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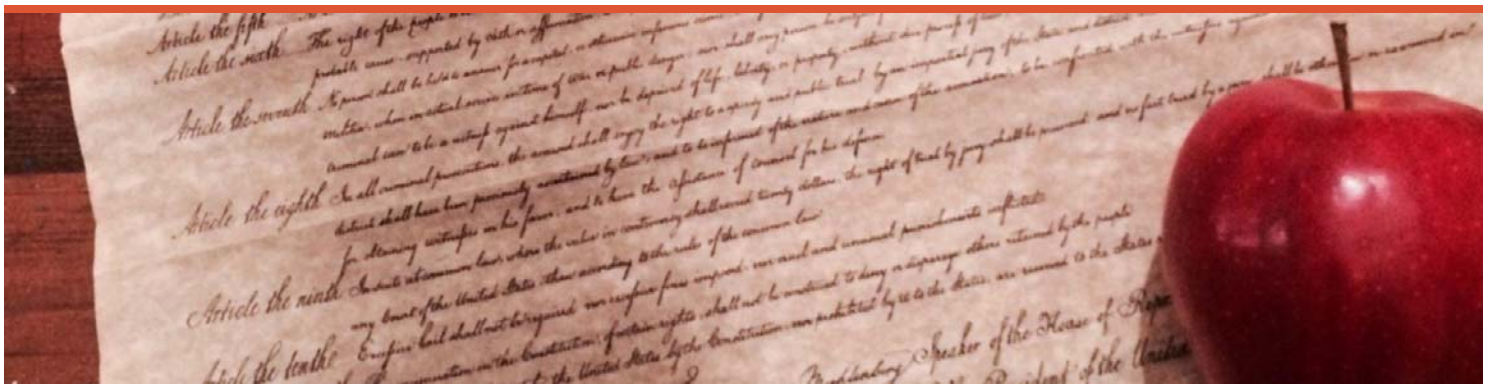
A First Amendment Blog for School Administrators and Attorneys



B.L.'S DISCIPLINE IS OVERTURNED — BUT WHO WON THE CASE?

June 25, 2021 Chris Gilbert Uncategorized Leave a comment

Yesterday the Supreme Court issued its decision in *Mahanoy Area School District v. B.L. by and through Levy*, the case involving a tenth-grade student who, disappointed that she did not make the varsity cheerleading squad, went home and posted a picture of herself on Snapchat with her middle finger raised, with the caption "Fuck school fuck softball fuck cheer fuck everything." The Supreme Court agreed with the Third Circuit that removing the student from the JV cheer squad for her sophomore year violated her First Amendment rights. However, the Supreme Court *disagreed* with the Third Circuit – or, at least, the two judges in the majority – as to *why* it violated her First Amendment rights.

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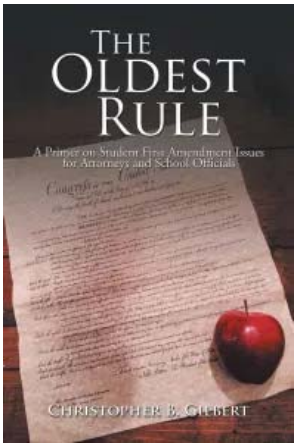

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This is important, because while the Supreme Court's decision was obviously a loss for the Mahanoy Area School District, I would go so far as to say that the decision was a victory – a minor victory, admittedly, but a victory nonetheless – for school districts in general. Why, you ask? Because the school district did not appeal the case to the Supreme Court because it was really that upset that its discipline of B.L. had been overturned (OK, yes, that was *a* reason it appealed, but not the major reason). And dozens of national organizations did not file amicus briefs weighing in on the case because they were that concerned with whether the student got to cheer again or not.

No, what made this case worrisome to school districts generally was one sentence from the majority opinion: "We hold today that *Tinker* does not apply to off-campus speech,"—a conclusion that Judge Ambro (writing in concurrence) recognized had been *entirely* rejected by all other circuits to have considered the issue. School districts were legitimately concerned that the Third Circuit's categorical rule would prevent schools from dealing with issues like bullying and sexual harassment, much of which has moved online and been amplified by the ability to speak without having to witness the listener's response.

This issue, the school districts won. Justice Breyer began his opinion by noting that "we do not agree with the reasoning of the Third Circuit panel's majority," and later held that "[u]nlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus." Justice Breyer stated that schools have a "significant" interest in regulating off-campus behavior that takes the form of "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."

Justice Breyer was hesitant to set out a specific test for what constituted "off campus" speech or when a school would be justified in disciplining a student for such speech, noting that

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circumstances would vary based on a student's age, the nature of the school's off-campus activity, and the impact upon the school itself. However, he mentioned three features of off-campus speech that diminish a school's ability to regulate such speech:

- "First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*." In other words, parents should generally be responsible for discipling their children for off-campus speech, not the schools. This was one of the major themes of both the plaintiffs and the organizations supporting them.

- "Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day." Since punishing kids for what they say away from school means kids would never be 100% free to express themselves, courts should be "more skeptical" of a school's efforts to punish for off-campus speech.

- "Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." Calling schools "the nurseries of democracy" and invoking the "marketplace of ideas" concept, the Court stressed that unpopular speech deserves more protection, not less.

Ultimately the Court agreed with the concurring judge from the Third Circuit, that B.L.'s discipline violated the First Amendment because the school could not show the "substantial disruption" needed under the *Tinker* test. Engaging in what sure looked like a balancing test, the Court pointed out that B.L.'s tweets were intended to contain an actual message criticizing the rules of the cheerleader community; did not amount to "fighting words" (historically deemed unprotected speech); were not obscene "as this Court has understood that term" (which will probably prove an unpopular part of the opinion, but the Court has in the past ruled that using the "f-word" as part of criticism can be protected, although this is the first time that concept has been successfully applied to a K-12 school); were posted outside of school hours from an off-campus location; did not identify the

school or target any member of the community; and were transmitted using her personal cell phone, to a "private circle" of friends. "These features of her speech," summarized the Court, "diminish the school's interest in punishing B.L.'s utterance."

The Court then turned to the school's interests, which it characterized as "an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty." The Court first noted that any interest in "punishing the use of vulgar language" was "weakened considerably by the fact that B.L. spoke outside the school on her own time." The Court then concluded that there was simply insufficient evidence in the record to meet the *Tinker* "substantial disruption" test, either within the bounds of the school-sponsored extracurricular activity, or as it might impact team morale.

As Breyer concluded: "It might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary."

My Thoughts – the Good and the Bad:

> While it is good that the Court rejected the Third Circuit's categorical rule that schools could not discipline for off-campus speech, which would have had a significant impact on the ability of schools to address cyberbullying and harassment, the fact that it refused to adopt any concrete rules or tests for off-campus speech, but instead left that to "future cases to decide", is disappointing. Several circuits have already adopted their own tests for applying *Tinker* to off-campus speech, which were fully discussed in numerous briefs; the Court couldn't have just picked one of them?
> A number of organizations (including the National Association of Pupil Services Administrators, for whom I wrote an amicus brief) urged the Court to adopt a test distinguishing between speech that addresses a broader issue or idea, and speech that targets a specific student or employee, with schools having greater authority to discipline for the latter (which would include both bullying

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and harassment). While I wouldn't say that the Court adopted such a test, it did include "serious or severe bullying or harassment targeting particular individuals" and "threats aimed at teachers or other students" as two examples of off-campus speech over which a school's regulatory interest "remains significant." Distinguishing between speech about ideas and speech targeting individuals will continue (in my opinion) to be a significant way of achieving the speech goals of both students and schools.

Along those same lines, I found this sentence inetresting: "When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." A number of groups have been trying to draw a circle around both religious and political speech, giving them a heightened form of protection (if not making them outright untouchable). Several of the justices asked questions specifically about political and religious speech during oral argument. It will be interesting to see if any courts try to carve them out of the various speech tests altogether.

I find it very interesting that the Court said that the school's interest in punishing B.L.'s use of "vulgar language" was only "weakened considerably" by its off-campus nature. Numerous Courts of Appeals have concluded over the last decade that *Fraser*'s anti-vulgarity rule does not apply at all to off-campus speech. It would have been easy for the Court to have adopted that rule here, but it instead left at least a slight window for schools to discipline for off-campus, vulgar speech.

I'm not thrilled that the Court invoked the "marketplace of ideas" concept in its opinion, when even John Stuart Mills (the originator of that phrase) rejected the notion that it applied to K-12 classrooms: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood." John Stuart Mills, *On Liberty* 13 (C. Shields ed. 1956); *see also Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538 n.7 (7th Cir. 1996) ("John Stuart Mill, the principal proponent of

the “marketplace of ideas” metaphor, thought it inapplicable to children…”).

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