



# EDUCATION LAW NOTES

## Federal and Virginia Developments in School Law

Bradford A. King, Attorney at Sands Anderson

A VASSP Bimonthly Publication • September, 2021 • Vol. 5, No. 1 • www.vassp.org

### **WHEN MAY ADMINISTRATORS PUNISH STUDENTS FOR SOCIAL MEDIA POSTS? *The U.S. Supreme Court says "Not so Fast"***

Public school administrators and school lawyers long have waited for the United States Supreme Court to establish clear guidance regarding when school officials may discipline students for social media activity that impacts school operations. Many thought such guidance was imminent when the Court agreed to review the Third Circuit's June 2020 ruling in *Mahanoy Area School District v. B.L.* Unfortunately, the Supreme Court's June 23, 2021 opinion may leave as many questions begging as it answered.

B.L., a student at Mahanoy Area High School, tried out for and failed to make her high school's varsity cheerleading team (but did make the JV squad). Over a weekend while at a local convenience store, she posted two pictures of herself on Snapchat. The first showed her and a friend with middle fingers raised and the caption "F\*\*K school f\*\*k softball f\*\*k cheer f\*\*k everything."

A second picture's caption read "Love how me and [another student] get told we need a year of jv before we make varsity but that doesn't matter to anyone else?" with an upside-down smiley face emoji. About 250 people saw the post, including many MAHS students - some cheerleaders. Several students complained to a cheer coach. The coaches ultimately determined B.L.'s "snap" violated team (respect for coaches, avoid foul language and inappropriate gestures, refrain from sharing negative information about cheerleading) and school (student athletes must conduct themselves in a manner to avoid tarnishing school's image) rules, which B.L. acknowledged before joining the team. They suspended B.L. from the JV team.

B.L. sued the school district alleging her

suspension violated the First Amendment and that the school/team rules were overbroad, viewpoint discriminatory and unconstitutionally vague. The trial court granted B.L. summary judgment. The United States Court of Appeals for the Third Circuit affirmed. It cited to the Supreme Court's landmark decision in *Tinker v. Des Moines* affirming schools may discipline students for speech "within the schoolhouse gate which is reasonably likely to cause a substantial disruption." However, it acknowledged that "[t]he digital revolution complicated that distinction. With new forms of communication have come new frontiers of regulation, where educators assert the power to regulate online student speech made off school grounds, after school hours, and without school resources."

***...the Supreme Court's  
June 23, 2021 opinion may  
leave as many questions  
begging as it answered.***

The Court of Appeals held that B.L.'s speech was protected, reasoning that it was off-campus speech, created away from campus, over the weekend, without school resources and on a platform unaffiliated with the school. The Court said that because the speech mentioned MAHS and reached its students is not sufficient to make it "on-campus" speech. The Court also rejected the school's argument that it had the authority to regulate the speech under the U.S. Supreme Court's *Fraser v. Bethel* decision, which permits schools to regulate vulgar on-campus speech. The Court opined further that it did not matter that B.L.'s punishment was related to an extra-curricular activity (to which she enjoyed no property right). Finally, the Court held that *Tinker's* substantial disruption test does not apply to off-campus speech. It acknowledged that nearly all online speech is reasonably foreseeable to reach school campuses but said

*Tinker* does not apply to off-campus speech. Notably, however, *Tinker* DOES apply to any student who, on campus, shares or reacts to controversial off-campus speech in a disruptive manner.

The Supreme Court rejected the Third Circuit's *reasoning* but upheld its ruling that the school district violated B.L.'s First Amendment rights. "Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus." Again citing *Tinker*, the Court said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The Third Circuit's distinction between on-campus and off-campus distinction is not appropriate, the Supreme Court reasoned, because even the parties agreed certain exceptions exist, including notably: serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices including material maintained within school computers. The Supreme Court emphasized that even B.L. disagreed with the distinction, recognizing that "on-campus" speech would include: all times when the school is responsible for the student; the school's immediate surroundings; travel *en route* to and from school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; any activities taken for school credit; and communications to school e-mail accounts or phones.

The Supreme Court reasoned that three features of off-campus speech often distinguish school's efforts to regulate that speech from their efforts to regulate on-campus speech. First, a school rarely stands *in loco parentis* off-campus: "off- campus speech will normally fall within the

zone of parental, rather than school-related, responsibility." Second, if a school could regulate off-campus speech, it would include all speech a student utters during the full 24-hour day. "Courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." Third, the school is in a unique position to foster First Amendment discourse. "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. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, 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.'"

B.L.'s speech was vulgar, but it included criticism of the team, the team's coaches, and the school, which is protected. The communications occurred away from school, transmitted on her personal cell phone, and to an audience of Snapchat friends. The Court held there was no evidence of substantial disruption, including none of any serious decline in team morale. Unfortunately for practitioners and educators, the Supreme Court concluded by saying "[w]e leave for future cases to decide where, when and how these features mean the speaker's off-campus location will make the critical difference." For now, school administrators are well-advised that these student social media cases are fact-specific. Administrators are encouraged to consult their division's legal counsel before imposing discipline for off-campus student speech.

***The school itself has an interest  
in protecting a student's unpopular  
expression, especially when  
the expression takes place off  
campus.***