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Legal Counsel to Employers and Schools

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HAPPY 4TH OF JULY

DID YOU KNOW?

The 4th of July became an unpaid federal holiday in 1870 — nearly 100 years after it was founded. It was not until 1941 that Congress made it a paid holiday for federal employees, and it remains so to this day.

We wish you a safe and wonderful Fourth of July with your family and friends.

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U.S. Supreme Court Issues Opinion In Landmark Case Addressing Public School Discipline of Student Speech That Is Online And Off-Campus

Last week, the U.S. Supreme Court issued its highly anticipated decision in Mahanoy Area School District v. B.L., 141 S. Ct, 2038 (June 23, 2021) a case addressing the extent to which public school officials may discipline students for speech that occurs outside of school. The Court ruled 8-1 that a public high school violated a student's First Amendment rights when it disciplined her for using vulgar language and gestures to criticize the school and the cheerleading team in a social media post made off-campus and outside of school hours. At issue was whether and to what extent the Court's landmark ruling in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) applies to off-campus and online speech. While the Court ruled that the discipline (which included suspending the student from the JV cheerleading team) was not appropriate on the facts of this case, it confirmed that while public schools have *less* authority to regulate off-campus speech, they do have an interest in and may restrict online or off-campus speech in certain circumstances.

The Court's ruling affirmed the central tenets of its decision in Tinker, namely that although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," schools have a special interest in regulating speech that materially disrupts class-work or substantially disrupts the order of the school or infringes on the rights of others. In doing so, the Court rejected the Third Circuit's bright-line rule that: "Tinker does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." B.L. v. Mahanoy Area School District, 964 F.3d 170, 189 (3rd Cir. 2020). Rather, the Court held that the special interest a school has in regulating speech that materially disrupts classwork or involves substantial disorder does not always disappear when off-campus speech is involved.

What Does It All Mean?

While the Court declined to announce a bright-line rule regarding the types of off-campus speech protected by the First Amendment, it did provide examples of off-campus speech or behavior that might require school regulation, including "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." The Court also acknowledged that recent developments with computer-based learning make it difficult to distinguish between on- and off-campus speech.

Additionally, the Court identified three characteristics to be considered that diminish a school's interest in regulating off-campus speech. First, parents or guardians are generally responsible for monitoring their child's off-campus conduct outside of school as the *in loco parentis* relationship only exists while students are in school (or participating in school events). Second, unchecked restrictions on off-campus speech would extend to include all student speech made outside school hours. Third, schools—acting as "nurseries of democracy," have an interest in promoting a student's expression of unpopular ideas outside of the school consistent with the adage, "I disapprove of what you say but I will defend to the death your right to say it."

It was the Court's application of these features to the speech in Mahanoy that led to it's determination that discipline was not appropriate: B.L.'s post was made off-campus and outside of school hours to a small group of friends; B.L. did not reference a particular individual or identify the school; and while vulgar, the post criticizing the coaches and team would have been protected by the First Amendment if she were an adult. In short, the school's interest in disciplining B.L. in order to teach good manners and punish use of vulgar language was insufficient to overcome her interest in freedom of expression.

Going forward, schools should exercise caution when considering discipline for off-campus speech and work with counsel to analyze the facts and circumstances under the framework provided by the Mahanoy Court.