



Off-Campus, Off-Limits

Supreme Court decision limits schools' ability to discipline in place of a parent

BY MARK PAIGE

Cellphones are ubiquitous, even among students in the elementary grades. They can certainly be helpful, allowing quick communication or access to online materials. Of course, students can use social media apps on their phones in unproductive ways, such as posting derogatory comments and images about students or school officials.

When students are on campus, school leaders have great latitude to regulate student speech, including what they can post on social media during the school day, without running afoul of the First Amendment. But what about a school administrator's ability to regulate or discipline for off-campus speech that, by its nature, involves the school, a student, or a matter related to school?

What options do you have if a student creates a social media post on the weekend and off campus that identifies the school, its officials, or programming in a negative or even

vulgar manner? Can a school regulate that type of speech?

The U.S. Supreme Court recently answered the question in the case of *Mahanoy Area School District v. B.L.*, a ruling that has important implications for school administrators.

Student First Amendment Rights

The Supreme Court famously said that students do not shed their constitutional rights at the schoolhouse gate, including the First Amendment right to freedom of expression.

Mary Beth Tinker, a student in a high school in Iowa, helped establish those rights. Tinker was disciplined for wearing a black armband to school to protest the Vietnam War. She sued, arguing that the school's actions violated her First Amendment right. The case led to the famous *Tinker* standard. Under that rule, schools can discipline for on-campus speech when it poses a "material and substantial disruption" to school operations.

With the advent of social media, courts—but not the Supreme Court—have typically extended the *Tinker* material and substantial disruption standard to students' off-campus speech (such as that which occurs online) related to school issues or matters, such as school online bullying. In other words, if the speech posed such a disruption, school administrators could typically regulate it.

New Court Guidance

The applicability of the *Tinker* standard to off-campus social media speech had yet to be determined by

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the Supreme Court until its decision in *Mahanoy v. B.L.*, and that's why this decision is so important to your work.

In *Mahanoy*, a student (B.L.) tried out for the school cheerleading team. She did not make the varsity team but was offered a spot on the junior varsity team. B.L. posted two images—over the weekend and off campus—on her Snapchat account, expressing her displeasure at not making varsity. One showed B.L. and another student with their middle fingers raised and the words, “F\$%k softball F\$%k cheer F\$%k everything.”

The other image was blank, with the caption “love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?” The images were ultimately viewed by other students, including those on the cheerleading team and eventually, a cheerleading squad coach.

Several cheerleaders approached the coach, “visibly upset” about the postings. Questions about the post persisted into an algebra class taught by one of the cheerleading coaches. School officials ultimately suspended B.L. from the cheerleading team because the posts violated school rules regarding the use of profanity in connection with extracurricular sports.

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B.L. challenged the decision in court, and the Supreme Court decided her case in June.

The Supreme Court's Decision

The court found that the school district violated B.L.'s First Amendment rights. In doing so, the court set forth three factors that diminish a school administrator's ability to discipline for off-campus speech. These three factors are new and important considerations for any decisions you contemplate regarding student off-campus speech that touches on a school matter.

First, the court noted that in off-campus speech situations, schools "rarely stand *in loco parentis*." What does this mean? That when parents can't guide or protect a child, the school assumes such a role.

But in off-campus situations in which students are presumably under the direction of their parents, the need for a school to stand *in loco parentis* diminishes, and so, too, does a school administrator's power to regulate off-campus speech.

Second, the Supreme Court noted that in the future, lower courts deciding similar cases should generally be skeptical of school regulation of off-campus speech, especially if that speech involves political or religious topics.

Third, the court noted that our representative democracy requires a "free marketplace of ideas," and schools must play an important role in this effort. Accordingly, in protecting unpopular ideas—which often need more protection than popular ones—expressed off campus, schools promote this exchange.

Implications for Administrators

The *Mahanoy* case certainly makes it more difficult for school administrators to issue school-related discipline

for speech that occurs off campus. But it certainly is not a "bright-line" prohibition, as the court pointed out.

Schools can still discipline for off-campus speech. Speech that might cause harm in school, such as online comments that represent severe bullying or harassment, target teachers or students, or violate rules governing the use of technology, can still be regulated by school officials.

Yet of particular importance for school administrators is the court's emphasis on the dilution of the doctrine of *in loco parentis*—the idea that schools can regulate a student's conduct in place of the parent under certain circumstances. To some school leaders, this might come as a relief.

Some, including school officials, have argued that schools have been asked to take on too much of a parenting role. The *Mahanoy* court shifted the equation back in the direction of parents, rather than schools. That might be welcome news to administrators.

There is one final point about off-campus speech that must be emphasized. Notwithstanding *Mahanoy*—or any other First Amendment case—if school officials do not discipline or retaliate against the student for speech, they avoid potential conflicts with the First Amendment.

What does this mean in practical terms? I think it opens the door to trying strategies other than discipline to promote decency and civility in student online behavior. As educators, you likely have many more ideas about how this can be done, so I'll leave the particulars to you.

Discipline might be warranted sometimes, to be sure, but *Mahanoy* shifts your authority to regulate off-campus student speech without prohibiting the continuation of conversations about how students should use social media appropriately.

And so I leave you with this question: Now that we know the speech is protected under the facts in *Mahanoy*, how would you have discussed the posting with B.L. (the student) if she were a student in your school—or would you have avoided it? ●

Mark Paige is associate professor of public policy at the University of Massachusetts Dartmouth, a former school law attorney, and a board member of the Education Law Association.