

B.L. v. Mahanoy Area School District & Off-Campus Student Speech

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Roadmap

- *Tinker v. Des Moines Indep. School Dist.* (U.S. 1969)
- *Kowalski v. Berkeley County Schools* (4th Cir. 2011)
- *B.L. v. Mahanoy Area School Dist.* (U.S. 2021)
- Where Does This Leave Us?

Tinker v. Des Moines Indep. Comm. School Dist. (U.S. 1969)

RULE: Student speech, even social or political protests, may be regulated or prohibited if the speech causes, or is reasonably likely to cause, “**substantial disruption of or material interference with school activities.**”

Tinker v. Des Moines Indep. Comm. School Dist. (U.S. 1969)

- Students don't "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
- An "undifferentiated fear or apprehension of disturbance" is not a reasonable forecast.
- A "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" does not justify speech restrictions.



Question for the Lower Courts: Does *Tinker* Apply to Off-Campus Student Speech?

- Early confusion as to whether *Tinker* allows regulation of off-campus speech
- Emerging consensus that *Tinker* does allow schools to regulate at least some off-campus student speech, especially cyber-speech
- Slightly different tests for determining whether *Tinker* applies, most based largely on the *reasonable foreseeability* of the off-campus speech reaching the school and causing a disruption there

**THE FOURTH CIRCUIT'S
“NEXUS” APPROACH:**

KOWALKSI V. BERKELEY CTY SCHLS,
652 F.3D 565 (4TH CIR. 2011)

The Fourth Circuit's "Nexus" Approach :

Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011)

FACTS: A student created a webpage called "S.A.S.H." ("Students Against SI** Herpes") dedicated mainly to insulting a fellow student named Shay. She invited 100 of her MySpace friends to join the group, and about two dozen students joined. Another student posted a photograph of the victim with red dots on her face to simulate herpes, a photo with a sign near victim's pelvic region that read, "Enter at your own risk," and a photo with a caption reading, "portrait of a wh***." Other students posted comments like "This is great" and "Haha. Sc*** her." Shay and her parents filed a complaint with the school principal, who concluded that Kowalski has violated the school's harassment and bullying policy. Kowalski was suspended for 5 days, not allowed to participate in cheerleading for the rest of the year, and prevented from crowning the school's next "Queen of Charm" in her capacity as the reigning Queen. The family sued, contending the school violated the First Amendment by punishing her for her "off-campus, non-school related speech."

The Fourth Circuit's "Nexus" Approach : *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011)

HELD: The school did not violate the First Amendment. The Court applied a two-part test for applying *Tinker* to online student speech:

- 1. Reasonable foreseeability that the speech will reach the school.** When students use the Internet, the physical location of the speaker at the time words are typed or spoken is not decisive. It is enough if the speech "could reasonably be expected to reach the school or impact the school environment."
- 2. The "nexus" requirement.** Schools have authority only if the "nexus" between the student's speech and the school's "pedagogical interests" is "sufficiently strong" to justify school official's actions in "carrying out their role as the trustees of the student body's well-being."

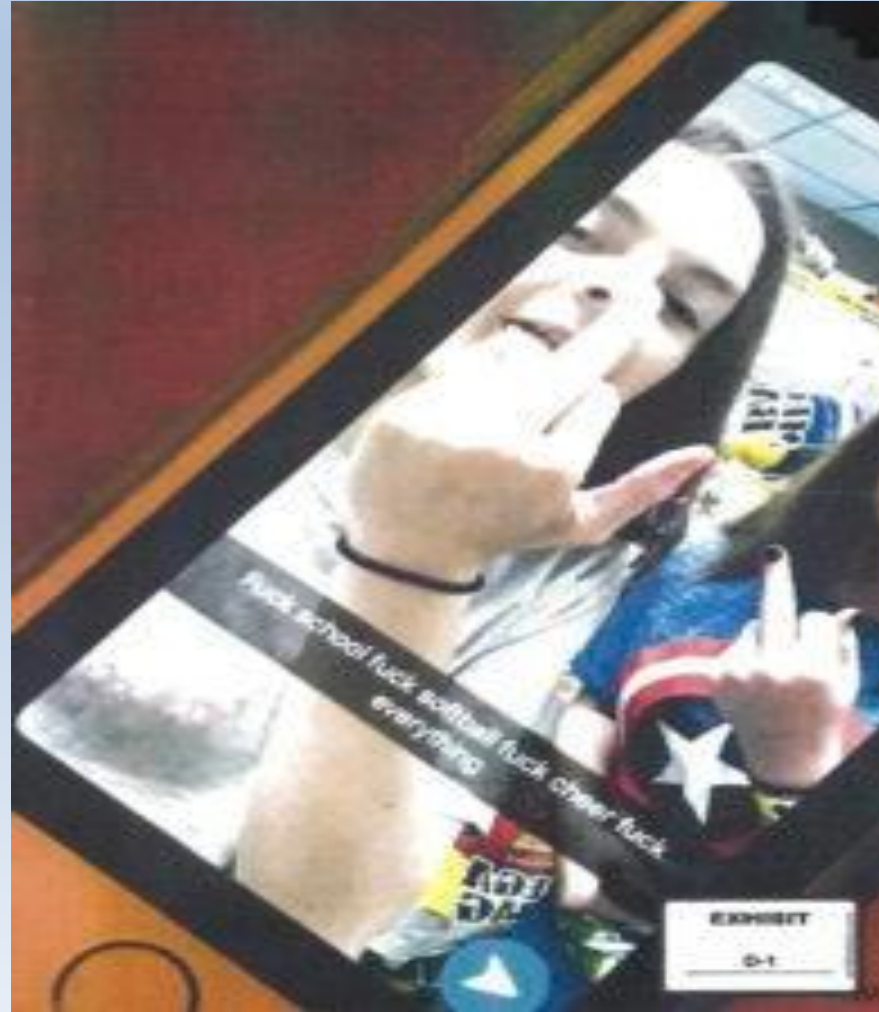
START OF A NEW CHAPTER?

*B.L. V. MAHANOY AREA SCHOOL DIST.,
141 S. CT. 2038 (2021)*

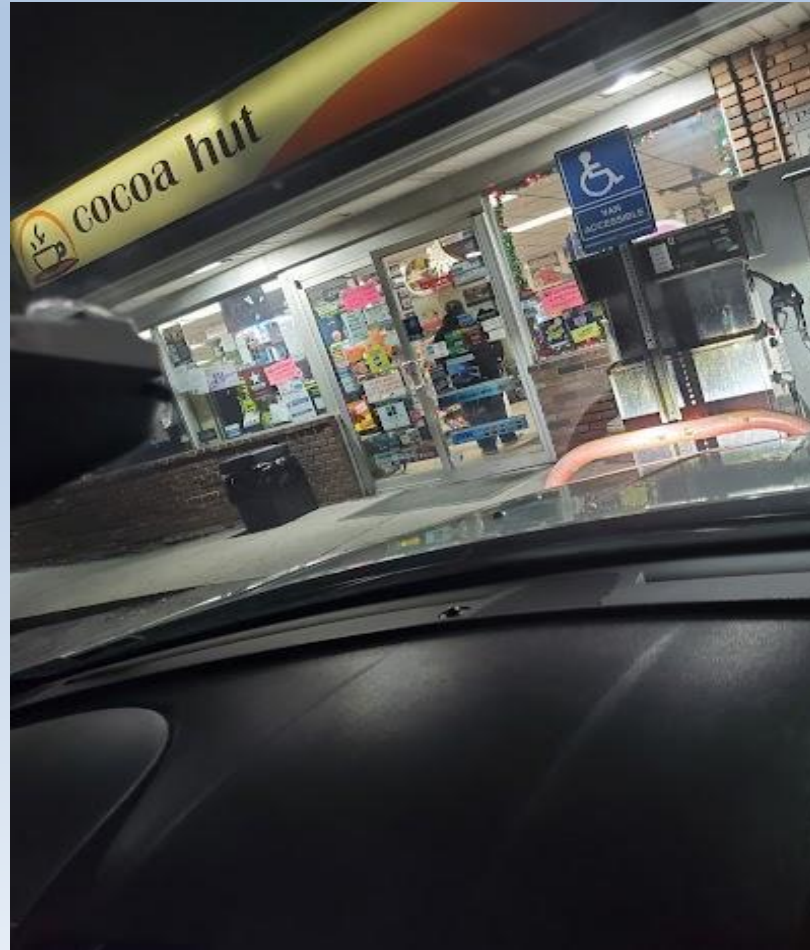
B.L. v. Mahanoy Area School District

FACTS: At the end of her freshman year, JV cheerleader Brandi Levy tried out for varsity for next year. She did not make the team and did not take the news well, especially after she learned that an incoming freshman did make varsity. She was also frustrated about her playing position on a private softball league. Over the weekend, while at the Cocoa Hut (a convenience store and popular teen hangout), Brandi and a friend took a selfie with their middle fingers extended and posted it to Snapchat with the caption, “**f*** school f*** softball f*** cheer f*** everything.**” Just afterwards, she posted a follow-up Snap with the caption “Love how me and [my friend] get told we need another year of jv before we make varsity but that’s [sic] doesn’t matter to anyone else?” accompanied by an upside-down smiley face. As with any Snap, these images were accessible to anyone in Brandi’s friend list (which included 250 people, including many students and cheerleaders) for 24 hours. . . .

B.L. v. Mahanoy Area School District



B.L. v. Mahanoy Area School District



B.L. v. Mahanoy Area School District

FACTS (cont.): One of the cheerleaders who received the Snap was the daughter of one of coaches. She took a screen shot and shared it with her mother. Word spread over the weekend, and several students, including cheerleaders and non-cheerleaders, approached a coach “to express their concerns that the Snaps were inappropriate.” Students were “visibly upset” and “voiced their concerns to [the coach] for several days.” The coaches decided to suspend Brandi from the cheerleading team for one year for violating the cheerleader code of conduct. Brandi’s parents appealed to the school board, but it “declined to get involved,” so they sued.

B.L. v. Mahanoy Area School Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019)

- The district court ruled for the student. It reasoned that it is an “open question” whether *Tinker* applies to off-campus student speech, but even if it does, the coaches “did not reasonably predict any substantial disruption”:
 - The “most” that can be said is that there were some “student concerns” and a brief disruption of one of the coach’s math classes.
 - When pressed on the specter of “chaos” resulting from the Snaps, the only example the coaches could muster was that a cheerleader once texted “something mean” to another cheerleader, and the coaches needed to “put out the fire” but did not resort to discipline.
 - One of the coaches admitted in her deposition that she suspended Brandi because of her use of profanity and would have done the same if she had said “Cheerleading is f***ing awesome.”

***B.L. v. Mahanoy Area School Dist.*, 964 F.3d 170 (3rd Cir. 2020)**

- The Third Circuit affirmed on different grounds, holding that **“*Tinker* does not apply to off-campus speech.”**
 - The law in this area is confused, and the need for clarity is paramount.
 - All of the approaches taken by other circuit courts “sweep far too much speech into the realm of school’s authority,” including the Fourth Circuit’s approach in *Kowalski*.
- Caveat: the Third Circuit carved out “*threatening violence or harassing particular students or teachers*” from its categorical rule and took “no position” on whether schools could punish those types of speech.

B.L. v. Mahanoy Area School Dist., 141 S. Ct. 2038 (2021)

CERTIORARI GRANTED!

First student speech case to get to U.S. Supreme Court since *2007!*



No student since Mary Beth Tinker has won in the Supreme Court on a free speech issue!

THARRINGTON SMITH^{LLP}

ATTORNEYS AT LAW | Est 1964

B.L. v. Mahanoy Area School Dist., 141 S. Ct. 2038 (2021)

- **HELD:** The First Amendment may allow school officials to regulate *some* types of off-campus student speech in *some* circumstances, but *this* school did not have authority to punish *this* student on *these* facts.
- **Rejection of 3rd Circuit Rule:**
 - “Unlike 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.”
- **Types of Off-Campus Speech that “May” Warrant School Regulation:**
 - “[S]erious or severe bullying or harassment targeting particular individuals”
 - “[T]hreats aimed at teachers or other students”
 - “[F]ailure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities”
 - “[B]reaches of school security devices, including material maintained within school computers”
- **No Rule Adopted:** Court is unsure how to create appropriate exceptions and will “not now set forth a broad, highly general rule” to cover all off-campus student speech.

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- **3 Key “Features” of Off-Campus Speech.** Next, the court identified three “features” that “often, even if not always,” distinguish off-campus speech and “diminish” schools’ authority to regulate it:
 1. Schools rarely stand “**in loco parentis**” as to off-campus speech. Off-campus speech “will generally fall within the zone of parental, rather than school-related, responsibility.”
 2. From “the student’s perspective,” a school’s regulation of both on-campus and off-campus speech includes “**all speech a student utters during the full 24-hour day.**” Courts “must be more skeptical” of off-campus speech regulations lest students be prohibited from engaging in that kind of speech at all. Especially with off-campus “political or religious” speech, schools have a “heavy burden to justify intervention.”
 3. Schools have an “interest in protecting a student’s unpopular expression,” especially when shared off-campus. The “**marketplace of ideas**” only works when unpopular ideas are protected. Schools should teach the message, “I disapprove of what you say, but I will defend to the death your right to say it.”
- “We leave for future cases to decide where, when, and how these features mean the speaker’s off-campus location will make the critical difference. This case, however, can provide one example.”

B.L. v. Mahanoy Area School Dist., 141 S. Ct. 2038 (2021)

- **The school violated B.L.’s First Amendment rights.**
 - While crude and brief, B.L.’s Snaps expressed “criticism” of the team, its coaches, and the school and did not include features that place it outside ordinary First Amendment protection.
 - The circumstances of B.L.’s speech “diminish the school’s interest” in punishing her. She was off campus and not acting during school hours. She did not identify the school or “target” any specific members of the school community with abusive language. She used her personal cell phone. Her audience was her “private circle of Snapchat friends.”
 - None of the school’s asserted interests are sufficiently weighty:
 - Its interest in “teaching good manners” is “weakened considerably” because B.L. “spoke outside of school and on her own time.” There is “no reason to believe B.L.’s parents had delegated to school officials their own control of B.L.’s behavior at the Cocoa Hut.”
 - Its interest in preventing a disruption at school or in an extracurricular activity are belied by the record. Discussion of the matter took “at most” 5 to 10 minutes of an Algebra class for two days, and some students were apparently “upset.” When a coach was asked if she feared disruptions other than that “kids kept asking about it,” she said “no.”
 - Its interest in protecting “team morale” was also unsupported by the record. One coach said she acted because “there was some negativity put out there that could impact students at the school.”

WHERE DOES THIS LEAVE US?

Burning Questions in the Wake of *Mahanoy*

Burning Questions

So What Rule *Does* Apply to Off-Campus Speech? We don't know yet. The Supreme Court refused to tell us this time around. We know that schools can regulate *some* off-campus speech in *some* cases but not where the boundaries lie. We know that schools cannot punish students for speech that is closely analogous to the Snaps Brandi Levy sent from the Cocoa Hut. We know that a majority of the Court thinks schools may have more authority to regulate targeted threats and harassment than other types of off-campus speech and that vague references to team or school "morale" will be closely scrutinized. For now, we need to use common sense and good judgment and think carefully, on a case-by-case basis, about how courts might view the merits of any individual off-campus student speech case.

Burning Questions

Is Kowalski Still Good Law? Yes. The case was not overruled and remains good law in North Carolina. It may, however, be something the Fourth Circuit will revisit, since several justices said at oral argument that a very *clear and workable* rule was needed (perhaps not one involving “foreseeability” and an examination of how closely the student’s words are connected to the school’s “pedagogical interests”). My best guess is that Kowalski will continue to apply to “serious or severe” off-campus bullying or harassment targeting individuals, but it remains to be seen whether the Fourth Circuit will come up with a new rule for other types of off-campus student speech.

Burning Questions

Can Schools Regulate Off-Campus “Bullying” and “Harassment” of Other Students?

- Probably, if those terms are *very carefully defined*.
- The majority opinion said that “serious or severe bullying or harassment” that targets specific persons “may” be subject to school regulation even if made off campus, and this position is supported by many, many lower federal court decisions.
- Justice Alito’s concurrence noted that bullying and harassment are “serious” and “age-old” problems, but the “concepts are not easy to define” for First Amendment purposes.
- My working theory is that board policies that track the legal definition of “bullying” and “harassment” that WCPSS already has in its policies stand a very good chance of being upheld, even when applied to off-campus student speech.

Burning Questions

Is the “Applicability of Code” Rule in the Student Code of Conduct Still Applicable?

- Yes, but there is a new layer of uncertainty as to First Amendment issues.
- Policy 4309 says that it applies to students “whose conduct at any time, place, or cyberspace, *on or off campus, has or is reasonably expected to have a direct and immediate impact on the orderly and efficient operation of the schools or the safety of individuals in the school environment.*”
- That rule comes from state statute (G.S. 115C-390.2). The statute is still good law, so the policy language does not need to be revised.
- Staff should be mindful when implementing the Code of Conduct that when the off-campus “conduct” is “speech,” it will be subject to more First Amendment protection than if it had occurred on campus. (We just don’t know how much more.)

Interim Guidance

- No policy revisions are immediately required, since the Supreme Court did not supply an actual rule. WCPSS staff and attorneys will review the types of off-campus student speech issues that arise and may return with policy recommendations based on local needs and concerns. This will be a difficult area for policy work until courts develop new rules in the post-*Mahanoy* world.
- WCPSS should continue emphasizing *non-disciplinary* responses and interventions to problematic off-campus student speech. The board's strong preference for non-disciplinary approaches is already enshrined in policy. Examples of non-disciplinary approaches to off-campus speech include :
 - Counsel students to help them understand the damage words can cause
 - Notify parents and ask them to offer guidance and take appropriate action at home
 - Send take-down requests to social media companies for violations of terms of use
- WCPSS should encourage principals to consult with Student Due Process before initiating out-of-school suspensions for off-campus student speech. SDP can get legal guidance as needed and can help promote fairness and consistency across the district while the First Amendment rules are further developed.