LITIGATION ALERT | JUNE 2021

Supreme Court Protects First Amendment Rights for Students' Off-Campus Speech

By Theresa E. Loscalzo and Arleigh P. Helfer III

In *Mahanoy Area School District v. B.L.*, No. 20–255,[1] the United States Supreme Court, in one of the most significant student free speech cases in 50 years, affirmed the decision of the Third Circuit Court of Appeals, confirming the importance of the free speech rights of students.

The Court, in an opinion delivered by Justice Breyer, in which Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett joined, held that school authorities must respect students' rights to express themselves outside of school, including their right to express dissenting or unpopular views. The Court also recognized that schools do not have the same authority to punish students for speech outside of school as they do in school contexts, and confirmed that parents, not schools, exercise primary responsibility for their children's speech. The Court explicitly held that the school violated B. L.'s First Amendment rights when it suspended her from the junior varsity cheerleading squad (Slip Op. 8–11), and concluded that B.L.'s Snapchat posts are entitled to First Amendment protection. Justice Alito filed a concurring opinion, in which Justice Gorsuch joined. Justice Thomas filed a dissenting opinion.

FACTUAL AND PROCEDURAL 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 phone, 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 Snapchat 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 Snapchat 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. When the school administrators and school board would not reconsider her punishment, B.L. 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. The District Court awarded her nominal damages and attorney's fees and ordered the school to expunge her disciplinary record.

In a precedential opinion, the Third Circuit affirmed, expressly holding for the first time that off-campus student speech was protected to the full extent afforded by the First Amendment and was not subject to the well-known *Tinker* standard that applies to student speech in school. In *Tinker v. Des Moines Independent Community School Dist*., 393 U. S. 503 (1969), the Supreme Court held that schools have a special interest in regulating on-campus student speech that

[1] Schnader Harrison Segal & Lewis LLP and the American Civil Liberties Union Foundation, the American Civil Liberties Union of Pennsylvania and Seth F. Kreimer are co-counsel of record in this case.

"materially disrupts class-work or involves substantial disorder or invasion of the rights of others." 393 U. S. 503, 513.

The school district appealed, contending that the Court should grant the same authority that schools currently have to curb and punish speech within school buildings, under *Tinker*, to also apply to students' off-campus speech.

UNITED STATES SUPREME COURT DECISION

The Supreme Court rejected the broad application of *Tinker* to off-campus speech and affirmed the Third Circuit. While emphasizing that minors are entitled to a significant measure of First Amendment protection, the Court noted that it has also stated that courts must apply the First Amendment "in light of the special characteristics of the school environment." Slip Op. 5 (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). Noting that it has previously outlined specific categories of student speech that schools could regulate under certain circumstances – indecent, lewd or vulgar speech uttered during a school assembly or on school grounds, speech uttered during a school trip that promotes "illegal drug use" and speech that others may reasonably perceive as "bear[ing] the imprimatur of the school, such as that appearing in a school-sponsored newspaper" – the Court also acknowledged that *Tinker* holds that schools have a special interest in regulating speech that "materially disrupts class-work or involves substantial disorder or invasion of the rights of others."

The Court concluded that these special characteristics may provide some leeway to allow schools to regulate speech that occurs under its supervision under certain circumstances. Disagreeing with the Third Circuit rationale that *Tinker* could never apply outside the school environment, the Court cautioned that these special circumstances do not always disappear when the speech occurs off campus, citing serious or severe bullying or harassment targeting specific individuals, or threats aimed at students or teachers, among other examples. But the Court declined both to set forth a broad general rule of just what counts as "off-campus" speech and also whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent substantial disruption or the protection of those in the school community.

Instead, observing that "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,'" the Court identified three features of off-campus speech that diminish the strength of the unique educational characteristics that might call for special First Amendment leeway, and which often, even if not always, distinguish schools' efforts to regulate off-campus speech.

First, the Court considered under what circumstances a school stands *in loco parentis* when a student speaks off campus. *In loco parentis* treats school administrators as standing in the place of parents where the children's parents are not present to protect them. The Court concluded that off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility and held that B.L.'s off-campus speech at issue here did not give rise to a circumstance in which the school stood *in loco parentis* and could thereby justify discipline.

Second, the Court noted that from the student speaker's perspective, school regulation of off-campus speech, coupled with the regulations of on-campus speech, would include all speech uttered by a student 24 hours a day. The Court cautioned that when political or religious speech is implicated, the school will have a heavy burden to justify regulation. Moreover, in language that acknowledges that students should not be subject to a "heckler's veto," the Court instructed that "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy."

Considering the school's claimed interest in prohibiting use of vulgar language to criticize a school team or its coaches, the Court first explained that the school's anti-vulgarity interest is weakened by the fact that B.L. spoke outside of school on her own time, at a point when the school did not stand *in loco parentis*. The Court further noted that the school presented no

evidence of any effort to prevent students from using vulgarity outside the classroom. In short, the Court held that the school's interest in teaching good manners was not sufficient in this case to overcome B.L.'s interest in free expression.

The Court also addressed the school's argument that it was trying to prevent disruption, if not in the classroom, then within the bounds of a school-sponsored extracurricular activity. The Court found no evidence in the record of the sort of "substantial disruption" of a school activity or threatened harm to the rights of others that might justify the school's action under *Tinker*. While B.L. used vulgar language and criticized the school community, the Court concluded that her now-famous Snapchat did not involve any of the "special characteristics" that might place it outside the protection of the First Amendment.

Third, the school presented some evidence that – at most – indirectly supported its claim that it was concerned for team morale. However, there was no evidence that there was any serious decline in team morale that could create substantial interference in or disruption of the school's efforts to maintain team cohesion. Explaining that simple "undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression" (Slip Op. 11, quoting *Tinker*), the Court rejected that concern in the context of the case.

Justice Thomas dissented, opining that under the historical rule, a school could regulate and impose discipline for off-campus speech so long as the speech had a proximate tendency to harm the school, the faculty or students, or its programs. Dissent 4. While noting that perhaps there are good constitutional reasons to depart from the historical rule, he criticized the failure of the majority to identify and explain that departure. *Id*. at 9.

Justice Alito, in a concurrence joined by Justice Gorsuch, summed it up this way: "[I]f today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory." Concurrence 19.

Beyond its obvious significance for the speech rights of millions of school students, the case shows that the Justices can and will reach across ideological divides to protect First Amendment free speech interests. In circumscribing the ability of school administrators to police students' thoughts and expressions outside of school, the Court demonstrated its firm commitment to protecting free speech and its important role in our democracy. ◆

For more information about Schnader's Litigation Services Department, or to speak with a member of the firm, please contact:

Theresa E. Loscalzo
Co-Managing Partner of the Firm
215-751-2254
tloscalzo@schnader.com

Arleigh P. Helfer III
Associate
215-751-2430
ahelfer@schnader.com

Stephen J. Shapiro
Co-Chair, Litigation Services Department
215-751-2259
sshapiro@schnader.com

Anne E. Kane
Co-Chair, Litigation Services Department
215-751-2397
akane@schnader.com

Communications and Media Group
Higher Education Group
Sports Law Team

www.schnader.com

* *See: www.schnader.com/jakarta*