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# Disciplining Off-Campus Student Speech: Balancing School Safety Interests with Students' Constitutional Free Speech Rights

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In *Tinker v. Des Moines* (1969), the U.S. Supreme Court ruled "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Still, the First Amendment does not provide students absolute rights to such freedoms. Schools have a special interest in regulating on-campus student speech when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," or such a disruption could be reasonably forecasted, or the speech "impinge[s] upon the rights of other students."[2] Balancing those competing interests, *Tinker* provides the standard for evaluating whether the First Amendment protects a student's speech.[3] Since *Tinker*, the Court has revisited student speech on multiple occasions, each time carving out narrow exceptions to the general *Tinker* standard based on certain characteristics or content of the speech, to include *Tinker's* reach to off-campus student speech.[4]

When *Tinker* was decided over a half century ago, the internet, cellphones, smartphones, and digital social media did not exist. In the present-day educational terrain, these technologies present growing challenges and difficult questions for school officials navigating school safety interests against the prospective application of student discipline, particularly as it involves off-campus student speech. A prevailing inquiry among school administrators:

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[1] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (where the private speech at issue was the silent, passive expression of opinion of students who wore black armbands to school to protest the Vietnam War).
[2] *Tinker*, 393 U.S. at 733.
[3] *Id*. at 733 (holding the students' speech protected under the First Amendment; a student "may express his opinions … if he does so without materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others"; the *Tinker* test is satisfied when: an actual disruption occurs; or the record contains facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.").
[4] S*ee, e.g., Morse v. Frederick,* 551 U.S. 393 (2007) (grave and unique threats to the physical safety of students, in particular, speech advocating illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988) (school-sponsored speech); *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (lewd, vulgar, or indecent speech); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007) (the Fifth Circuit Court extended the *Morse* exception to certain threats of school violence or "bearing the stamp of … mass, systemic school-shootings").

Under what circumstances do schools possess the authority and jurisdiction to apply discipline to student speech that occurs outside the schoolhouse gate or off campus and not at a school function?

Notwithstanding the rise in incidents of violence against school communities, in tandem with a legitimate school safety backdrop, school officials must be informed and mindful not to violate a student's First Amendment right to free speech. In *Mahanoy Area School District v. B.L.* (2021), the Supreme Court's ruling that a cheerleader's F-bomb posting was protected by the First Amendment serves as a reminder that not all off-campus speech falls within the school's authority and jurisdiction permitting schools to rightfully govern or direct and apply student discipline, even if the speech is unpleasant, controversial, critical of school operations, or even offensive. [5]

In evaluating the special characteristics that give schools additional license to regulate student speech that takes place off-campus, this article will examine and compare two distinct cases[6]:
The 2021 Supreme Court decision in ***Mahanoy Area School District v. B.L.*** and the 2015 Fifth Circuit Court of Appeals decision in ***Bell v. Itawamba County School Board***.

## *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021)

In this recent decision, the Supreme Court held that the special characteristics that give schools additional license to regulate student speech do not always disappear when a school regulates off-campus speech. However, in this case, the highest court of the land ruled that the school violated the student's First Amendment rights when it suspended her from the junior varsity cheerleading squad for using profanity in a social media post made off-campus using her own personal cell phone.

B.L., a student at Mahoney Area High School, failed to make the school's varsity cheerleading squad after trying out and failed to get her preferred softball position on a private softball team. Over the weekend, B.L. posted two images seen by selected friends on Snapchat, a social media platform that deletes posts after a set period. B.L.'s posts expressed frustration with the school and school's cheerleading squad, containing vulgar language and gestures.

**Content of the Speech**

[5] *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021).
[6] These cases deal with secondary school students. Courts have been less protective of elementary school students' rights: "Elementary school officials will undoubtedly be able to regulate much—perhaps most—of the speech that is protected in higher grades. When officials have a legitimate educational reason—whether grounded on the need to preserve order, to facilitate learning or social development, or to protect the interests of other students—they may ordinarily regulate public elementary school children's speech." *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417–18 (3d Cir. 2003).

Specifically, B.L. posted a picture of herself and a friend with middle fingers raised and included the following caption:

> *"F*** the school, F*** softball, F*** cheer, F*** everything!"*

**Evaluating *Tinker's* 'Material and Substantial Disruption' Standard**

School officials suspended B.L. from the junior varsity cheerleading squad for the upcoming year because "there was profanity in [her] Snap and it was directed towards cheerleading."[7] B.L. had about 250 Snapchat friends, which included other Mahanoy Area High School students, some of whom were on the cheerleading squad. The ability to view her Snapchat images was set for a 24-hour period before the postings would be deleted. Some members of the cheerleading squad were "upset" about the content of B.L.'s Snapchats. One of the students who received the post showed it to her mother, who was a cheerleading squad coach. The post spread throughout the school and questions were raised by students during one of the coach's classes.

According to court testimony, in addressing the matter, school officials took at most 10 minutes of a class "for just a couple of days." The Court noted that B.L. did not name the school in her posts, nor did she target any school official with vulgar or abusive language. Additionally, her posts were directed to an audience consisting of her private circle of Snapchat friends. Furthermore, when the coaches were asked in court if there was reason to believe this incident would disrupt class or school activities, other than students inquiring about it, the coaches responded with "no."[8] Simply stated, the facts did not support an actual material and substantial disruption with school activities or one that could be reasonably forecasted.

As has been clearly stated in *Tinker*, and echoed in its progeny, for 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."[9]

Here, the Court noted that the facts do not satisfy *Tinker's* demanding standards. Ultimately, the Supreme Court held that the school violated B.L's First Amendment free speech rights.

Notably, the Supreme Court held that special characteristics that give schools additional license to regulate student speech do not always disappear when the student speech takes place off-campus. Significantly, the Court identified three features of off-campus speech that often distinguish schools' efforts to regulate that speech as compared to efforts to regulate on-campus speech: (1) a school rarely stands *in loco parentis* in relation to off-campus

[7] *Id*. at 27, 47.
[8] One wonders how well the witnesses were prepped for testifying for the school district.
[9] *Tinker*, 393 U.S. at 733.

student speech and instead falls within the zone of parental responsibility and not that of the school's; (2) a school's regulation of both on-campus and off-campus student speech equates to a regulation of student speech during the full 24-hour day, which translates to full and definite restriction of this kind of speech; (3) schools have an interest in protecting a student's unpopular speech or expression, especially when the expression takes place off campus, given that schools are seen as the "marketplace of ideas" and "nurseries of democracy."[10]

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## *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015)

In this 5th Circuit case out of Mississippi, Taylor Bell, a student at Itawamba Agricultural High School, posted a rap recording on Facebook, viewable by the public, alleging misconduct by two coaches against a female student. Later, after being addressed by school officials regarding the rap recording, Bell created a finalized version of the recording, adding commentary and a picture slideshow, and uploaded it to YouTube for public viewing. In the recordings, Taylor calls himself "T-Bizzle" and identifies the Coaches as Coaches W. and R.

### Content of the Speech

The following is a transcribed version of the recording [*profanity concealed with an asterisk**]:

> *'Let me tell you a little story about these Itawamba coaches / dirty a** niggas like some f***ing coacha roaches / started f***ing with the white and know they f***ing with the blacks / that p**** a** nigga W[.] got me turned up the f***ing max /*
>
> *F***ing with the students and he just had a baby / ever since I met that cracker I knew that he was crazy / always talking s**t cause he know I'm from daw-city / the reason he f***ing around cause his wife ain't got no tidies /*
>
> *This niggha telling students that they sexy, betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack / Quit the damn basketball team / the coach a pervert / can't stand the truth so to you these lyrics going to hurt*
>
> *What the hell was they thinking when they hired Mr. R[.] / dreadlock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as h*ll / Talking about you gangsta / drive your mama's PT Cruiser / Run up on T–Bizzle / I'm going to hit you with my rueger*
>
> *Think you got some game / cuz you f***ing with some juveniles / you know this s**t the truth so don't you try to hide it now / Rubbing on the black girls ears in the gym / white h**s, change your voice when you talk to them / I'm a dope runner, spot a junkie a mile away / came to football practice high / remember that day / I do / to me you a fool / 30 years old f***ing with students at the school*

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[10] The Court did affirm that the following speech can still be regulated and lead to discipline: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, (2) speech, uttered during a class trip, that promotes "illegal drug use,"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, [and] … speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045, internal citations omitted.

*Hahahah / You's a lame / and it's a dam shame / instead you was lame / eat s**t, the whole school got a ring mutherf***er*

*Heard you textin number 25 / you want to get it on / white dude, guess you got a thing for them yellow b***s / looking down girls shirts / drool running down your mouth / you f***ing with the wrong one / going to get a pistol down your mouth / Boww*

*OMG / Took some girls in the locker room in PE / Cut off the lights / you mother***ing freak / F***ing with the youngins / because your pimpin game weak / How he get the head coach / I don't really f***ing know / But I still got a lot of love for my nigga Joe / And my nigga Makaveli / and my nigga codie / W[.] talk s**t b**ch don't even know me*

*Middle fingers up if you hate that nigga / Middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga'*

**Evaluating *Tinker's* 'Material and Substantial Disruption' Standard**

Noticeably, of all the potentially objectionable language in the rap recording, the court focused on specific language it deemed "threatening, harassing, and intimidating." Specifically, the court noted the "incredibly profane and vulgar rap recording had at least four instances of threatening, harassing, and intimidating language against the two coaches"[11] and identified those instances (excerpts highlighted in red above) as follows:

1. "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack";
2. "Run up on T–Bizzle / I'm going to hit you with my rueger";
3. "you f***ing with the wrong one / going to get a pistol down your mouth / Boww"; and
4. "middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga".

Importantly, Bell's use of "rueger" [sic] references a firearm manufactured by Sturm, Ruger & Co., and the reference to "cap" someone is slag for "shoot."[12]

The day after the recording was posted, one of the named coaches learned of the posting from his wife, who heard about it from a friend. The coach listened to the rap recording and immediately reported the rap recording to the school principal, who alerted the superintendent. The next day, the principal, superintendent, and school attorney questioned Bell about the veracity of the allegations, the extent of the alleged misconduct, and the identity of the students involved. Bell was sent home for the remainder of the day. When Bell returned to school, he was suspended and informed that a disciplinary-committee hearing would convene to address the matter. During the disciplinary hearing, Bell clarified that he hoped the Facebook version would be heard by his friends and "people locally," and the YouTube version would be heard by music labels. He admitted that he produced the rap recording "to increase awareness of the situation," knowing students, and hoping administrators, would listen to it, and was "foreshadowing something that might happen."

[11] *Id*. at *384.
[12] *Id*. at *385.

Consequently, Bell was assigned to Mississippi's version of a disciplinary alternative education program (DAEP) for approximately six weeks.

The two coaches identified in the rap recording later testified that it adversely affected their work at school; one coach identified being "scared" because "you never know in today's society…what somebody means, [or] how they mean it." The court stressed that "threatening, harassing, and intimidating a teacher impedes, if not destroys, the ability to teach." Additionally, "it disrupts, if not destroys, the discipline necessary for an environment in which education can take place" and " encourages and incites other students to engage in similar disruptive conduct." Moreover, "it can even cause a teacher to leave that profession."

Ultimately, the Court of Appeals held the *Tinker* rule applies when a student intentionally directs speech to the school community that is reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when the speech is off-campus speech. The Court emphasized that it could be reasonably forecasted that the student's rap recording could have caused a substantial disruption of the school. Bell appealed his case to the Supreme Court, but the Court denied certiorari. As a result, we don't have an opinion from the Court analyzing the case.

**A Brief Comparison: *Bell* versus *B.L.***

Although the cases are from two different courts, a comparison of the two is still instructive, as both Courts are over Texas courts. Recognizing the differences between Bell's post and B.L.'s post is critical to correctly assessing the circumstances under which schools may have authority and jurisdiction to act. Aside from the obvious differences in the speech content, the illustration below highlights a few other characteristics central to judging whether speech is protected free speech under the First Amendment versus when the school may have authority and jurisdiction to apply student discipline.

| ***Bell* (5th Circuit Court of Appeals)** | ***B.L.* (U.S. Supreme Court)** |
|---|---|
| **Speech Not Protected by the First Amendment Schools May Discipline Off-Campus Speech** | **Speech Protected by the First Amendment Schools May Not Discipline Off-Campus Speech** |
| **Off-Campus Speech Content** | |
| 1. "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack";<br>2. "Run up on T–Bizzle / I'm going to hit you with my rueger";<br>3. "you f***ing with the wrong one / going to get a pistol down your mouth / Boww"; and | "F*** the school.<br>…F*** cheer,<br>F*** everything." |

| | |
|---|---|
| 4. "middle fingers up if you want to cap that nigga/middle fingers up / he get no mercy nigga". | |
| **Social Media Platform** | |
| • Facebook, where post was viewable by the public and anyone could listen to it.<br>• Posting was up on Bell's profile page at least 16 hours when the screenshot was taken.<br>• Finalized rap recording, with commentary and slideshow, posted on YouTube for public viewing. | • Snapchat, where posts delete after a period of time (here, 24 hours).<br>• Private circle of followers; 250 followers.<br>• Not publicly viewable. |
| **Student's Intent** | |
| • Bell stated he did not intend the rap to be a threat.<br>• Bell intended to reach the school community, Itawamba, which was named in the rap.<br>• Bell foreshadowed that something might happen. | • There was no indication that B.L. intended for her posts to reach the school community.<br>• B.L. did not name the school in her post, nor did she target anyone in her posts. |
| **Is *Tinker* applicable? If so, applying *Tinker's* 'Material & Substantial Disruption' Standard** | |
| • *Tinker* applies to the off-campus speech at issue.<br>• Facts did not support Bell's off-campus speech caused a material and substantial disruption at the school.<br>• Superintendent indicated there was a foreseeable danger of substantial disruption at the school.<br>• The court concluded that a material and substantial disruption could have been forecasted.<br>• The court declined to decide whether Bell's speech constituted a 'true threat' unprotected by the First Amendment after resolving the case on other grounds. | • *Tinker* applies to the off-campus speech at issue.<br>• Facts did not support that B.L.'s off-campus speech caused a material and substantial disruption at the school.<br>• School officials indicated that they did not forecast such a disruption.<br>• The Court concluded that a material and substantial disruption could not have been forecasted. |

Albeit the *Bell* court declined to decide whether Bell's speech constituted a true threat unprotected by the First Amendment after resolving the case on other grounds, a word of caution to school officials when judging language for true threat. There is an important distinction between *threatening* language versus *true threat* language versus *disrespectful* language. Many recognize the general exceptions to the freedom of speech, which consists of incitement, defamation, fraud, obscenity, child pornography, fighting words, and threats. Speech deemed to be a "true threat" is not protected by the First Amendment, as recognized

by the Supreme Court. [13] However, not every off-hand reference to violence is a 'true threat' unprotected by the First Amendment.[14] In fact, a 'true threat' encompasses "those statement where *the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence* to a particular individual or group of individuals."[15] ***Burge ex rel. Burge v. Colton Sch. Dist. 53*** provides valuable guidance to school officials on this subject.[16]

In *Burge*, Braeden, a 14-year-old eighth grade student, who was an "A" student with no discipline history, became upset when he received a "C" from his health teacher, Ms. Bouck. Due to the failing grade, Braeden's parent grounded him for a portion of the summer. In frustration, Braeden posted a series of comments on his private Facebook page from his home when school was not in session. Specifically, he posted that he wanted to "*start a petition to get mrs. Bouck fired, she's the worst teacher ever.*" In response to a student inquiry about what the teacher had done to upset Braeden, Braeden posted, "*She's just a bitch haha*." The friend responds, "*XD HAHAHAHA!!*" Braeden then writes, "*Ya haha she needs to be shot.*"

Six weeks later, a parent of another student anonymously placed a printout of the posting in the principal's school mailbox. Prior to this, there had been no discussion at school about Braedon's postings, which had since been removed from his private Facebook page. Still, Braeden was suspended for several days. Ms. Bouk was allegedly "scared," "nervous," and "upset," and asked for Braeden to be removed from her class but accepted the school's decision to return him back to her class. There was no further incident and no discussions concerning Braedon's comments.

Braeden's parent objected to the suspension and argued that his speech did not result in a disruption, a school investigation was not conducted, and the school's discipline infringed on Braeden's rights to free speech. In response, the school's attorney argued the comment "*she needs to be shot*" was a threat of violence, which is not constitutionally protected.

So why did the court rule in favor of the student? First, the court found there were insufficient facts under *Tinker* to support that Braedon's comments caused a material and substantial disruption with the appropriate discipline at the school or that one could be forecasted. And, as to the threat assertion, the court noted the school district did not treat the "threat" like a real threat, citing five things the school did not do.

Namely, the school did not:

1) Ask the parents if the boy had access to guns;

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[13] *Virginia v. Black,* 538 U.S. 343 (2003) (The Supreme Court recognized a narrow "true threat" exception to the First Amendment).
[14] *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057 (D. Or. 2015).
[15] U.S.C.A. Const. Amend. 1. [emphasis added].
[16] *Burge*, 100 F. Supp. 3d 1057 (D. Or. 2015).

2) Contact the police;
3) Have Braeden evaluated by a mental health professional;
4) Discuss the comments with other teachers who knew Braeden;
5) Investigate whether he had similar, subsequent comments.

In short, it was clear to the court that the school did respond to the threatening language as a true threat based on their actions. Notably, it was confirmed that Braeden did not intend to threaten or otherwise communicate with Ms. Bouck and did not seriously believe that she would be shot. The lesson learned: If you are going to argue that you disciplined a student for off-campus speech because the speech was a threat, make sure you treat it like one. Simply stated, the school's responsive actions must align with its rhetoric.

Unquestionably, school officials have an affirmative duty to react quickly and efficiently in protecting students and staff from threats, intimidation, and harassment intentionally directed at the school community. Cases involving First Amendment freedom of speech claims are often complex and fact intensive. Therefore, it is essential to investigate an incident thoroughly and completely and properly evaluate all noteworthy characteristics, particularly since a slight deviation in a set of facts could lead to an entirely different conclusion. What's more, school officials must judiciously stay abreast of the ever-evolving case law and legal authorities regarding student discipline, particularly of the extent to which off-campus student speech may be restricted without offending or running afoul of the First Amendment and students' freedom of speech rights.