

# SUPREME COURT SIDES WITH STUDENT IN FIRST AMENDMENT CASE

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In just an 11 page opinion issued earlier today, the United States Supreme Court addressed for the first time how far a school district can go in disciplining a student for off-campus speech. The Court in *Mahanoy Area School District v. B. L., a Minor*, ruled that the District violated the student's First Amendment rights when it disciplined her for using "vulgar language and gestures" criticizing both the school and its cheerleading team. More specifically, the student (B.L.), then a sophomore, reportedly posted a self-deleting (within 24 hours) Snapchat photo of her and a friend raising their middle fingers, captioned with "f\*\*k school f\*\*k softball f\*\*k cheer f\*\*k everything." The caption also contained an upside-down smiley-face emoji.

By way of background, B.L.'s message was prompted by her having learned that she did not make the school's varsity cheerleading team for the second straight season, while a freshman student made the team on her first try. Apparently out of frustration, B.L. posted the message involved, followed by a second message that said, "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?" These posts were not transmitted directly to the school. Rather, they were sent to other students of the District, some of whom belonged to the cheerleading squad. At least one of those students, using a separate cell phone, shared pictures of B.L.'s posts with other members of the cheerleading squad, following which the images spread within the school. At one point, questions about the posts were raised in an Algebra class taught by one of the two cheerleading coaches.

Key to the Court's decision was its interpretation of its previous and quite famous decision in *Tinker v. Des Moines Independent Community School District*. In *Tinker*, the Court held that a public high school could not constitutionally prohibit a peaceful political student demonstration on school property during the school day. In reaching this conclusion, however, the Court also stated that: "Conduct by [a] student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guarantee of freedom of speech."

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The question the Supreme Court addressed today is whether the *Tinker* standard applies to off-campus speech. The Court, in ruling in favor of the student and without detailing a list of instances, essentially concluded that a school may discipline a student for some off-campus speech. But the Court quickly added that the circumstances under which a school may issue such discipline are very limited by three factors. The first is whether the school is acting or would be acting *in loco parentis*. In this connection, the Court stated, "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related responsibility." Second, the Court stated that, "[w]hen it comes to political or religious speech that occurs outside of school or a school program or activity, the school will have a heavy burden to justify intervention." The third factor was found to be a school's "interest in protecting a student's unpopular expression, especially when the expression takes place off-campus."

Applying these limiting standards to B.L.'s speech, the Court concluded that there was nothing in it that would place it outside the protection of the First Amendment. The posts did not contain "fighting words", nor were they "obscene", as the Court has previously defined those terms. The Court also found it to be significant that the posts appeared outside of school hours, did not target any students and were transmitted through B.L.'s personal cell phone to a private circle of friends. While the Court also recognized that there was some risk that the student's transmission could end up in school (which it did), that risk was insufficient under the circumstances to justify disciplining the student for having made it.

**Takeaway:** as Justice Alito states in his concurring opinion: "If 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."

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