School Regulation of Off-Campus Speech: *Mahanoy Area School Dist. v. B. L.*

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On June 23, 2021, the U.S. Supreme Court issued an 8-1 decision in *Mahanoy Area School Dist. v. B. L.* affirming that a public high school violated a student's First Amendment speech rights when it suspended her from a cheerleading squad for one year based on Snapchat posts created off-campus on her personal smartphone. This memorandum provides an overview of this case, including its facts and procedural history, analyzes the majority opinion, and considers its possible impact on college and university campuses.

While the decision does not directly address the First Amendment rights of college and university students, it outlines the Constitutional balance that college officials will consider when regulating student speech off-campus. Schools must balance their interest in protecting the class environment from substantial disruption with their interest in promoting student speech, even "unpopular expression."

Importantly, the Court holds that a public school generally has the authority to regulate student speech that occurs off-campus and through the internet where it causes a substantial disruption, threatens harm to a teacher or fellow student, or constitutes harassment based on a protected category. But a public school's off-campus jurisdiction is not limitless, and it cannot discipline a student for "pure speech" that is unpopular or that others find vulgar.

Overview

As Court observers expected, this decision is both groundbreaking and quite limited: important, because it is the Supreme Court's first attempt to examine the boundaries of a public school's disciplinary authority over student speech occurring off-campus and through the internet; yet also limited, because the Court has expressly declined to create a broad rule in favor of a set of principles for regulating off-campus speech.

In the Court's view, several features of off-campus speech "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway" present within the schoolhouse gates, including the way off-campus regulation blurs the lines between home and school, interferes with parental authority and expectations, and undermines the school's own interest in protecting unpopular expression.

The case arises from a public high school and does not directly consider the rights of postsecondary students. In a footnote within his concurrence, Justice Alito notes that he does not understand *Mahanoy* to apply to college and university students, whose "age, independence, and living arrangements" distinguish their speech rights from K-12 learners.

Still, this decision is important for postsecondary institutions in making clear that a college or university can, in appropriate cases, regulate off-campus student speech, including

speech occurring through social media. The Court could have drawn a line here between on and off-campus speech, but did not. The institution would have to show, among other possibilities, that the speech causes substantial disruption to the classroom, invades the rights of others, targets specific individuals with threats, or amounts to harassment on the basis of sex, race, or other protected category. This holding is consistent with case precedent, most campus codes of conduct, and the recently issued Title IX regulations, which consider some forms of off-campus and online speech to fall within a school's jurisdiction.

But the opinion also reinforces that most student speech in the public K-12 or college-level setting enjoys First Amendment protections. In particular, the Court identifies a student's criticism of school officials as "pure speech" entitled to the strong First Amendment protections, even where vulgarity is used. The decision, then, is worth considering both for what it permits a college or university to regulate as for what it defines as outside the institution's control.

Facts and Procedural History

B.L., a public school student at Mahanoy Area High School, tried out for a position on the school's varsity cheerleading team at the end of her freshman year. B.L. also tried out for a private softball team as a right fielder. After the try-out process, B.L. was informed that she made the school's junior varsity cheerleading team, instead of the school's varsity cheerleading team. B.L. also found out that she was not offered her preferred right fielder position on the private softball team.

The following weekend, B.L. visited the Cocoa Hut, a local convenience store, with a friend. At the Cocoa Hut, B.L. posted two photos on her Snapchat story, which gave approximately 250 of B.L.'s Snapchat "friends" the opportunity to view the two images. The first Snapchat image B.L. posted showed B.L and her friend raising their middle fingers to the camera. The caption of the photo contained explicit messages directed toward the school, cheer squad, and softball team. The second Snapchat image contained an upside-down smiley-face emoji and the caption, "[l]ove how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else[.]" Other Mahanoy Area High School students used a separate phone to take pictures of the two images posted on B.L.'s Snapchat story. The students shared the Snapchat images with other members of the cheerleading squad and the cheerleading squad coach. Throughout the following week, several members of the cheerleading squad, and other students at the high school, appeared visibly upset about B.L.'s Snapchat posts. A discussion about the Snapchat images ensued in an Algebra class taught by one of the cheerleading coaches.

After discussing the issue with Mahanoy Area High School's principal, the cheerleading coaches decided that B.L.'s Snapchat images violated team and school rules because the images "used profanity in connection with a school extracurricular activity." The cheerleading coaches suspended B.L. from the junior varsity cheerleading squad for the upcoming school year. B.L. made several apologies to school officials, but her suspension was subsequently confirmed by the school's athletic director, the school's principal, the superintendent of the school district, and the school board.

Following the failure to have the suspension reversed, B.L. and her parents sought relief in federal court, arguing that punishing B.L. for her speech was a violation of her First Amendment rights and did not meet the standard of substantial disruption defined in *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969). A Pennsylvania district court granted a temporary restraining order and an injunction then ordered the school to reinstate B.L. on the cheerleading team. Applying *Tinker*, the district court granted B.L.'s subsequent motion for summary judgment because her post had not caused a substantial disruption in school. Upon granting summary judgment, the district court awarded B.L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.

The school appealed, and the Third Circuit affirmed. Of note, the Third Circuit reasoned that *Tinker* did not apply because schools had no special license to regulate student off campus speech, where they defined off-campus speech as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." A concurring member of the panel agreed with the result but stated "the school had not sufficiently justified disciplining B.L." because her speech was not substantially disruptive and therefore there was no need to discuss whether *Tinker* applied.

The Supreme Court granted certiorari on the issue of "whether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus."

Analysis

The Supreme Court issued an 8-1 decision in favor of B.L., with Justice Breyer writing the majority opinion and Justice Alito publishing a concurrence joined by Justice Gorsuch. Justice Thomas wrote in dissent. The majority affirmed that the suspension of the cheerleader for her Snapchat post was a violation of her First Amendment right to free speech. Diverging from the Third Circuit's application of *Tinker* while affirming its outcome, the Court held that the school's "additional license" to regulate speech does not always disappear when the speech takes place off-campus because a school's regulatory interests remain significant in some off-campus circumstances.

After restating its familiar holding from *Tinker* that a student's free speech rights are not suspended at the "school house gate," the majority listed several situations where a public school has "special leeway" to regulate speech occurring under its supervision, including speech causing substantial disruption. The heart of its analysis, however, was whether a school's "regulatory interests" extend off-campus.

The Court declined to define a set of off-campus locations and activities that would always fall within a public school's regulatory license. "Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself."

Rather than offer a broad First Amendment ruling that would prohibit the application of *Tinker's* substantial disruption standard to off-campus speech, the Court provided three principles cautioning schools against overreaching their authority. The first is that off-campus speech regulation may exceed the *in loco parentis* authority of school officials by entering into spaces ordinarily controlled by parents or guardians. The second, related, principle is that off-campus speech regulations potentially put a student under their school's watch for the full 24 hours of their day, rather than only the time they are engaged in school programs. And the third principle is that schools must balance any regulatory interests against their "interest in protecting a student's unpopular expression, especially when the expression takes place off campus." The Court takes seriously that public schools are the "nurseries of democracy" that must protect unpopular ideas, including those that challenge authority.

The Court then applied these principles to the cheerleader's suspension, drawing upon the case as an example of overreach. Substantively, she didn't use "fighting words" but "the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection." She posted outside of school hours, at an off-campus location, and on a personal smartphone to a private audience of her Snapchat friends. And the post itself did not target an individual member of the school community with vulgar or abusive language, which diminished the school's interest in punishing her for the post. While acknowledging the school's interest in punishing vulgar speech, it found this interest outweighed by the facts that the student spoke outside school on her own time in a location where the school wouldn't ordinarily act *in loco parentis*, that the post caused no "substantial disruption" beyond 5 to 10 minutes of discussion in one classroom over a few days, and that the post did not seriously impact team morale.

Impact on Colleges and Universities

As this discussion suggests, the *Mahanoy* case does not directly impact the power of colleges or universities to regulate student speech, on or off campus. Justice Alito, in a footnote in his concurrence, noted "[t]his case does not involve speech by a student at a public college or university. For several reasons, including the age, independence, and living arrangements of such students, regulation of their speech may raise very different questions from those presented here. I do not understand the decision in this case to apply to such students."

Still, courts will likely apply these announced principles to public postsecondary institutions. Colleges have statutory, contractual, and common law obligations regarding campus safety and the power to investigate and sanction misconduct. And, while colleges generally are not considered to stand *in loco parentis*,[1] courts increasingly recognize that they may form a "special relationship" with students enforceable through a negligence action to protect them from a foreseeable risk of harm in spaces within the institution's control.[2] *Mahanoy* affirms that a

[1] See, for example, the Preamble to the Title IX Final Regulation, 85 Fed. Reg. 30026, 30040 (May 19, 2020) (noting that *in loco parentis* does not apply in postsecondary education).

[2] Regents of Univ. of California v. Superior Court, 413 P.3d 656, 669 (Cal. 2018). New York courts do not recognize a "special relationship" between students and postsecondary institutions. Eiseman v. State, 70 N.Y.2d 175, 190 (1987). But one well-developed exception arises when the institution provides housing to the student; in that case, the institution may be liable under premises liability standards applicable to New York landlords. Miller v. State, 62 N.Y.2d 506, 511 (1984). Yet New York colleges and universities are unlikely to be liable in negligence for

school's disciplinary authority may extend off-campus (or in cyberspace) to forms of unprotected speech, such as true threats or harassment on the basis of sex or other protected category.[3]

Likewise, the broad First Amendment principles restated in *Mahoney* resonate as postsecondary institutions grapple with "unpopular expression." Students cannot be disciplined for speaking on sensitive matters like politics or religion or for speech that a listener finds "vulgar," whether the speech is made on or off campus. In Justice Breyer's words, "sometimes it is necessary to protect the superfluous in order to preserve the necessary."

Less clear, of course, is whether off-campus speech that targets specific people, whether a campus administrator, faculty member, staff, or fellow student, will remain protected. The *Mahoney* court noted that B.L.'s speech "did not identify the school in her posts or target any member of the school community with vulgar or abusive language." As such, directly targeting a student with social media posts or text messages that amount to cyberbullying, harassment, or "true threats" of bodily harm may be unprotected speech subject to campus regulation, even if sent from an off-campus location.

harm occurring in off-campus settings they do not control. Fitzsimons v. Brennan, 169 A.D.3d 873, 875 (N.Y. App. Div., 2d Dept. 2019) (dismissing negligence claim arising from fire at privately-rented off-campus housing advertised on college website).

[3] E.g., Feminist Majority Found. v. Hurley, 911 F.3d 674 (4th Cir. 2018) (reversing dismissal of Title IX deliberate indifference claim where university had substantial control of campus network hosting social media platform Yik Yak and of the students who sent harassing messages and true threats through Yik Yak, but declining to reach Constitutional issues).