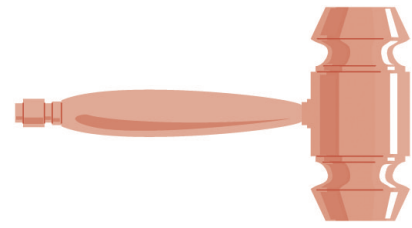


# Legal Corner



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## Regulating Off-Campus Student Speech – *Mahanoy Area School District v. B.L.*



As most school administrators are no doubt aware, on June 23, 2021, in *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 141 S. Ct. 2038 (2021), the U.S. Supreme Court ruled by an 8-1 decision that under certain circumstances, schools may regulate student speech that originates off campus.

Owing to the national media coverage, the facts of the case itself are fairly well known. B.L.,

a 14-year-old student at Mahanoy Area High School, failed to make the school's varsity cheerleading squad, then expressed her disappointment and frustration on Snapchat by posting a photo of herself with her middle finger raised, along with the caption "F\*\*\*school f\*\*\* softball f\*\*\* cheer f\*\*\* everything." Although the post was only visible for 24 hours and only shared with 250 of B.L.'s friends, word of the Snapchat post traveled through the school the following week and the school's coaches saw screen shots of the post. Citing that her conduct violated team and school rules, B.L. was suspended from the junior varsity cheerleading squad for the upcoming year.

B.L. and her parents, represented by the American Civil Liberties Union (ACLU), sued the school district in federal court, arguing that punishing B.L. for her speech violated the First Amendment. The U.S. District Court for the Middle District of Pennsylvania granted an injunction ordering the school to reinstate B.L. to the cheerleading team. Relying on *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)<sup>1</sup>, the District Court held that B.L.'s punishment violated the First Amendment because her Snapchat posts had not caused substantial disruption at the school. The District Court awarded B.L. one dollar in nominal damages.

On appeal, the Third Circuit affirmed the judgment of the District Court, but specifically reasoned that *Tinker* did not apply because schools had no ability to regulate student speech occurring off campus. In other words, school districts had no ability to discipline off-campus student speech, even if it caused a disruption to school.

The school district sought review by the U.S. Supreme Court. The sole issue framed for the Supreme Court was

whether *Tinker* applies to student speech that occurs off campus. By an 8-1 vote, the Supreme Court affirmed the Third Circuit's ruling in favor of B.L. that her free speech rights were violated in this case. However, all nine members of the court specifically disapproved the Third Circuit's analysis and ruled that *Tinker* applies to off-campus speech. This means that a student can be disciplined for his or her off-campus speech if it causes a disruption at school.

As to this issue, Justice Breyer stated that in *Tinker*, the Supreme Court indicated that schools have a special interest in regulating on-campus student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Moreover, Breyer reasoned that the special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Contrary to the Third Circuit, Breyer asserted, a school may have substantial interest in regulating a variety of off-campus conduct, such as severe bullying, threats aimed at students or teachers, the failure to follow rules concerning lessons, the writing of papers, the use of computers, participation in on-line school activities or hacking into school computers.

Applying *Tinker*, the Supreme Court ultimately held that B.L.'s comments were still protected by the First Amendment's freedom of speech. As such, the court held that the school violated B.L.'s First Amendment rights when it suspended her from the junior varsity cheerleading squad.

The Supreme Court's decision provides several insights for school administrators addressing off-campus speech.

- First, according to the Supreme Court, a school's interests in off campus speech normally will be viewed with more skepticism than that of on-campus speech. Justice Breyer reasoned that the school had a diminished interest in regulating and punishing B.L.'s off-campus speech. Justice Breyer expressed that there were three characteristics of off-campus speech that often, but not always, mitigate against a school district having an interest in regulating it, thus causing courts to be more skeptical of a school's efforts to regulate such speech, and diminishing the leeway the First Amendment grants to schools in light of their special characteristics.<sup>2</sup> As Justice Breyer noted:

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this:

*Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.*

*Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021). (Emphasis added)

- Second, applying *Tinker*, the Supreme Court determined that B.L.'s off-campus posts were entitled to First Amendment protection because her statements reflected criticism of the rules of the community and her message did not involve features that would place it outside the First Amendment's ordinary protection. As noted by Justice Breyer: "Consider B.L.'s speech. Putting aside the vulgar language, the listener would hear criticism of the team, the team's coaches, and the school – in a word or two, criticism of the rules of a community of which B.L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection." *Id.*, 141 S. Ct. at 2046-2047. Justice Breyer also opined that B.L.'s words, while crude, did not amount to fighting words, and while B.L. used vulgarity, her speech was not obscene as that term is understood by the court. Justice Breyer noted that B.L. did not identify the school in her posts or target any member of the school community.
- Third, the court also noted that B.L. transmitted her speech through a personal cellphone to an audience consisting of her private circle of Snapchat friends. Weighed against B.L.'s First Amendment rights, the court reasoned that the school's interests were weakened considerably by the fact that B.L. spoke outside the school on her own time and under circumstances where the school did not stand *in loco parentis*.
- Fourth, addressing the school's need to prevent disruption, the Supreme Court found no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. Specifically, the court held that the school's interest in preventing a disruption was not sup-

ported by the record, which showed that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B.L.'s Snapchats. *Id.* Likewise, the court found little to suggest a substantial interference in, or disruption to, the school's efforts to maintain cohesion or morale on the school cheerleading squad. Thus, according to the court, the facts did not satisfy the *Tinker* standard.

The broad takeaway from the above discussion is that schools may still continue to regulate and discipline student speech even when it is off campus, as long as it fits within the narrow framework established under *Tinker* and other relevant cases or statutes but that such regulation and discipline of off-campus speech will be met with some skepticism. Thus, schools may (albeit cautiously) address such off-campus speech that is reasonably foreseeable to be disruptive in the school environment, where a sufficient nexus to school and education can be established, and where the speech is directed at the school community.

What the Supreme Court decision did not address with any particularity was whether and to what extent a school district could have rules regulating off campus speech or behavior and how those rules must be written in order to be effective. One of the arguments made by the school district was that B.L. had waived her First Amendment rights to post the "f\*\*\* cheer" snapchat by agreeing to the school and team rules cited by the school. The Third Circuit disagreed. While B.L. argued that any such insistence of a waiver of such speech rights would be unconstitutional, the Third Circuit did note that there are a wide range of extra-curricular activities and student roles that may make conditions on speech more or less connected to the needs of the program. As noted by the Third Circuit:

All rights, including free speech rights, can be waived. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-43, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). But waivers “must be voluntary, knowing, ... intelligent, ... [and] established by ‘clear’ and ‘compelling’ evidence,” *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988) (citation omitted), and courts must “indulge in every reasonable presumption against waiver,” *id.* at 1095 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Applying those standards, we conclude that B.L.’s snap does not clearly “fall within the scope,” *United States v. Wilson*, 707 F.3d 412, 414 (3d Cir. 2013) (citation omitted), of any of the rules on which the School District relies. *B.L. by & through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 192–93 (3d Cir. 2020) *aff’d*, 141 S. Ct. 2038 (2021).

In this instance, the Third Circuit noted that, as written, the rules cited by the school to have been violated by B.L. either did not expressly apply to off campus activities or adequately cover the type of behavior at issue or provide clear examples of the type of behavior that would violate the rules. The court found that the language was too obscure and thus, too dependent upon the whims of school officials to give rise to a knowing and voluntary waiver of rights to speak as she did. The Third Circuit thus held that B.L.’s snap was not covered by any of the rules relied upon by the school district and rejected the contention that B.L. waived her First Amendment rights.

To this last point, as expressed by the Third Circuit, to the extent that a school establishes codes of conduct in general or as to extracurricular activities in particular, such rules must be reasonably related to the legitimate needs and purposes of the school. Also, the activity should be written in a manner clearly outlining what, if any, rights students are expected to forfeit as a result of participation, and include the express conduct forbidden by such rules (as well as the applicable time, place and manner). In ad-

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dition to creating appropriate rules and using clear and unmistakable language, schools must also track and record any explanation provided by the administration or coaches and maintain records of any review and consent by the students/parents.

School administrators are always under heavy scrutiny in exercising their responsibilities in the governance of their schools and extracurricular programs. This is all the more reason that when enforcing student handbooks and codes of conduct in matters involving off-campus conduct, it is imperative for school administrators to consult with central administration and solicitors to ensure proper action is undertaken in such instances.

#### End Notes

<sup>1</sup>In 1969, the United States Supreme Court in *Tinker* had held that public school officials may regulate student speech that would “materially and substantially disrupt the work and discipline of the school.”

<sup>2</sup>Justice Breyer identified those three characteristics as follows: First, as the school does not usually stand in loco parentis when a student speaks off-campus, a student’s off-campus speech will generally be the responsibility of that student’s parents. Second, from a student’s perspective, regulation of off campus speech would cover virtually everything that a student says or does outside of school. Third, schools have an interest in protecting unpopular speech by its students. *Id.*

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