DO BULLIES HAVE FREE SPEECH RIGHTS?

No one likes bullies. But we may reasonably ask whether bullies retain their free speech rights when they leave **school grounds.**

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After hearing oral argument in *Mahanoy Area School District v. B.L.*[2] on April 28, the United States Supreme Court may soon answer that question. In its decision below, the Third Circuit held that school officials overstepped in disciplining a student for a post on social media. The student's speech in this case was vulgar and inconsequential. However, resolution of the issue under review – whether school officials have jurisdiction over off-campus student speech – could have a profound impact on our public schools. In deciding that case, it will be important for the Court to clarify that school administrators may still apply the well-known *Tinker* test to protect students from bullying by their mean-spirited peers, whether such bullying occurs on or off campus.

The *Tinker* test comes from the seminal decision of the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*.[3] There, the Court considered whether Mary Beth Tinker, a student, had the right to wear a black armband at school to protest the war in Viet Nam. Ruling in favor of the student, the court acknowledged that students retain their First Amendment rights when they go to school, holding famously that "[i]t can hardly be argued that either students or teachers shed their constitutional rights of freedom of speech or expression at the schoolhouse gate." But the Court held further that student free speech rights are subject to what is now known as the *Tinker* test: "Conduct...[that] materially disrupts classwork or involves substantial disorder or [is an] invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." Accordingly, school administrators are empowered to regulate student speech when they reasonably forecast that the speech will have such effects.

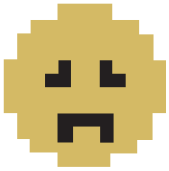
As we emerge from a pandemic and look at over a year of remote instruction, we are rethinking the very concept of "school property." Fifty-plus years after *Tinker*, it is clear that school administrators can and should regulate student speech in appropriate cases, even when such speech occurs beyond the "schoolhouse gate." The *Tinker* test should remain the way to balance school interests in maintaining order against the important free speech rights of students, wherever student speech occurs.

Focus on the conduct, not where it occurs.

It is well-established in Connecticut that the authority that school officials have over students is not limited to the time that they are on school property. Since the mid-1990s, Connecticut law has conferred authority on school officials to discipline students for certain offenses that occur off campus. Such offenses include the sale or distribution of controlled substances, the possession of a firearm as defined by federal law, or the possession and use of a weapon in the commission of a crime.[4]

Our Connecticut Supreme Court got into the act in 1998 with *Packer v. Thomaston Board of Education*,[5] ruling that students are subject to school discipline for other misconduct off campus if such conduct "markedly interrupts or severely impedes the day-to-day operation of a school." Moreover, while the *Packer* case was working its way through the courts, the General Assembly weighed in, amending C.G.S. § 10-233d(a)(1) to permit student discipline for certain off-campus conduct, further providing that school officials may consider: "(A) [w]hether the incident occurred within close proximity of a school; (B) whether other students from the school were involved or whether there was any gang involvement; (C) whether the conduct involved violence, threats of violence or the unlawful use of a weapon, as defined in section 29-38, and whether any injuries occurred; and (D) whether the conduct involved the use of alcohol."

School authority to regulate off-campus student conduct has long included student speech. Interestingly, this premise was first advanced by Judge Jon O. Newman in a concurring opinion that has been more influential than the decision itself. In *Thomas v. Board of Education, Granville Central School District*,[6] the Second Circuit struck down school discipline of a student who published a vulgar underground newspaper off-campus, holding that the discipline violated the student's First Amendment rights. However, in a concurring opinion, Judge Newman held open the prospect that school officials can, consistent with the First Amendment, discipline students for speech that occurs off-campus when such speech is aimed at the school community: "School authorities ought to be accorded



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some latitude to regulate student activity that affects matters of legitimate concern to the school community, and *territoriality is not necessarily a useful concept in determining the limit of their authority*. Possibly the traditional standard of the law that holds a person responsible for the natural and reasonably foreseeable consequences of his action might have some pertinent applicability to the issue." (Emphasis added.)

Twenty-nine years later, in *Doninger v. Niehoff*,[7] the Second Circuit quoted Judge Newman's prescient words in rejecting the First Amendment claims of a student who was disciplined for intemperate language on her blog about the superintendent and principal. Avery Doninger, a student at Lewis Mills High School in Burlington, Conn., was annoyed that a student activity was not permitted to go forward. She complained on her online blog that the high school principal and the superintendent were "douche bags," and she urged other students to send emails to the superintendent to "piss her off more."

As a consequence of these posts, Avery was removed as class secretary and prohibited from running again for that office. In response, she and her mother brought suit in federal district court, claiming that the penalty imposed on Avery violated her First Amendment rights. However, District Court Judge Kravitz denied her request for an injunction against the school district's actions, and the Second Circuit affirmed.

In its ruling, the Second Circuit relied on *Wisniewski v. Board of Education*,[8] a case it decided just the year before. There, the court rejected a student's free speech claims and upheld his expulsion for creating and sharing with other students a crude instant messenger icon that referred to killing his math teacher. Citing *Wisniewski*, the court applied the *Tinker* test in *Doninger* even though Avery's offensive posts were made online, stating, "We recognized that off-campus conduct of this sort 'can create a foreseeable risk of substantial disruption within a school' and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline." The court then found that Avery's posts were disruptive under the *Tinker* test and upheld the actions of school officials in disciplining her.

Other appellate courts have also applied *Tinker* to affirm actions by school officials disciplining

students for off-campus speech. In *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*,[9] for example, the Eighth Circuit applied the *Tinker* test to uphold the expulsion of a student who made off-campus threats against other students. Similarly, in *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*,[10] citing *Tinker*, the Ninth Circuit rejected the First Amendment claims brought on behalf of a seventh-grade student who received a two-day out-of-school suspension for participating in harassment of two disabled students as they were walking home from school.

Returning to *Mahanoy*, by contrast, the Third Circuit Court of Appeals held that school officials cannot rely on *Tinker* for the authority to discipline students for off-campus speech.[11] In that case, B.L. was disappointed to learn that she had not made the varsity cheerleading team for a second year in a row. She vented her frustration by posting a picture on Snapchat of herself and a friend with middle fingers raised, and included the caption, "Fuck school fuck softball fuck cheer fuck everything." Other students promptly brought B.L.'s post to the attention of the coach and school authorities, and B.L. was suspended from the cheerleading team for the remainder of the season. She sued, claiming that the school rules that she supposedly violated were unconstitutionally vague and that her punishment violated her free speech rights.

In its decision, the Third Circuit thoughtfully reviewed the case law on student speech, noting that various other courts of appeal have held that school officials may rely on *Tinker* to impose school discipline on students for off-campus speech, as discussed above. However, the Third Circuit eschewed this approach. Not only did it rule in favor of the student (as well it should have, given the triviality of the student's conduct), but it doubled down, holding categorically that the *Tinker* case does not give school officials jurisdiction over online speech.

The decision was not unanimous. Judge Ambro concurred in the result, but he expressly dissented from the court's broad holding that *Tinker* does not authorize school officials to regulate "off-campus" student speech. In dissenting from the court's holding, Judge Ambro appropriately pointed out that online student speech could raise significant issues for school officials, such as "off-campus racially tinged student speech" that could cause disruption. In Judge Ambro's view, there was no need for the majority categorically to reject the *Tinker* test in deciding such a simple case of off-campus speech.

Bullying behavior and its statutory definition have both evolved with technology

Bullying behavior is a scourge that has tormented countless students and has even claimed the lives of students in Connecticut and elsewhere by suicide. The statistics are alarming. As the Centers for Disease Control and Prevention (CDC) reported in 2019, nearly 14 percent of public schools reported that bullying is a disciplinary problem that occurs on a daily basis in their schools, or at least once a week.[12] And while that statistic alone is frightening, the number of cyberbullying reports is even higher. In 2020, the CDC reported that 33 percent of middle school students and 30 percent of high school students are cyberbullied.[13] The need to address this problem is compelling.

Since 2002, the state of Connecticut has required boards of education to address bullying in the schools. Conn. Gen. Stat. § 10-220, the Connecticut law requiring school districts to have policies to address bullying behavior, was first passed that year following the shocking suicide of a twelve-year-old student in Meriden who had been the victim of persistent bullying and harassment by his classmates. Daniel's fellow students frequently shoved him, yelled at him and on one occasion even threw a chair at him.[14]

Bullying behavior has evolved from name-calling and schoolyard confrontations to hurtful attacks on social media, and the General Assembly recognized, over time, the need for school officials to regulate such cyberbullying. However, establishing jurisdiction over

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off-school bullying behavior, or even defining "bullying" itself, has not been simple.

In repeated efforts to address bullying behavior more effectively, the General Assembly has amended the bullying statute six different times (2006, 2008, 2011, 2014, 2018 and, most recently, in 2019). "Bullying" was first defined in 2002, when the General Assembly mandated that boards of education develop policies to address the existence of bullying in schools. Public Act 02-199 defined bullying as "any overt acts by a student or a group of students directed against another student with the intent to ridicule, humiliate or intimidate the other student while on school grounds or at a school-sponsored activity which acts are repeated against the same student over time."

Public Act 06-115 was the first revision of the statute, and it invited school districts to address "bullying outside of the school setting if it [has] a direct and negative impact on a student's academic performance or safety in school." Clearly, the General Assembly was encouraging, but not requiring, school districts to include a prohibition against cyberbullying in their required policies.

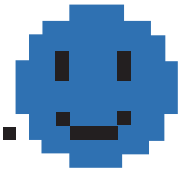
The invitation to address off-campus conduct became a mandate in 2011, and the General Assembly specifically conferred jurisdiction (and responsibility) for off-campus bullying behavior through its third revision of the statute. Public Act 11-232, An Act Concerning the Strengthening of School Bullying Laws, added a new definition of "cyberbullying," and it redefined "bullying" to be, inter alia, "the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district,... that: (i) [c]auses physical or emotional harm to such student or damage to such student's property, (ii) places such student in reasonable fear of harm to himself or herself, or of damage to his or her property, (iii) creates a hostile environment at school for such student, (iv) infringes on the rights of such student at school, or (v) substantially disrupts the education process or the orderly operation of a school."

With this statutory amendment, districts became responsible for intervening in bullying behavior that occurs off campus. However, the new statute established a different standard for such intervention, the thrust of which is simple – if the bullying conduct has a direct nexus to or impact at school, school officials are responsible for taking action.

In 2019, the definition of bullying was revised once again. Effective July 1, 2021, "bullying" will be defined as "an act that is direct or indirect and severe, persistent or pervasive, which (A) causes physical or emotional harm to an individual, (B) places an individual in reasonable fear of physical or emotional harm, or (C) infringes on the rights or opportunities of an individual at school." Significantly, however, the General Assembly retained the prohibition against cyberbullying, and school officials in Connecticut remain responsible for the discipline of students for off-campus bullying behavior that has a direct nexus to school.

Tinker remains an appropriate framework

Courts in other jurisdictions have relied on *Tinker* in affirming the authority of school officials to impose discipline on students for off-campus bullying behavior. An early case is *Kowalski v. Berkeley County Schools*.[15] There, the Fourth Circuit applied the *Tinker* test to reject a First Amendment challenge by a student who was disciplined



for posting to a MySpace page she created, "which was largely dedicated to ridiculing a fellow student." In so doing, the court cited the rarely invoked third prong of *Tinker* – student speech that "'collid[es] with' or 'inva[des]' 'the rights of others,'" stating, "Thus, the language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."

Similarly, in *S.J.W. v. Lee's Summit R-7 School District*,[16] the Eighth Circuit applied *Tinker* to hold that students were unlikely to be successful in challenging their suspension for offensive online posts that "contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name."[17]

The *Tinker* test can cut both ways, and the courts have ruled against school districts when student speech, albeit vulgar, is neither disruptive nor invasive of the rights of others. In *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*,[18] for example, two high school students brought a First Amendment claim after they were suspended from their volleyball team for posting raunchy pictures from a sleep-over. Citing *Tinker* and noting that school officials had failed to establish any material disruption of the educational process, the court sustained the students' free speech claim. Other examples include a ruling that a letter sent to a college admissions office about another student may be protected speech because it did not meet the *Tinker* standard[19] and a ruling that a derogatory post by a student about a classmate was not disruptive.[20]

Getting it right – the need for a thoughtful balancing act

The Third Circuit could have (and should have) applied *Tinker* in *Mahanoy* to find the student's vulgar post was protected speech. Through these various decisions, we see that the *Tinker* test has provided an appropriate framework for balancing legitimate school interests with student free speech rights, including online speech beyond the "schoolhouse gate." Some online student speech is disruptive and hurtful, sometimes with tragic consequences. Forcing the victims of bullying to rely on criminal complaints or civil redress would be unnecessary and problematic. Permitting school officials to apply *Tinker* and to take action in appropriate cases, by contrast, facilitates prompt and effective action to intervene and address the harm that bullying so clearly can inflict.

Finally, the new definition of "bullying" under Connecticut law is particularly well-suited to the balancing of interests that *Tinker* requires. Free speech is important, and school officials should be able to regulate student speech online only when there is a compelling need to do so. By redefining bullying as conduct that is "severe, persistent or pervasive," the General Assembly has established an appropriately high bar before school officials can discipline a student for bullying, whether on campus or off.

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2 No. 20-255, 2021 WL 77251 (U.S. Jan. 8, 2021).
3 393 U.S. 503 (1969).
4 Conn. Gen. Stat. § 10-233d(a)(2).
5 246 Conn. 89 (1998).
6 607 F.2d 1043 (2d Cir. 1979).
7 527 F.3d 41 (2d Cir. 2008).
8 494 F.3d 34, 40 (2d Cir. 2007), cert. denied, 552 U.S. 1296, (2008).
9 647 F.3d 754 (8th Cir. 2011).
10 835 F.3d 1142 (9th Cir. 2016).
11 *B.L. v. Mahanoy Area School District*, 964 F.3d 170 (3d Cir. 2020).
12 https://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/fastfact.html
13 https://www.cdc.gov/injury/features/stop-bullying/index.html.
14 See *Scruggs v. Meriden Board of Education*, 2007 WL 2318851 (D. Conn. 2007).
15 652 F.3d. 565 (4th Cir. 2011).
16 696 F.3d 771 (8th Cir. 2012).
17 See also *Dunkley v. Board of Education of the Greater Egg Harbor Regional High School District*, 216 F. Supp. 3d 485 (D. N.J. 2016) (discipline of student upheld for online bullying posts).
18 807 F. Supp. 2d 767 (N.D. Indiana 2011).
19 See, e.g., *M.B. by Brown v. McGee*, 2017 WL 1364214 (E.D. Virginia 2017).
20 *J.C. ex rel. R.C. v. Beverly Hills Unified School Dist.*, 711 F. Supp. 2d 1094 (C.D. Calif. 2010).