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Third Circuit Expands First Amendment Speech Protection for Students' Off-Campus Speech

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On June 30, 2020, the U.S. Court of Appeals for the Third Circuit held in *B.L. v. Mahanoy Area School District*, No. 19-1842[1], that a high school student's off-campus speech was protected by the First Amendment to the same extent an adult's would be. The Third Circuit affirmed in a precedential opinion expressly holding for the first time that off-campus student speech was protected to the full extent afforded by the First Amendment and not subject to the well-known *Tinker* standard that applies to student speech in school.

BACKGROUND

Appellee B.L. failed to make her high school's varsity cheerleading team and, over a weekend and away from school, using her own smartphone, shared a picture of herself at a local store with a caption including the words "fuck cheer" via Snapchat. The cheerleading coaches learned about the image and decided B.L.'s snap violated team and school rules, which B.L. had acknowledged before joining the team. Those rules required cheerleaders to "have respect for [their] school, coaches, . . . [and] other cheerleaders"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet." The coaches also felt B.L.'s snap violated a school rule requiring student athletes to "conduct[] themselves in such a way that the image of the . . . School District would not be tarnished in any manner." She was suspended from the junior varsity team for a year and sued her school in federal court for violating her First Amendment rights.

The District Court granted summary judgment in B.L.'s favor, ruling that the school violated her First Amendment rights when it punished her.

THIRD CIRCUIT DECISION

The Third Circuit posited that there were two critical inquiries that required resolution. First, was B.L.'s snap protected speech? If not, that would end the inquiry. But if it were protected speech, the Court said that it then must decide whether B.L. waived that protection. The Third Circuit concluded that B.L.'s snap was protected and that she did not waive her right to post it.

In assessing whether B.L.'s speech was protected by the First Amendment, the Third Circuit first surveyed the law addressing student speech in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and its progeny. In *Tinker*, the Court famously stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" but added a narrow exception "in light of the special characteristics of the school environment." So "to prescribe and control conduct in the schools," *Tinker* held that school officials may regulate speech that "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker* and its progeny, which created certain narrow exceptions, struck a balance, reaffirming students' rights but recognizing a limited zone of heightened

[1] Schnader Harrison Segal & Lewis LLP and the American Civil Liberties Union of Pennsylvania are counsel of record in this case.

governmental authority. Consistent with prior case law, the Third Circuit reiterated that a student's First Amendment rights are subject to narrow limitations when speaking in the "school context" but "are coextensive with [those] of an adult" outside that context.

Turning next to an analysis of whether B.L.'s snap was "on-" or "off-campus" speech – that is, in the "school context" or outside of it – the Court reviewed the dividing line separating on- from off-campus speech, and held that B.L.'s speech fell on the off-campus side. Acknowledging the difficulty of assessing the distinction between on-campus and off-campus speech in the age of digital communications, the Court reviewed Third Circuit precedent, and noted that a student's online speech is not rendered "on campus" simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment. Applying those principles to B.L.'s case, the Third Circuit held that her snap fell outside the school context.

The Court then turned to a review of whether the First Amendment allowed the School District to punish B.L. for her off-campus speech. The Third Circuit rejected each of the School District's arguments in short order. The School District first argued it was entitled to mete out punishment based on its power "to enforce socially acceptable behavior" by banning "vulgar, lewd, obscene, or plainly offensive" speech by students as set out in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). But the Third Circuit rejected that argument, holding that Third Circuit precedent made clear that *Fraser* does not apply to off-campus speech. The Court saw no sound reason to graft an extracurricular distinction onto the Third Circuit's precedential case law.

The Court also swiftly rejected the School District's argument that B.L. had no "constitutionally protected property right to participate in extracurricular activities," concluding that due process case law is an equally poor fit in the First Amendment context. The School District also claimed that students who join extracurriculars "represent their schools much in the way that government employees represent their employer." So by going out for the team, it argued, students subject their speech rights to coaches' whims so long as their speech does not involve "a matter of public concern." The Court disposed of this argument, too, holding that students' free speech rights are not limited to matters of public concern.

The School District next argued that *Tinker* should apply and that B.L.'s snap was likely to substantially disrupt the cheerleading program. After extensively surveying and largely rejecting the law of the other Circuits, citing a lack of clarity and predictability in standards announced there, the Third Circuit for the first time expressly held that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."

Finally, the School District argued that by agreeing to certain school and team rules, B.L. waived her First Amendment right to post the "fuck cheer" snap. The Third Circuit disagreed. Noting the District Court's holding that requiring B.L. to waive her First Amendment rights as a condition of joining the team violated the unconstitutional conditions doctrine, the Third Circuit held that for the government to condition participation in a beneficial program on a waiver of First Amendment rights raises serious constitutional concerns, particularly where the government "seek[s] to leverage [benefits] to regulate speech outside the contours of the program itself."

While acknowledging that all rights, including free speech rights, can be waived, the Court noted that waivers "must be voluntary, knowing, . . . intelligent, . . . [and] established by 'clear' and 'compelling' evidence," and that courts must "indulge in every reasonable presumption against waiver." Applying those standards to B.L., the Third Circuit held that B.L.'s snap did not fall within the scope of any of the rules on which the School District relied and to which B.L. had agreed – a rule to exercise respect for the school, coaches, and other cheerleaders; a rule to avoid "foul language and inappropriate gestures"; and a rule to refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet" – and thus the Court rejected the District's contention that B.L. waived her First Amendment rights.

Judge Ambro concurred in the judgment. However, he dissented from the majority's holding that *Tinker* categorically does not apply to off-campus student speech, expressing concern that the majority went too far. He would have held that the Court's decisions in *Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (en banc), and *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc), controlled this case because B.L.'s snap did not cause the disruption required under *Tinker* for the School District to punish B.L., leaving no need to reach the question of whether *Tinker* applies to off-campus student speech. ◆

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