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Mahanoy and its Implications for Student Speech On and Off-Campus

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Introduction

Typically when cases go before the Supreme Court, the litigants, Court watchers, lawyers in the field, academics, and whoever else may be paying attention expect (or perhaps hope) for two things: (1) a resolution of the instant case and (2) guidance for future cases. *Mahanoy Area Sch. Dist. v. B.L.* delivered a final statement on the "cursing cheerleader" – the school had violated B.L.'s First Amendment rights and the District Court's decision ordering the school to reinstate B.L. on the junior varsity cheerleading team was affirmed.

For those other parties (the ones not directly tied to the case), *Mahanoy* leaves something to be desired. The application of the majority opinion's analysis to future cases is difficult to project. The majority opinion does not create a new standard for student speech in the way that *Tinker* did, nor does it create a concrete multi-factor test to be applied by schools and administrators so that they can balance student speech and the interests of the school.[1] Rather, the majority offers three "features of off-campus speech" that will "often" distinguish a school's effort to moderate speech uttered off-campus versus on-campus.[2] These "features" are: (1) whether a school is standing *in loco* parentis for the student, (2) regulating off-campus speech, in addition to on-campus speech means that student speech would be regulated at all hours of the day, and (3) the school has an interest in protecting unpopular expressions off-campus.[3] These factors are unweighted and not thoroughly explained or explored in the majority's opinion. The opinion merely hands schools (and their lawyers) additional factors to consider as they seek to balance the schools' interest in maintaining order and disciplining students against the First Amendment rights of students.

[1] Although, by rejecting the Third Circuit's wholesale refusal to apply *Tinker* to off-campus speech, the Court is at least saying that *Tinker* will have some role to play going forward in off-campus matters.
[2] *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).
[3] *Id.*

This paper will set the stage by briefly examining the four primary Supreme Court precedents on student speech that predate *Mahanoy*. The *Mahanoy* case will then be analyzed. Then, several relevant lower court cases that flesh out *Mahanoy*'s analysis will be examined. The paper will conclude with a few pieces practical guidance and observations on student speech in the post-*Mahanoy* world.

Setting the Stage

Tinker

At the end of 1965, three teenage students, including the named plaintiff John Tinker, wore black armbands to their school to protest the Vietnam War.[4] The students were suspended and their parents filed suit against the school.[5] Ultimately, the case found itself before the US Supreme Court, where the Court adopted the material and substantial disruption test that has formed the backbone of student speech for the last 50+ years. In its opinion, the Court wrote:

> 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. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[6]

Tinker makes clear that viewpoint discrimination of student speech is unconstitutional and that the threat or possibility of unrest due to a student's speech is insufficient justification to limit a student's First Amendment right. The Supreme Court did not limit its holding to on-campus speech, writing that conduct by students, either on- or off-campus, which, "materially disrupts classwork or involves

[4] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).
[5] *Id.*
[6] *Id.*, at 509 *quoting Burnside* v. *Byars*, 363 F.2d 744, 749 (1966).

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