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The First Amendment and Student Speech: *Mahanoy Area School District* v. *B.L.*

In June 2021, the United States Supreme Court issued an 8-1 ruling in *Mahanoy Area School District* v. *B.L. by and through Levy*, 141 S.Ct. 2038 (2021), holding that the suspension by a public high school of a student from the school's cheerleading team, after the student sent a vulgar social-media message disparaging the team while she was off campus, violated the First Amendment. In doing so, the Supreme Court held that, although public schools may have an interest in regulating student speech, this interest is diminished when the speech occurs off campus. The Court provided much-needed guidance to lower courts about how to evaluate restrictions on off-campus student speech under the First Amendment.

I. Background

In 2017, B.L.[1] was a sophomore at Mahanoy Area High School in Pennsylvania. B.L. by Levy v. Mahanoy Area School District, 289 F. Supp. 3d 607, 610 (M.D. Penn. 2017). After she failed to make the varsity cheerleading team, B.L. posted a photo to Snapchat showing her and a friend lifting their middle fingers with the caption, "fuck school fuck softball fuck cheer fuck everything." Id. The message was posted on a weekend while B.L. was off campus. Id. B.L. made her post available for only 24 hours and made it accessible only to B.L.'s circle of friends. However, one of the recipients took a screenshot of B.L.'s post and distributed it more widely. Five days later, a cheerleading coach pulled B.L. out of class to inform her that, in response to her social-media post, she had been suspended from the school's junior-varsity cheerleading team for violating team rules requiring cheerleaders to "have respect for your school, coaches, teachers, and other cheerleaders and teams," and to avoid using "foul language and inappropriate gestures" or placing "any negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet." B.L. by and through Levy v. Mahanoy Area School District, 376 F. Supp. 3d 429, 432 (M.D. Penn. 2019).

B.L.'s parents made numerous attempts to have the school's decision overturned, but the school refused to reinstate her to the team. B.L. by Levy v. Mahanoy Area School District, 289 F. Supp. 3d at 610. School officials stated that the school had the right to discipline B.L. for "disrespecting the school," and that the coaches had determined that B.L.'s social-media post was "demeaning to [a cheerleading coach], the school, and the rest of the cheerleaders." Id. After the school refused to reconsider its decision, B.L. filed an action in federal court, alleging that the school had violated her First Amendment rights. Id. at 611. The district court granted B.L.'s motion for a preliminary injunction and ordered the school to reinstate her to the junior-varsity cheerleading team. Id. at 616. The district court also granted B.L.'s motion for summary judgment, awarded her attorneys' fees and nominal damages, and ordered the school to expunge her disciplinary record. B.L. by and through Levy v. Mahanoy Area School District, 964 F.3d 170, 175 (3d Cir. 2020). In its ruling, the district court relied on Tinker v. Des Moines Independent

[1] Because she was a minor, the Court abbreviated B.L.'s name.

Community School District, 393 U.S. 503 (1969) — which held that a public school's prohibition on wearing black armbands to school to protest the Vietnam War violated students' First Amendment rights because the protest did not "materially and substantially interfere" with the operation of the school — and found that B.L.'s social-media post had not caused "substantial disruption" at her school and was thus protected by the First Amendment. Id. at 176.

The U.S. Court of Appeals for the Third Circuit affirmed, but rejected the district court's reasoning that Tinker applied. Id. at 189. Specifically, the Third Circuit reasoned that the Tinker standard does not apply at all to "off-campus speech," which the court defined as "speech that is outside school owned, operated, or supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Id. Because B.L.'s speech took place off campus, the Third Circuit concluded that the school had no interest in disciplining B.L. for her speech. Id. at 191.

II. The Supreme Court's Opinion

The school appealed, arguing that the *Tinker* standard should apply to off-campus speech. 141 S.Ct. at 2044. Although the Court agreed that the *Tinker* standard may apply to certain off-campus speech, the Court held that the school's suspension of B.L. had violated the First Amendment because the school's interest in regulating B.L.'s speech was insufficient to overcome her interest in free expression. *Id.* at 2045.

The Court explained that "the special characteristics that give schools . . . license to regulate student speech" do not "always disappear when a school regulates speech that takes place off campus." *Id.* Indeed, the Court explained that a school's interest in regulating student speech remains significant in many off-campus contexts, including (i) "serious or severe bullying or harassment targeting particular individuals"; (ii) "threats aimed at teachers or other students"; (iii) "the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities"; and (iv) "breaches of school security devices, including material maintained within school computers." *Id.*

The Court declined to "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 need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community." *Id.* However, the Court described "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate off-campus speech," noting that these "features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway." *Id.* at 2046.

First, a school will "rarely stand *in loco parentis*"[2] in relation to off-campus speech. *Id.* The Court explained that "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." *Id.*

Second, the Court explained that "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day." *Id.* This means that "courts must be more skeptical of a school's efforts to regulate off-campus speech" because "doing so may mean [that] the student cannot engage in that kind of speech at all." *Id.*

Finally, the Court stated that "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." *Id.* The Court explained that "America's public schools are

[2] The "doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." *Id.*

the nurseries of democracy," and that "representative democracy only works if we protect the 'marketplace of ideas.'" *Id.* Because unpopular ideas are in greater need of protection than popular ideas, "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

The Court concluded that "these three features of much off-campus speech mean that the leeway the First Amendment grants to schools" under *Tinker* "in light of their special characteristics is diminished." *Id.* However, the Court "le[ft] for future cases to decide where, when, and how these features mean [that] the speaker's off-campus location will make the critical difference." *Id.*

The Court applied these factors to B.L.'s speech and held that the school's interest in regulating B.L.'s speech could not overcome her interest in free expression. *Id.* at 2048. As an initial matter, the Court explained that B.L. "uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection." *Id.* at 2047. In addition, B.L.'s "posts appeared outside of school hours from a location outside the school," and she "did not identify the school in her posts or target any member of the school community with vulgar or abusive language." *Id.* Moreover, B.L. "transmitted her speech through a personal cellphone, to an audience consisting of her private circle of . . . friends." *Id.* Taken together, these factors "diminish[ed] the school's interest in punishing B.L.'s utterance." *Id.*

The Court next analyzed the school's interest in "prohibiting students from using vulgar language to criticize a school team or its coaches," which the Court examined in three parts. *Id.* First, the Court "consider[ed] the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community." *Id.* The Court concluded that the school's interest in "teaching manners" could not overcome B.L.'s interest in free expression because her speech took place off campus "under circumstances where the school did not stand *in loco parentis*." *Id.*

Second, the Court analyzed the school's interest in preventing disruption "within the bounds of a school-sponsored extracurricular activity," but found "no evidence in the record of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action" under *Tinker*. *Id.* at 2047-48.

Finally, the Court examined the school's interest in maintaining the morale of the cheerleading team. *Id.* Apart from one coach's assertion that "there was negativity put out there" by B.L.'s social-media post, the Court found little evidence of a decline in team morale that "could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion." *Id.*

The Court concluded that "[i]t might be tempting to dismiss B.L.'s words as unworthy of . . . robust First Amendment protection[]," but "sometimes it is necessary to protect the superfluous in order to preserve the necessary." *Id*.

III. Conclusion

Although public schools may have an interest in regulating student speech, the Court's decision makes clear that this interest is diminished when the speech occurs off campus. However, the Court left for future cases to define the proper balance between the First Amendment rights of students and the interests of schools in preventing substantial disruption to learning-related activities and protecting members of the school community.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor (Associate) at 212.701.3445 or jmacgregor@cahill.com; or Lauren Hoffman (Associate) at 212.701.3064 or lhoffman@cahill.com; or email publications@cahill.com.

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