We should have seen it coming: the *Mahanoy* decision considered

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ABSTRACT

Electronic communication plays a significant role in most schools and in all of our personal lives as well. The legal question of what is acceptable and what is not acceptable electronic speech for students that is constructed and delivered totally off-campus on such platforms such as Snapchat, Tic Toc, Facebook or Meta, U-Tube, and regular email, to name just a few, begs the question of when school officials may intervene and penalize students for electronic communication? With electronic communication having such a significant role in schools, a new array of legal issues has surfaced for off-campus speech. The U.S. Supreme Court in the landmark case of *Tinker v. Des Moines* and subsequent cases clarified the various parameters of appropriate student speech on campus and when school officials may take corrective action to curtail that speech. The *Mahanoy Area School District v. B.L.* decision by the Supreme Court in 2021 offers some limited guidance on how student off-campus electronic speech may be contemplated by school officials. How do prospective principal candidates view off-campus posts in light of the *Mahanoy* decision?

Keywords: student speech, electronic communication, student expression, substantial disruption test, clear and present danger test, *in loco parentis*

INTRODUCTION

Early on Monday morning in 1976 Edith Winters, a high school business teacher, was chomping at the bit having what would now be inappropriately called a "hissy-fit" in the principal's office. One of Edith's students had given her the middle finger gesture, commonly consider to be at least an insult if not assault, at a fast-food establishment the previous evening. Edith wanted the young man drawn and quartered and if that was not possible at least expelled.

The young principal, a recent graduate of a master's in education administration program, was familiar with the *Tinker* decision and understood that "the finger gesture" was symbolic speech on the part of the student that may be protected. There was little doubt in the mind of the principal that had this occurred in Edith's classroom the student would most certainly have been reprimanded with a corresponding disciplinary measure as it most certainly would have created a disruption as required by the *Tinker* decision. The principal was well aware of how Edith would have reacted to the situation had it occurred in the classroom. However, Edith's experience with the rude gesture was far off-campus on a Sunday evening. Would the action of this boy translate into a major disruption on campus? It was obvious to the principal that Edith was going to make a big deal out of this when she confronted the boy in the classroom or sometime prior to class.

The principal empathized with Edith, understanding that no one wishes to be disrespected in that manner. The principal promised to speak with the boy when he arrived at school and promised to get back to Edith later. This administrator did have the foresight to instruct Edith not to mention this incident as there were no other observers to the event. Edith was advised to be circumspect and very cautious in her dealings with the student and not to make this event evident to anyone else at school.

The principal conferred with the student and in a most chastising tone asked the student what he was thinking. Of course, the student did not know why he did what he did, but he was absolute in his disdain for Edith. The student was told that he would have three days of after school detention for forty minutes each day. Also, the student was instructed not to mention or discuss this outrageous behavior with anyone, or the after-school suspension could very likely become an expulsion recommendation.

Ms. Winters was not pleased with the principal's decision; however, the finger incident did not escalate. Several students and teachers understood why the boy was in detention, but the onus of that punishment was enough to dissuade others from making a joke out of the situation at Edith's expense or making the perpetrator of the incident into a campus hero.

Thinking back over this incident years later in light of the *Mahanoy* decision, the now decidedly much older university professor was pleased with the way that "finger incident" had been resolved.

U.S. SUPREME COURT CASES PRIOR TO *MAHANOY*

The First Amendment of the United States Constitution allows for the right of free speech. The U.S. Supreme Court has given direction to school officials regarding student speech on four occasions prior to the off-campus electronic speech decision in *Mahanoy Area School District v. B.L.* in 2021.

The seminal decision concerning speech for students is the case of *Tinker v. Des Moines* decided in 1969. The famous quote that "students (and teachers) do not shed their First Amendment right of free expression at the schoolhouse door" is often quoted and well

understood in public schools *(Tinker v. Des Moines Independent School District*). However, the Supreme Court indicated that school administrators may curtail student expression when necessary to avoid substantial disruption or interference with school discipline or the rights of others.

Justice Fortas writing for the majority in the *Tinker* decision stated that "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." (Ibid). The wearing of the black armbands to protest the War in Vietnam did not create a substantial disruption. The major or substantial disruption test for students was born.

The substantial disruption test that was affirmed in *Tinker* was clarified further in a series of three subsequent Supreme Court decisions. The first of these was the case concerning a vulgar and lewd nominating address given at school by a student during an assembly *(Bethel School District v. Fraser).* The student sued the school district when he was punished, but the U.S. Supreme Court held for the school district, stating that the "First Amendment does not prevent school officials from disciplining students from indecent speech protecting other students from vulgar and offensive language." (Ibid). The school district had a policy in place that forbid this type of speech and the court concluded that there was reasonable disruption created by the address.

Following the *Bethel* decision, the Supreme Court addressed student speech that is sponsored by the school district in the 1987 decision in *Hazelwood Sch. Dist. v. Kuhlmeier*. The Supreme Court held that a school newspaper and school yearbook were non-public forums because they were school sponsored and related to the curriculum of the school. The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." (Ibid.)

The *Hazelwood* decision gives educators a greater latitude to censor student work, but the Court made it clear that student editors, under the guidance of their advisors, should be free to report the news and editorialize, but the rules of responsible journalism must be adhered to. (Essex). The Hazelwood school-sponsored speech decision has been extrapolated to mean the type of music that a band may play. The school band director disallowed the playing of the music to the song White Rabbit by Jefferson Airplane due to drug implications of the lyrics, which were not utilized at all in the band performance.

In the 2007 case of *Morse v. Frederick* the U.S. Supreme Court further limited the impact of student expression that began with the *Tinker* decision in 1969. The Supreme Court did not take the case on certiorari from the Ninth Federal Circuit allowed the decision to stand. A student displayed a fourteen-foot banner that read "Bong Hits 4 Jesus" standing on a public sidewalk during an Olympic torch relay event. Frederick was punished for promoting illegal substances at a school-sanctioned event. The school district had a policy in place that stated that drugs could not be advocated on campus. Although Frederick claimed that the sign was nonsensical and its only purpose was to be seen on television as the Olympic torch went by, the Court ruled in favor of the school district. With the proper policy in place a student wearing a t-shirt depicting a marijuana leaf can be disciplined. With no anti-drug policy in place this is just another green leaf.

It is evident that while students have the right of free speech, yet this right is not without limitations. The Supreme Court's rulings in the *Bethel, Hazelwood,* and *Morse* case make it clear

that with the proper policies in place and under circumstances of the legitimate fear of substantial disruption, school officials may discipline students.

COURT CASES THAT FORECAST *MAHONOY*

Student's in-school abuse of social media and the internet is a matter regulated by the discipline code of the school and the internet policy. However, disciplinary action taken against students for off-campus social media without the utilization of the district's network has been problematical. The following cases prior to *Mahony* will amplify the Supreme Court's 2021 ruling.

The United States District Court for the Eastern Division of Missouri held in 1998 that a student's Internet homepage was not grounds for disciplinary action despite the inclusion of vulgar insults about school administrators. The school district argued in the court that the webpage might cause a material disruption at school. The court found no evidence that would support that conclusion. The discipline of the student was overturned by the court because of the belief that that administrators were only upset about the comments made towards them on the webpage. (Franczek Sullivan P.C. 2003 p. 8). The court concluded that disliking or being upset by the content of a student's speech is not an acceptable reason for limiting student speech. (*Beussink v. Woodland R-IV School District*)

A high school student created a webpage from home, entitled "Unofficial Kentlake High Home Page" which included disclaimers that the website was not school-sponsored and was for entertainment purposes only (Franczek Sullivan P.C. 2003 p. 7). The site was particularly critical of the school administration. There were mock obituaries of students and people were encouraged to vote on who would be the next to die.

News spread throughout the community that a 'hit list' had been posted and the student was disciplined for intimidation, harassment, and disruption to the educational process. The court ruled that the non-school sponsored speech was entirely outside of the school's supervision boundaries. The fact was that the disclaimer of "for entertainment purposes only" appears to have been a determining factor in the decision.

The ruling was that there was no evidence that the website was intended to threaten anyone. (*Emmet v. Kent School District*).

In 1999 a high school student became upset about the denial of a student parking permit and the rules and regulations that were imposed upon members of the track team by the athletic director Bozzuto. The student published a 'Top Ten' list about the school athletic director on his home computer. The list included very negative statements about the athletic director's appearance, including the size of his genitals. A few weeks later a copy of the top ten list was found in the teachers' lounge. An undisclosed student had reformatted the original e-mail and distributed the document on school grounds. The student admitted to creating the top ten list at home and emailing it to several friends but avowed vociferously that he did not bring the list to campus.

The student was suspended from school for ten days because the list contained offensive remarks about a school official, the list was found on campus, and the student admitted to having written the list. The Western District Court of Pennsylvania determined that the school district had failed to satisfy the substantial disruption test that was articulated in *Tinker*. The court said that there was no evidence that teachers were incapable of teaching or controlling their classes

because of the list. It was determined that the list had been on school grounds for several days before the administration became aware of it. (*Killion v. Franklin Reg'l Sch. Dist.*).

The United States District Court for Eastern Michigan held in 2002 *Mahaffey* case that the district violated a student's First Amendment rights by suspending him for over ten days (expulsion) for contributing to a website created by another student, outside of school property. The website entitled "Satan's Web Page," included lists of people that the authors wanted to die or needed to die. The website also included "people that are cool" (Franczek Sullivan P.C. 2003 p. 4).

The District Court held that no reasonable person would interpret the statements as a serious intention to kill or harm anyone. The court noted that there was no evidence of any disruption on campus. (*Mahaffey v. Aldrich and the Brd. Of Educ.*)

The Supreme Court of Pennsylvania affirmed in 2002 that a student could be disciplined for the content of a website created and maintained out of school. The student created a website entitled "Teacher Sux" (Franczek Sullivan P.C. 2003 p. 4) This site was viewed by numerous students, focused on one teacher in particular, including images of her severed head and solicitation for funds to hire a hitman to kill her.

The student was expelled, and the Supreme Court of Pennsylvania affirmed the appellate court's decision due to the website's actual and substantial disruption of the entire school community. There was evidence that the targeted teacher had suffered anxiety and depression and was forced to take a medical leave as a result of the website. (*J.S. v. Bethlehem Area School District).*

A student created a website on his home computer and accessed his website utilizing a school computer. The content on the website contained some profanity and crude images of students that were categorized as "losers." The United States District Court of Northern Ohio held that the school district did not violate the student's First Amendment rights by disciplining him for accessing the website on the school computer. The court made it clear that if the school had disciplined the student based on the content of the website, that the student would have prevailed. (*Coy v. Brd. Of Educ. Of North Canton schools*)

Two Second Circuit court decisions (2007 and 2008) make it quite clear that schools can regulate and discipline students for off-campus speech that foreseeably creates a risk to substantial disruption within the context of the campus.

The first was the *Wisniewski v. Board of Education of Weedsport Cent. School Dist.* decision in 2007. The case arose when an eighth grader was utilizing AOL Instant Messaging (IM) software from his parents' home computer. The student's IM icon was a drawing of a pistol firing a bullet into a person's head with dots representing splattered blood. Beneath the drawing were the words "Kill Mr. VanderMolen." VanderMolen was the student's English teacher. The Second Circuit concluded that this crossed the boundary of protected speech and would constitute conduct that poses a foreseeable risk that it would "materially and substantially disrupt the work and discipline of the school." (*Ibid.)*

The Second Circuit ruled in 2008 in the *Doninger v. Niehoff* decision that a student could be punished and eliminated from the ballot to become secretary of the senior class. From a home computer the student referred to school administrators as 'douchebags' for allegedly cancelling a music event. The musical event known as "Jamfest" was an on and off again event that eventually was held, but not before members of the Student Council had interjected themselves into the decision by a letter writing campaign. The student, Doninger, believing that the event was cancelled sent the critical email from home.

The *Doninger* court ruled by quoting from two other student speech cases. The court said that they "were not called upon to decide whether the school officials exercised their discretion wisely. Local school authorities have the arduous task of teaching the shared values of a civilized social order, values that include our veneration of free expression and civility. (*Fraser op.cit*)

Quoting from a Supreme Court decision from 1975 the Second Circuit stated "educators will inevitably make mistakes in carrying out this (student discipline) delicate responsibility. The United States Supreme Court cautioned years ago that the system of public education that has evolved in this Nation relies necessarily upon the discretion and judgement of school administrators and school board members." (*Wood v. Strickland*)

In 2011 the Eighth Federal Circuit concluded that when a student through his home instant messages sent a message that "he would obtain a gun and shoot students at his school," it was reasonable for school authorities to believe that a substantial disruption would occur within the school environment, and because there was actually some substantial disruption, the court ruled that the school could lawfully punish this student. (*D.J.M. v. Hannibal Public School District #60.*

In 2019 the Ninth Federal Circuit ruled that when a court considers whether a school district may constitutionally regulate off-campus speech, it must determine, based on the totality of the circumstances, whether the speech bears a sufficient nexus to the school. The nexus test is fact specific. There are relevant considerations the Court ruled that should be considered. The degree and likelihood of harm to the school caused or argued by the speech; whether it was foreseeable that the speech would reach and impact the school; and the relationship between the content and context of the speech and the school.

In the *McNeil* case the student created within his personal journal a hit list of students that must die. The student's mother discovered the journal and informed a therapist, who informed the police, who informed the school district. The Court of Appeals for the Ninth Circuit ruled that by the nature of the hit list, the student's access to firearms, and with his home being in close proximity to the school, that the school did not violate his rights to free speech by expelling him for one-year. (*McNeil v. Sherwood Sch. Dist.*)

The above cases serve as illustration of how lower courts have recently concluded the issue of off-campus student speech that is conveyed through electronic media. The crux of the decisions centered on whether or not the media created a substantial disruption on campus. When federal circuits disagree, the Supreme Court will often take a case in order better clarify the issue. The stage was set for *Mahanoy*.

MAHANOY AREA SCHOOL DISTRICT v. B.L.

On June 23, 2021, the U.S. Supreme Court detailed in the *Mahanoy* decision the extent to which public school officials may regulate students off campus speech. *Mahanoy* is the first time that the Supreme Court of the United States addressed how *Tinker* applies to purely off-campus, online speech. This case came on appeal from the Third Circuit, where a divided panel ruled that the school district lacked any authority over B.L.'s online electronic speech.

B.L., a public high school student, posted Snapshot videos in which she used both vulgar language and gestures criticizing the school district and the school's cheer team. This message was a weekend post off of school premises. B.L. made a series of generalized obscene comments after she failed to make the varsity cheerleading squad. B.L. took a selfie of herself and added

the text "f---- school f--- softball f--- cheer and f--- everything." The Snapshot was viewed by about 250 of B.L.'s friends.

Although Snapshot is designed to be of limited exposure, one of the other cheerleaders, a daughter of the coach that was also a teacher in the school, took a picture of the post and brought the offensive Snaps to the attention of her mother the cheer coach. B.L. was suspended from the cheer squad for one year for violating the Respect Provision and the Negative Information Rule of the Cheerleading Rules. The district court granted summary judgement in B.L.'s favor ruling that B.L. had not waived her speech rights by agreeing to the team's rules and that her suspension from the team implicated the First Amendment even though extracurricular participation is a privilege. The Third Circuit unanimously affirmed the judgement of the district court.

The majority of the Supreme Court held that public schools have a special interest in regulating some off-campus student speech, however, the special interests offered in this case are not sufficient to overcome B.L.'s interest in free expression. Although there was some brief minor disruption in the class taught by the coach, the duration was only about ten-minutes, and the court could find no evidence of substantial disruption (*Mahanoy Area School District v. B.L.*).

The Court distinguished three features of off-campus speech that often, even if not always, distinguish schools' ability to regulate that speech from their efforts to regulate on-campus speech. Quoting from the *Mahanoy* decision:

"First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Secondly, 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. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. 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.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, *I disapprove of what you say, but I will defend to the death your right to say it.* Given the many distinct kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and differing extent to which those justifications may call for First Amendment grants to schools in light of their special characteristics is diminished. 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" (Ibid).

From one perspective it would seem as if the Court tied the hands of school officials in disciplining a student for off-campus speech that does not lead to a substantial disruption material disruption on-campus. What exactly constitutes a substantial disruption on campus has always placed the burden upon school officials to determine. We can extrapolate from the *Mahanoy* decision that a very brief disruption on campus in one particular classroom is not enough to be considered as a substantial disruption under *Mahanoy*.

CONCLUSION

When school districts and school officials face a lawsuit that ends up in court, the outcome is often a roll of the dice on what the decision may be. Each case turns on the actual facts of a particular situation. Federal Circuit Courts prior to *Mahanoy* reached different conclusions as to whether or not off-campus electronic speech posting was so disruptive that school officials could discipline the perpetrator(s). What direction for the future did the *Mahanoy* decision provide? At the very least, school officials must be very circumspect when it comes to discipling students for electronic off-campus speech. The crux of any decision to punish a student totters on whether or not the off-campus speech finds its way to campus and creates a substantial disruption. What exactly a substantial disruption details are difficult to determine; it depends.

It appears from this decision that schools may regulate off-campus online speech where the message involves bullying, threats, or school academic or safety issues. School officials should take note of what does or does not constitute a substantial disruption under the *Tinker* standard. *Mahanoy* serves as a reminder that even when *Tinker* does apply, school officials must be able to cite some basis for believing that the speech will cause a disruption, or an actual disruption occurs, before it may legally regulate that speech.

The *Mahanoy* decision identified some special interests when off-campus electronic speech might be susceptible to disciplinary measures. These include serious bullying or harassment targeting particular individuals and actual threats aimed at teachers or other students. Also, the Court indicated that "failure to follow rules concerning lessons, the writing of papers, the use of computers or participation in other online school activities; and the breaches of school security devices, including material maintained within school computers, may be subject to discipline by the school. (*Ibid.*)

The Court might decide how future off-campus speech issues is still a head-scratcher for school officials.

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