

EDUCATION LAW

High Court Applies 'Substantial Disruption' Standard for Off-Campus Cyber Speech

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About 50 years ago when students protesting the Vietnam War dominated the news, the U.S. Supreme Court balanced First Amendment rights belonging to students against in loco parentis responsibilities belonging to school officials. The court held that while students do not surrender their First Amendment rights at the schoolhouse gate, school officials may limit speech that would cause a "substantial disruption" on-campus. See *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969). In the following years, courts struggled to decide if and how the authority enunciated in *Tinker* applied to off-campus speech. Today, posts on Instagram, Facebook and Twitter complicate the matter, enabling off-campus speech to quickly and easily impact on-campus events. In *Mahanoy v. B.L.*, 594 U.S. ___ (2021), the Supreme Court recently revisited and modernized the *Tinker* "substantial disruption" standard in the context of cyber speech, holding that schools have less authority to regulate off-campus versus on-campus speech. Importantly, the court considered the competing needs for schools to regulate disruptive speech while respecting the students' First Amendment rights expressed over the internet.

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activities or the protection of those who make up a school community." But the Supreme Court did note that the school's interest in regulating off-campus speech is diminished when compared to on-campus speech for three reasons: off-campus speech generally falls within a parent's zone of responsibility and thus a school's in loco parentis standing is not likely to apply; students speech would be regulated all 24 hours of the day if schools regulated both on-campus and off-campus speech and "public schools are the nurseries of democracy" and thus schools themselves have an interest in promoting off-campus speech.



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In *Tinker*, six students in Iowa wore black armbands to express their grievances about the Vietnam War. In response, school authorities established a no-black armband rule on-campus and suspended the students. The court held the suspensions violated the students' free speech rights on-campus because wearing black armbands did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Students, according to the Supreme Court, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" unless

the speech materially disrupts classwork or involves substantial disorder or invasion of the rights of others.

However, *Tinker*, which was decided when no one anticipated the internet, did not determine the breadth of a school's authority to regulate off-campus speech. As such, circuit courts disagreed about how to apply *Tinker* to speech published on the Internet, the "modern public square."

Fast forward 50 years to *Mahanoy v. B.L.*

B.L. was a ninth-grade, junior varsity cheerleader at Mahanoy Area High School in Pennsylvania. To be on the squad, the district had a policy that required cheerleaders to sign an agreement not to use profanity. For 10th grade, B.L. tried out but failed to make the varsity squad. Disappointed, B.L. took a selfie with her middle finger raised and shared it on Snapchat for 250 "friends" to see, stating "f--- school f--- softball f--- cheer f--- everything." School officials, in response, suspended her from the cheerleading squad for one year for violating the district's cheerleading policy. After the school board upheld the suspension,

Parents filed a complaint in the Middle District of Pennsylvania, arguing that the suspension violated B.L.'s First Amendment rights. The lower court agreed. The district appealed, and the U.S. Court of Appeals for the Third Circuit affirmed, holding that under *Tinker*, the school's authority did not extend to off-campus speech and therefore the school lacked authority to suspend B.L.

Any limitation on free speech, either on-campus or off-campus, is an infringement of a constitutionally protected right.

The Supreme Court granted certiorari to resolve a circuit split on if and how *Tinker* should apply to off-campus speech. While the court recognized that schools may still have an interest in regulating off-campus speech when it substantially disrupts school functioning, the court explained that it is difficult to provide bright-line guidance

about how far a school's reach should extend to off-campus speech—especially given the advent of computer-based learning—and so declined to adopt a rule on when "ordinary First Amendment standards must give way ... to a school's special need to prevent ... substantial disruption of learning-related

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In considering the competing interests presented by the case, the Supreme Court held that B.L.'s post was entitled to First Amendment protection because it encompassed a message of criticism; the off-campus nature of her speech diminished the school's interest in regulating it, especially because the school did not stand in loco parentis for the student; and there was no evidence that the speech substantially disrupted the school or interfered with the officials' efforts to maintain cohesion in the cheerleading squad. The court left it for future cases to determine the contours of "where, when and how" schools may regulate off-campus speech but reiterated the importance of maintaining the delicate balance between First Amendment rights

and schools' inherent interests in maintaining order among students.

Following *Mahanoy*, schools have some authority to regulate off-campus speech, but courts must be "more skeptical" concerning off-campus speech because the school's authority to regulate is "diminished."

From *Tinker*, during the Vietnam era, to *Mahanoy* during the internet age, the critical issue is if student speech causes disruption in schools. Any limitation on free speech, either on-campus or off-campus, is an infringement of a constitutionally protected right. However, as the Supreme Court opined in 1969 and again now, preventing disruption in education is also critically important. Finding a balance is difficult and vital. •