Pinellas County School Board Attorneys Office

Legally Speaking

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PCS PINELLAS COUNTY SCHOOLS

Vision
100% Student Success
Mission
Educate and prepare each student for college, career and life.

High Court Weighs in on Off-Campus Student Speech

By David Koperski, School Board Attorney

Since 1969, the United States Supreme Court has recognized that public school students retain their First Amendment right to freedom of speech while at school. The boundaries of that right have been defined through various Supreme Court rulings over the decades – a short summary of those rulings is provided below. However, what has not been specifically addressed, until now, is the Supreme Court's views on student speech made off of school grounds, but that relate to school in some way. Many lower courts have ruled on this issue, but we now have some guidance from the nation's highest court in the case of *Mahanoy Area Schl. Dist. v. B.L.*

History of Cases

As noted above, the Court first addressed public school student free speech in 1969 in the *Tinker* case. In that opinion, the Court settled the national debate whether public school students even retained their free speech rights while at school,

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Legal Department Mission Statement

The mission of the School Board Attorney and Staff Attorney Offices is to provide the highest quality legal services to the Pinellas County School Board, the Superintendent and the District by ensuring timely and accurate legal advice and effective representation on all legal matters.

Masks in Schools - Pending Litigation

By: Laurie Dart, Staff Attorney

In advance of schools re-opening for the 2021-2022 school year, Governor Ron DeSantis issued an Executive Order on July 30, 2021 finding that "immediate action is needed to protect the fundamental right of parents to make health and educational decisions for their children…" The Executive Order directed the Florida Department of Education (FDOE) and the Florida Department of Health (FDOH) to execute rules and take all necessary action to ensure that constitutional freedoms and fundamental rights of parents were not violated, and to protect children with disabilities or health conditions who would be harmed by protocols such as face masking requirements. The FDOH promptly issued an emergency order establishing protocols for schools to re-open including a statement that "students may wear

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and concluded that they did except when the speech causes a substantial disruption to the educational environment or infringes on the rights of others. In *Tinker*, the students in question wore black armbands in protest of the Vietnam War and were suspended for their expressive speech. The Court ultimately ruled in their favor based upon the general rule of free speech and after concluding that the speech did not, in fact, cause a substantial disruption to the school or infringe on the rights of others.

Under *Tinker*, "substantial disruption" means more than just embarrassment experienced by another or an administrator's authority being called into question temporarily; rather, this test requires a true disruption of the educational mission of the school, such as staff or students not attending school or the loss of a significant amount of instructional time. One thing *Tinker* did not specifically address, likely because it was not relevant in 1969, was whether its test applied to student speech made off of school grounds, but nevertheless impacted school.

Seventeen years after *Tinker*, the Court considered its second student speech case, *Fraser*. There, a high school student gave a speech to the student body in support his friend's campaign for student of government. In the speech, the student used "an elaborate, graphic, and explicit sexual metaphor," which resulted in his suspension. This time around, unfortunately for young Mr. Fraser, the Court ruled in favor of the school. It stated that lewd, vulgar, and obscene speech is not protected in the public school setting as it runs counter to the educational mission of the public schools. This was the first, but not the last, opportunity the Court took to caution students that their free speech rights in school are not as expansive as they are in a public park on a Saturday or that are enjoyed by adults – this is because of the special and educational setting of the public schools.

Two short years after *Fraser*, the Court grappled with student speech again in the *Kuhlmeier* case. Somewhat different from the other cases because it did not involve student discipline, this case asked whether the First Amendment protected a student's draft article in the school newspaper. The articles in question related to sensitive topics including teenage pregnancy and divorce. The faculty sponsor of the school newspaper did not print the articles as she and the principal did not feel they were appropriate and because they were concerned that "anonymous" students referenced in the articles could be identified by others in the school community. Once again, and to the detriment of budding journalist Ms. Kuhlmeier, the Court ruled in favor of the school. It stated that the First Amendment did not protect the speech in question because the newspaper was school-sponsored and was part of a curricular assignment (the students received academic credit for their work on the newspaper). The Court noted that the school has powers to edit student speech when it is also school-sponsored speech so long as the school's actions are "reasonably related to legitimate pedagogical concerns."

Then, after a quiet period of almost 20 years, the Court again took a student free speech case, *Morse*. In this case, several students were suspended when they unfurled a nine-foot banner that read "BONG HITS 4 JESUS" during a public event in front of the school. One of the defenses was that the students were not on school property, but across the street from the school on a public sidewalk. Although this fact had the makings of a Court ruling involving off-campus speech, the Court quickly dispensed with that defense, stating that the students were at a school-sponsored activity much like a field trip. Then, the Court again ruled against the students, stating that student speech on campus (or at a school-sponsored event) promoting illegal drug use is not protected by the First Amendment.

During the 14 years between *Morse* and the issuance of the *B.L.* decision this year, society made exponential advances in technology, especially in the area of social media platforms and cell phones. To illustrate, the *Morse* decision was released exactly four days before the first iPhone went on sale in 2007. Since *Morse*, many appellate courts have grappled with cases where schools disciplined students for off-campus speech. These cases have involved everything from parody social media profiles to cyberbullying and threats. Most of these cases applied the oldest Court case, *Tinker*, and ruled in favor of the schools if the off-campus speech caused a substantial disruption of the campus environment, and ruled in favor of the students if it did not. However, one appellate court made a somewhat controversial ruling in 2020 that a student's off-campus speech cannot be regulated (i.e., punished) *at all* by the school, and this, in part, lead the Court to take the *B.L* case.

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masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask."

State Court Lawsuit

Several parents from the Tampa Bay area filed a six- count complaint in Leon County challenging the authority of the Governor to ban local school districts from adopting a face mask mandate unless the mask mandate allowed parents to opt out. On September 3, 2021, Judge Cooper issued a written order finding in favor of the Plaintiffs on three of the six counts. He concluded that the Executive Order, premised on the Parents' Bill of Rights, is unconstitutional because it exceeds the authority granted under the statute. He concluded that:

*"...*the Parents' Bill of Rights does not ban school board face mask mandates. The Statute expressly permits school boards to adopt policies regarding the healthcare of students (such as face mask mandates) even if a parent disagrees with the policy. The statute requires only that the policy be reasonable, is necessary to achieve a compelling state interest, and be narrowly tailored and not otherwise served by a less restrictive means."

The FDOH rule allowing masks only if parents could opt out was not struck down by the Court because the Plaintiffs did not name the FDOH as a party to the lawsuit.

The Appeal and the Stay

The State immediately filed a notice appealing the trial court's decision to the First District Court of Appeal. This resulted in an automatic stay of Judge Cooper's decision. The Plaintiffs then filed an emergency motion asking the Judge to lift the stay so that his order would be in effect pending the appeal. He granted their motion. Two days later the appellate court re-instated the stay which means that the Executive Order is enforceable pending the outcome of the appeal. Now, the case is moving ahead as a traditional appeal, which will likely not be decided before December or January at the earliest.

Rule Challenge

Following a different procedural path to challenge the State's authority to invalidate mask mandates, several school districts filed a "rule challenge" asking an administrative judge with the Division of Administrative Hearings (DOAH) to determine that mask

mandates are permissible under the DOH rule even if the ability to opt out requires medical documentation.

However, on September 22, 2021 the state's brand-new Surgeon General issued a new Emergency Rule replacing and superseding the previous rule issued by his predecessor surgeon general. Because the case challenging the old rule was moot, it was dismissed by the DOAH judge. Under the new rule, parents can opt their child out of a mask requirement "in their sole discretion." Further, unless a student tests positive for COVID -19 or is symptomatic, it is up to the parent or legal guardian whether they attend school. The stated purpose is to prevent healthy kids from missing school. On October 6, 2021, several school districts filed a petition challenging the new rule. That challenge is moving forward.

Federal Lawsuit

Lastly, there is a lawsuit pending in the U.S District Court for the Southern District of Florida alleging that the Executive Order violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act because it causes a barrier for students with disabilities from returning to school safely. That lawsuit remains pending as well.●

Lighter notes

A lawyer awoke from surgery and asked the nurse why all the blinds were closed. The nurse replied "There's a fire across the street and we didn't want you to think you had died."

A client visits a lawyer about an issue. After the meeting, the lawyer says the charge will be $100, and the client hands her a crisp $100 bill and leaves. The lawyer then notices that the bill was so new and crisp it had another $100 bill stuck to it. Now she faced the age old ethical dilemma – should she keep it herself or split it with her partner?

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B.L. Case

In B.L., a high school freshman student tried out in the Spring for the varsity cheerleading squad for the next year, but only made the JV squad again even though other freshmen made varsity. She also played softball and asked to be the starting right fielder for the next school year, but that starting position was given to a teammate. After these setbacks, B.L. posted a "Snap" to Snapchat that included a picture of her and a friend at a local convenient store after school raising their middle fingers and stating: "f--- school, f--- softball, f--- cheer, f--- everything" [*dashes are mine, not the student's*]. She was removed from the JV squad for violating the written cheerleading rules that, among other things, required good sportsmanship and prohibited "any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." Her family then sued.

At trial, the judge sided with the student, stating that the free speech exceptions discussed by the U.S. Supreme Court did not apply and, therefore, the general rule of *Tinker* (students have free speech rights) applies since no substantial disruption of the school environment occurred. At the appellate court level, the student won again, but that court wrote: "*Tinker* does not apply to off-campus speech…*Tinker*'s focus on disruption makes sense when a student stands in the school context, amid the 'captive audience' of his peers. But it makes little sense where the student stands outside that context, given that any effect on the school environment will depend on others' choices and reactions."

Notably, on appeal, the school also argued that the removal was not a suspension or expulsion from school (arguing that attending school is a right), but rather was a removal from an extracurricular activity (arguing that cheering, football, debate, etc. are not a right, but a privilege), and that this does not rise to the same level of protection as the removal of a right. The school also argued that the student waived her rights to free speech by agreeing to the cheerleading rules. The appellate court was not persuaded, noting that Constitutional rights cannot be infringed regardless of the context, essentially equating her consequence to discipline, and that B.L. did not waive her rights to free speech by signing the cheerleading rules.

The U.S. Supreme Court, after voluminous briefing by the parties and other advocacy groups on both sides of the issue, also ruled in favor of the student, reiterating the rules in *Tinker* and subsequent cases. Importantly, the Court acknowledged that *Tinker* could be applied to off-campus speech. This basically overruled the lower appellate court holding the opposite and many observers speculate that this was the primary, if not only, reason it took this case, especially since the Court did not change the result.

In the end, the Court did not provide any new insights into or legal tests for off-campus student speech. But, it did confirm that what the appellate courts have been doing since the first iPhone was released is what they should have been doing – applying the *Tinker* standard and affirming student discipline if the off-campus speech caused a true substantial disruption to the school environment, which is always a very fact-specific analysis. If this issue arises at your school, we are always available to assist in analyzing the legal issues and advising the school administration.●

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The School Board Attorney and Staff Attorney Offices would like to wish you and your families a Safe and Happy Fall and Holiday Season