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How High Court Clarified Off-Campus Student Speech Rights

By **Joseph Kenney and Amanda Harding** (July 6, 2021, 5:55 PM EDT)

More than 50 years ago in *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court held in 1969 that students retain their First Amendment rights while on school grounds.

The court, however, clarified that students' First Amendment rights are not as sweeping as those of a regular citizen and that schools may regulate student speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." [1]

Since the landmark decision in *Tinker*, the Supreme Court has carved out three additional exceptions to students' First Amendment rights.

First, in the 1986 Supreme Court case of *Bethel School District No. 403 v. Fraser*, the court held that schools can constitutionally prohibit students' use of vulgar and offensive language.

Two years later, in the 1988 case of *Hazelwood School District v. Kuhlmeier*, the Supreme Court found a school does not violate the First Amendment by exercising editorial control over student speech, so long as their actions are "reasonably related to legitimate pedagogical concerns." [2]

Finally, and most recently in the 2007 case of *Morse v. Frederick*, the Supreme Court held schools can regulate speech that is characterized as promoting illegal drug use.

When the court decided these cases, it could not anticipate the ways in which technology would develop and complicate students' First Amendment rights.

Prior to 2007, when the last of these four cases was decided, social media sites like Facebook and Twitter were still in their infancy. Others, such as Snapchat and TikTok, were not yet invented.

Now, social media is a popular way for students to interact with one another outside of school.

This has raised questions about *Tinker's* applicability to off-campus speech. Lower courts have approached the issue of if and when schools can regulate off-campus student speech in varied ways.

The Supreme Court's recent decision in *Mahanoy Area School District v. B.L.* will now provide lower courts and schools alike with some clarity on how to approach off-campus speech.

The Facts of Mahanoy

As a high school freshman and sophomore, B.L. was offered a spot on the Mahanoy Area High School's junior varsity cheerleading squad rather than its varsity cheerleading squad.

Frustrated with her place on the team, and while off campus, B.L. posted a Snapchat story of her and



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her friend holding up their middle fingers with the caption "Fuck school fuck softball fuck cheer fuck everything." [3] The image was allegedly visible to about 250 people, some of whom were students at Mahanoy Area High School.

Once school officials became aware of B.L.'s Snapchat, they suspended her from the cheerleading team for one year.

After unsuccessfully appealing the suspension to the school board, B.L. sued the Mahanoy Area School District. Both the U.S. District Court for the Middle District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit ruled in favor of B.L., finding the school district violated B.L.'s First Amendment rights by suspending her as a result of her off-campus speech.

In its opinion, the Third Circuit considered other circuit court approaches but ultimately decided to "forge [its] own path." [4]

In doing so, the court rendered the broadest circuit court opinion about off-campus student speech. It concluded schools cannot regulate student speech that occurs outside of school-sponsored activities. The school district subsequently filed petition for a writ of certiorari to the Supreme Court.

The Supreme Court's Opinion

On appeal, the question the court faced was whether Tinker applies to off-campus student speech.

The court issued an 8-1 decision in favor of B.L. Although the court affirmed the Third Circuit's holding, it disagreed with the Third Circuit that the special characteristics of the school environment always disappear [5] when the speech occurs off campus.

The court recognized that there are some circumstances where a school's regulatory interests apply to off-campus speech. Some examples of this are:

serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers or participation in other online school activities; and breaches of school security devices, including material maintained within school computers. [6]

Despite providing this list of examples, the court declined to provide an exhaustive list of what off-campus activities may apply. It noted situations may vary "depending upon a student's age, the nature of the school's off-campus activity or the impact upon the school itself." [7]

The court did, however, provide three features of off-campus speech that often diminish a school's special interests, making it less likely that the school can constitutionally regulate the student's off-campus speech:

1. Under the doctrine of in loco parentis, school officials are treated as the student's parents in situations where parents are not there to protect, guide or discipline. When a student is off campus, however, speech normally falls within the parent's responsibility.
2. Courts should be skeptical of a school regulating a student's off-campus speech because coupling this with regulation of on-campus speech means students are subject to around-the-clock regulation.
3. A school has an interest in protecting unpopular student speech to ensure students understand how to respectfully engage and disagree with one another.

The court then turned to B.L.'s case. It began by noting that although her speech was vulgar, it was not threatening or obscene.

Instead, the speech was criticizing the team, the coaches and the school; were B.L. an adult, this speech would warrant strong First Amendment protection.

Moreover, B.L. posted while off campus, outside of school hours and on her personal phone, all of which placed her far outside of the school district's responsibility. These facts strongly diminished the

school district's interest in regulating the speech.

Nevertheless, the court recognized the school district did have an interest in prohibiting B.L. from using vulgar language when criticizing a school team or its coaches. It broke down this interest into three parts:

1. The school's interest in teaching good manners; and
2. The school's interest in preventing a disruption within the bounds of a school-sponsored activity; and
3. The school's interest in preserving team morale.

Regarding the first point, the court found although B.L.'s language in the Snapchat was vulgar, it was not obscene or threatening, but rather a form of criticism.

Thus, B.L.'s First Amendment rights outweighed the school district's interest in teaching good manners.

To the second point, the school district did not present any significant evidence of a substantial disruption within the bounds of a school-sponsored activity. The court emphasized "a mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint"[8] is insufficient to justify regulation of speech.

Regarding the third point, the school district also failed to present any compelling evidence that B.L.'s Snapchat would disrupt team morale to the point that it could create a substantial disruption or interference.

Thus, because B.L.'s First Amendment rights outweighed the school district's interests, the suspension was deemed unconstitutional.

The Future of Off-Campus Student Speech Cases

The Supreme Court decided in favor of B.L. not solely because the speech occurred off campus, but also because it was neither threatening nor disruptive to the school environment.

The opinion explicitly disagreed with the Third Circuit's finding that schools can never regulate off-campus student speech. In other words, this case leaves the door open for schools constitutionally to regulate more extreme forms of off-campus speech.

Given the way students today communicate, it makes sense that the court developed a flexible approach rather than adhering to a strict distinction between on- and off-campus speech. Online learning, social media and smartphones have blurred the geographical boundaries of the school environment and off-campus activities.

Technology allows students to remain constantly connected outside the school building. When a student comments, likes, posts or shares something on social media, their peers can view and interact with the content.

In many instances, these interactions serve as an extension of the school environment. Thus, it is much more likely that online expression, as opposed to traditional forms of expression, will enter and have an impact upon the school environment.

The ubiquitous nature of online speech means the line between on-campus and off-campus speech becomes arbitrary. If the court had adopted the Third Circuit's strict standard, it would be difficult for schools to determine what speech occurred off campus versus on campus.

This is especially true given that the COVID-19 pandemic altered the way schools operate and forced many students to participate in remote learning. Even as our world begins to return to in person activities, the pandemic likely increased the amount schools will utilize technology.

While it will ultimately be up to future cases to clarify when regulation is constitutionally permissible, the court did provide some examples of when it may be reasonable for a school to regulate off-campus student speech.

One situation the court explicitly mentioned was severe bullying or harassment. This situation is most likely to arise in the context of cyberbullying rather than in the context of off campus, in-person bullying. Online communication circulates quickly, can be permanent and can be accessed anywhere.

In other words, cyberspeech can enter into the school environment more easily than traditional forms of expression.

The pervasive nature of social media creates a strong interest for schools to regulate off-campus cyberbullying.

First, part of a school's responsibility is to protect its students and teach appropriate online behavior. By punishing students who bully or harass others online, a school can maintain a safe environment for students and also demonstrate to any bullies that their behavior will not be tolerated.

Second, cyberbullying can cause a disruption to the school environment because victims experience a variety of negative consequences such as anxiety, depression and low self-esteem.[9] As a result, those who are cyberbullied may struggle academically, feel distracted in class or miss school altogether.

In fact, a survey by the Cyberbullying Research Center of 2.75 million students found roughly 300,000 stayed home many times due to cyberbullying.[10] Thus, although off campus, peer-to-peer cyberbullying that harms the victim's mental health and educational experience may justify school intervention.

Despite schools having a strong interest in regulating instances of off-campus cyberbullying, the issue nevertheless remains tricky.

While B.L.'s case was a fairly straightforward example of when schools cannot regulate off-campus student speech, other scenarios may toe the line and place courts in more difficult positions.

For instance, imagine the language in B.L.'s Snapchat had threatened a cheerleading coach or student. Despite still occurring off campus, the court would have likely sided with the school given that this speech would cause a substantial disruption in the school by causing the targeted individual to feel unsafe within the school building.

Similarly, the outcome of the case may have been different had B.L.'s Snapchat been posted while in school. This would liken the case to Fraser and heighten the school district's interest in prohibiting students from using vulgar or offensive language in school.

There will undoubtedly be situations where off-campus speech is more egregious than B.L.'s. Only time will tell how courts draw the distinction between what off-campus expression schools may and may not regulate.

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[1] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

[2] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

[3] *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 175 (2020).

[4] *Id.* at 189.

[5] *Id.*

[6] *Id.* at 6.

[7] *Id.*

[8] *Id.* at 10 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

[9] *Effects of Bullying on Mental Health*, Stopbullying.gov (Oct. 25, 2019), <https://www.stopbullying.gov/blog/2019/10/25/effects-bullying-mental-health>.

[10] Justin W. Patchin, *Millions of Students Skip School Each Year Because of Bullying*, Cyberbullying Res. Ctr. (Jan. 3, 2017), <https://cyberbullying.org/millions-students-skip-school-year-bullying>.

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