Supreme Court Protects Off-Campus Speech of Public School Student

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The U.S. Supreme Court ruled on June 23, 2021 that a public high school student's off-campus social media postings in which she used vulgar language and disparaged school programs constituted protected speech under the First Amendment. This decision signals the Court's willingness to protect certain types of off-campus speech, even if the speech concerns school activities. The Court made clear, however, that schools remain able to police off-campus speech in some limited circumstances.

Background of the Case

In *Mahanoy Area School District v. B.L.*, a Pennsylvania public high school student tried out for the school's varsity cheerleading team. She did not make the varsity cheerleading team, but was offered a spot on the junior varsity cheerleading team. Disgruntled by this decision, the student posted two images to the social media platform Snapchat that depicted her raising her middle fingers and contained the caption: "F*ck school f*ck softball f*ck cheer f*ck everything" (expletives edited). The student took and posted the photos on a weekend and off school grounds. The images made their way to school administrators and coaches who determined that the student's use of profanity in connection with school extracurricular activities violated team and school rules. As a result, the school suspended the student from junior varsity cheerleading for one year. The student's parents sued the school alleging that the student's speech was protected and the school's punishment violated the student's First Amendment right to free speech.

The Landscape of Off-Campus Speech Regulation

Before *Mahanoy*, U.S. Circuit Courts of Appeals were divided on the extent to which schools may regulate off-campus speech. The seminal case on student speech in public schools is the 1969 case *Tinker v. Des Moines Independent Community School District*. In *Tinker*, a public school disciplined students for wearing black armbands in protest of the Vietnam War. The Supreme Court held that the First Amendment applies to public schools and that schools may not regulate speech unless it "materially disrupts" school activities. Since the armbands did not cause disruption, the Court held that the First Amendment protected the right of students to wear them.

U.S. Circuit Courts of Appeals have since struggled to determine whether and how the *Tinker* standard applies to off-campus speech. The Eighth Circuit (which includes Arkansas) and other circuit courts applied *Tinker* where it was reasonably foreseeable that a student's off-campus speech would reach the school environment. Many of these cases involved threats of school violence made off campus. Other circuit courts applied *Tinker* to off-campus speech that demonstrated a sufficient "nexus" to a school's "pedagogical interests." Some of these cases involved off-campus harassment by school students. No clear universal standard existed.

The *Mahanoy* Ruling

The *Mahanoy* Court affirmed the lower courts' holding that the student's Snapchat posts were protected speech. The Court declined to provide a bright-line rule stating what counts as "off-campus speech" and when the First Amendment protects such speech. The Court instead delineated three "features" of off-campus speech that "often, even if not always" diminish a school's interest in regulating it as compared to on-campus speech. First, a school does not stand in for the parent ("*in loco parentis*") off campus as it does on campus, meaning that off-campus speech normally falls in the zone of parental, rather than school-related, authority. Second, off-campus speech and on-campus speech constitute all student speech, thus regulating it would leave students with little to no opportunity to speak freely. This means that courts will be more skeptical of a school regulating off-campus speech, with the added guidance that where off-campus political or religious speech is involved, the school will "have a heavy burden to justify intervention." Third, public schools, as "nurseries for democracy," have an interest in protecting unpopular student expression, especially off campus. The Court said it would "leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference."

Using this new standard, the Court held that the student's Snapchat posts were protected by the First Amendment. First, the Court made clear that the speech did not fall into a category that would place it outside of First Amendment protection, such as true threats, fighting words, or obscene speech. Second, the Court said that the student had no expectation that the school was standing *in loco parentis*. The student made the posts on a weekend, off campus. The post was circulated from her private cellphone to her private circle of Snapchat friends. The student did not identify the school or target any individuals in the post. Third, the Court declined to find that the school's interest in policing vulgar speech was strong enough to meet "*Tinker*'s demanding standard." Specifically, the Court rejected the arguments that the school had an interest in teaching good manners off campus or that the posts significantly disrupted school. These features, taken together, the Court said, diminished the school's interest in punishing the student for the speech.

What Now?

When deciding whether to police off-campus speech, schools should first consider whether the off-campus speech indeed is protected by the First Amendment. True threats, fighting words, and obscene speech are not protected. Regulation of this type of speech, even if occurring off campus, does not conflict with the First Amendment. If the off-campus speech is protected, the school should consider whether the three "features" outlined above diminish the school's interest in regulating the speech. In doing so, schools should ask whether parents delegated authority to the school to regulate speech in that particular circumstance. If any of the factors weigh in favor of the student, schools should exercise caution in issuing any discipline. If sufficient authority to regulate off-campus speech appears to exist, schools should ask the *Tinker* question: does this speech materially disrupt a school activity?

Public schools would be well-served to revisit rules and policies that may run afoul of the new ruling. This extends to those rules and policies officially enacted and found in formal handbooks, as well as less standardized rules and policies that individual coaches, teachers, and administrators may create. In *Mahanoy*, remember, the student was punished in part for violating rules that two cheerleading coaches had adopted from their predecessors. Schools should amend policies that appear to overreach by punishing speech off-campus that may be protected by the First Amendment.

The Court provided a few examples where off-campus behaviors may call for school regulation. These include: serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the 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. This list is not absolute, the Court made clear.

The increase in online and remote learning has no doubt blurred the lines between on-campus and off-campus speech. Though no bright-line test emerged from the *Mahanoy* ruling, schools have additional tools in their toolboxes to determine if, when, and how to police statements made off campus.