Circuit disagreed and affirmed the district court in full.

Void for Vagueness. A law is unconstitutionally vague if it fails to provide sufficient notice to an ordinary person of what conduct is prohibited under the law or if the law fails to establish standards preventing arbitrary or discriminatory enforcement. *Johnson v. U.S.*, 576 U.S. 591, 595 (2015). Criminal laws are evaluated for vagueness under a heightened standard of review. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1976). This heightened standard is of "particular force" when a criminal law targets speech. *Hynes v. Mayor & City Council of Oradell*, 425 U.S. 610, 620 (1976).

The Holding. Applying the above rules, the majority agreed with the district court that both laws were void for vagueness and therefore violated due process as applied to the class members. As to the first law (prohibiting "disorderly" conduct and "profane" language), the court found that it lacked objective standards by which an ordinary person could predict what conduct amounted to criminal conduct versus "garden-variety" misbehavior. In the court's words:

> The terms disorderly, boisterous, obscene, and profane do not explain the law's scope or limit the discretion of those charged with enforcing it. . . Based solely on the dictionary definitions of the statutory terms—particularly disorderly and boisterous—it is hard to escape the conclusion that any person passing by a schoolyard during recess is likely witnessing a large-scale crime scene. *Carolina Youth Action* Slip op. at 18 (cleaned up).

No state court decision had narrowed the reach of the disorderly conduct offense. Evidence before the district court showed that officers used "a glorified smell test" in deciding whether to bring charges under the law, resulting in arbitrary and unpredictable enforcement. Indeed, evidence before the court showed that Black schoolchildren were around seven times more likely to be charged with the offense than white children. According to the court: "The Constitution prohibits this type of inequitable, freewheeling approach." *Id*. at 21.

The disturbing schools law suffered the same fate. "It is hard to know where to begin with the vagueness problems with this statute. . . Even more than with the disorderly conduct law, the vagueness problem with the disturbing schools law stems from its utter failure to describe the specific conduct covered. . ." *Id*. at 24-25. The court observed that if the State chose to prosecute all "unnecessary disturbances" by children at school, the state courts would be overwhelmed by the cases. Like with the disorderly conduct offense, no state court decisions had limited the statute's reach, and it could not pass constitutional muster. According to the court:

> The Supreme Court has struck down statutes that tied criminal culpability to whether the defendant's conduct was annoying, or indecent—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. We do the same here. *Id*. at 26 (cleaned up).

Potential Impact on North Carolina. Compare the challenged South Carolina laws to North Carolina's G.S. 14-288.4(6). In pertinent part, our law makes it a misdemeanor to "disrupt," "disturb," or "interfere with" the teaching of students, or "to engage in conduct which disturbs the peace, order, or discipline" at any school. That language is close to the wording of the statutes found to be unconstitutionally subjective by the Fourth Circuit. But North Carolina's offense has some potentially significant differences to consider.

For one, North Carolina's disorderly conduct at school law requires an intentional act. One of the South Carolina laws had no mens rea element at all; the other required "willful or unnecessary" acts to qualify for a violation. This distinction may be meaningful for a court considering a vagueness challenge to the N.C. statute. The requirement that one intentionally cause a disturbance at school that disrupts the teaching of students arguably provides more guidance on what kind of conduct rises to the level of a crime (as opposed to mere willfulness or some other mens rea).

There's also a definition in G.S. 14-288.1 that seems relevant, at least at first glance. A "public disturbance" for purposes of North Carolina's disorderly conduct law (in all its iterations) is defined as "any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question." Reading that language into the (a)(6) version of the offense, disorderly conduct at school would be intentionally causing an annoying or disturbing act that exceeds the bounds of social toleration for a school in session, by disturbing, disrupting, or interfering with the teaching of students. That definition may not add much to the analysis here, considering the repetitive language used.

The most significant limiting principle for our disorderly conduct at schools offense comes from case law. Under *State v. Wiggins*, 272 N.C. 147 (1967), the State Supreme Court interpreted "interfere" and "disturb" as requiring a substantial interference with or disruption of the operation of the school (albeit under an earlier version of the statute). Much of the case law on the offense focuses on this issue—did the alleged disorderly conduct cause a substantial disruption? Here is a list of representative published cases on the point:

Cases Finding Insufficient Evidence of Substantial Disruption

- *In re: Eller*, 331 N.C. 714 (1992) (tapping radiator repeatedly causing class to be momentarily disrupted, and lunging at another student causing the other student to move away, was not a substantial disruption)
- *In re: S.M.*, 190 N.C. App. 579 (2008) (walking in hallway talking and giggling when the student should have been in class and fleeing when approached by school official resulting in classroom students and teachers briefly looking into the hallway was not a substantial disruption
- *State v. Humphreys*, 275 N.C. App. 788 (2020) (loudly cussing and fussing at officers in the school parking lot while a group of students walked by was not a substantial disruption)

- *In re: Grubb*, 103 N.C. App. 452 (1991) (loudly talking in class after being told to stop, causing a disruption of teaching, was not a substantial disruption)
- *In re: Brown*, 150 N.C. App. 127 (2002) (talking during a test, slamming the door loudly in the teacher's face, and begging not to be sent to the office was not a substantial disruption despite requiring the teacher to be absent from class for several minutes)

Cases Finding Sufficient Evidence of Substantial Disruption

- *State v. Wiggins*, 272 N.C. 147 (1967) (silently picketing outside in front of the school causing students inside to be distracted and requiring school officials to redirect the pupils was a substantial disruption)
- *In re: M.G.*, 156 N.C. App. 414 (2003) (yelling "shut the f**k up" to a group of students in the hallway while classes were in session, requiring teacher to take the student for detention and explain what happened was a substantial disruption)
- *State v. Midgett*, 8 N.C. App. 230 (1970) (taking over school office by force was a substantial disruption)
- *In re: Pineault*, 152 N.C. App. 196 (2002) (loudly yelling "f**k you" in class requiring the teacher to leave the classroom to take the student to detention and being so belligerent as to require the presence of multiple school officials was a substantial disruption)
- *In re: M.J.G.*, 234 N.C. App. 350 (2014) (arguing with the teacher in front of the student body assembled in the school gym, requiring removal from the gym, and subsequent shouting at teachers in the hallway requiring several school officials, was a substantial disruption)

While some of those cases can been seen as extremes of a spectrum—taking over the school office, for instance, clearly qualifies as disorderly conduct at school, while talking loudly in class does not—the substantial disruption test may not be enough to save the law from a vagueness challenge. Recall that a law is unconstitutionally vague if it fails to provide fair notice of the prohibited conduct to an ordinary person *or* if it permits arbitrary or discriminatory enforcement. Either prong is sufficient. The circumstances in some of the cases are difficult to distinguish, which would be an important consideration under the notice prong.

According to North Carolina's DJJ annual reports, disorderly conduct at school was the second most commonly charged school-based offense in 2018, 2019, and 2020. There were over 1,100 complaints for the offense in 2018, over 1,100 in 2019, and over 500 in 2020 and 2021 (presumably lower due to school closures those years). Those numbers over time are comparable to the number of children being charged under the South Carolina laws. The demographic breakdown of students charged with the offense does not appear to be publicly available. Depending on those details, along with evidence of how different officers and jurisdictions charge the offense, there may be an argument that the law has led to arbitrary enforcement, even if the law gives the average student fair notice of what conduct is prohibited. The *Carolina Youth Action Project* court seemed to give those data points significant weight in its analysis, and such data

could play a central role in any similar challenge to N.C.'s law.

Looping back to our Supreme Court's substantial interruption test in *Wiggins* for a final point, the case is notable as the last (and apparently only) time that a vagueness challenge was brought for this offense. (Other parts of the disorderly conduct law have been challenged as vague at various times, sometimes successfully, but *Wiggins* was the only one I saw on this part of the law.) Again, that was under an earlier, now-repealed version of the statute, but the challenge focused in large part on the meaning of the word "disturb," which remains in our current statute. The court was dismissive of the challenge and ultimately ruled against the defendants:

> It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words ['disturb' and 'interrupt'] as they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by 'men of common intelligence.' Nevertheless, we treat this contention as having been seriously made. *Wiggins* at 153.

Constitutional law regarding free speech as well as vagueness has developed significantly since *Wiggins*. It is also impossible to ignore the context of the day then: North Carolina was still in the process of fully desegregating its schools, the *Wiggins* defendants were charged and convicted for protesting a lack of adequate desegregation, and school segregation was still very much a live political issue in the state. I have doubts about whether a similar result for silent picketing of a school would pass constitutional muster today for more reasons than one. Depending on the details, a vagueness challenge might also shake out differently.

Readers, I would be interested to hear about your experiences with disorderly conduct at school. What is your sense of how it is charged in your district? Do the charges reflect a clear line between mere school misconduct from criminal conduct? If you're inclined to share, or if you have any questions or concerns, shoot me an email at dixon@sog.unc.edu.