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Tinkering With 'Tinker': 3d Cir. School Districts May No Longer Discipline Students for Certain Off-Campus Speech

In rejecting the approach of other circuits, the majority in 'B.L. by Levy' opined that some decisions which deployed 'Tinker' to uphold punishment of offensive off-campus speech may have encompassed too much non-harmful speech.

By Eric Harrison and Kajal Patel

On June 30, 2020, the U.S. Court of Appeals for the Third Circuit, in *B.L. by Levy v. Mahanoy Area School District*, ___ F.3d ___, 2020 U.S. App. LEXIS 20365 (3d Cir. June 30, 2020), broke from several of its sister circuits to rule that public school districts may not discipline students for certain off-campus electronic speech—even when such speech creates a "material and substantial interference with the requirements of appropriate discipline in the operation of the school," the constitutional threshold set in 1969 by the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

In *Tinker*, the U.S. Supreme Court held that "to justify prohibition of a particular expression of opinion," school officials must demonstrate that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." A school may circumscribe speech that results in the "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone."

Prior to June 30, 2020, cases within the Third Circuit upholding a First Amendment challenge to punishment for off-campus student speech have relied on the absence of evidence of substantial disruption. For example, in *Dwyer v. Oceanport School District*, Civ. Action No. 03-6005, Judge Chesler ruled unconstitutional a school district's suspension of a student who maintained a website on which he and other students posted comments critical of the school because the district failed to demonstrate a "specific and significant fear of disruption."

For better or for worse, *B.L. by Levy* makes clear that substantial disruption alone no longer will justify the imposition of discipline for off-campus speech. The Third Circuit articulated a dramatic departure from the reasoning of other circuits to rule that *Tinker* simply does not apply to such speech.

The district court in *B.L. by Levy* enjoined a school district from dismissing a student from the high school cheerleading squad for posting a profane "snap" on Snapchat outside of school. On a Saturday, while at a local store with a friend, she took a photo of herself and her friend with their middle fingers raised and posted it to her Snapchat story with the following caption: "F*ck school f*ck softball f*ck cheer f*ck everything. . . . Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?" Upon receiving the snap, the coaches removed B.L. from the cheerleading team on the basis that she had violated team and school rules of conduct.


Eric Harrison


Kajal Patel

B.L. sought an injunction barring her removal from the squad, claiming that her suspension from the team violated her First Amendment right to free speech. The district court agreed, applying *Tinker* to rule that the school had overreached because there was no evidence of "actual or foreseeable substantial disruption" to school operations.

As noted by Judge Ambro's concurrence, the Third Circuit could have affirmed the district court's judgment on this basis, which would have made the decision both unremarkable and non-precedential. Instead, the two-

judge majority chose to address the question of whether *Tinker* should apply at all:

The time has come for us to answer the question. We begin by canvassing the decisions of our sister circuits. We then consider the wisdom of their various approaches, tested against *Tinker*'s precepts. Finally, we adopt and explain our own, concluding that *Tinker* does not apply to off-campus speech and reserving for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others.

B.L. by Levy, No. 19-1842, 2020 U.S. App. LEXIS 20365, at *25.

In rejecting the approach of other circuits, the majority opined that some decisions which deployed *Tinker* to uphold punishment of offensive off-campus speech may have yielded overbroad principles that encompassed too much non-harmful speech. For example, in *Wiesniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007), the court applied *Tinker* to uphold punishment of a student who threatened violence toward a teacher on the basis that disruption was "reasonably foreseeable." Subsequently, however, in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), the Second Circuit applied the *Tinker*-based "reasonably foreseeable disruption" test to uphold discipline of a student who wrote a blog that criticized school staff and encouraged fellow students to contact a school official to protest the postponement of a concert. "Bad facts make bad law," noted the Third Circuit, and cases interpreting *Tinker* as requiring only "reasonable foreseeability" of disruption or a "nexus … to the school's pedagogical interests" have produced "rules untethered from the contexts in which they arose."

We would argue that benign facts can make bad law as well. In this case, the majority, in the face of rather common juvenile social media profanity (at least to the ears of the co-author who lives with teenagers), declines to apply a test which most certainly would have yielded an affirmance and determines instead to jettison that test altogether.

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Let's take a closer look at the *Doninger* case, which the Third Circuit cited as illustrative of the slippery slope created by application of *Tinker* to off-campus electronic communication. The Third Circuit described the student disciplined in *Doninger* as having criticized school staff and encouraging students to contact a school official to protest the "postponement" of a concert. *B.L. by Levy*, supra. at *27. In fact, the district court in *Doninger* found much more than that:

- Prior to the blog entry for which she was disciplined, the plaintiff—a student council officer—sent a mass email which inaccurately stated that the concert was cancelled;
- The student council advisor spoke with the plaintiff after reading that email and reminded her that as a student council officer she was expected to work cooperatively with her faculty advisors;
- The advisor asked the plaintiff to send a corrective email making clear that the concert was not canceled, and the student agreed to do so;
- Rather than sending the corrective email, the plaintff posted a blog entry that stated "jamfest is cancelled due to douchebags in central office. . . . if you want to write something or call her to piss her off more, im down."
- As a result of the controversy generated by the blog entry, the school was inundated with calls and emails protesting the cancellation of an event which had not been cancelled, causing two administrators to arrive late to several school-related activities;
- As a result of the plaintiff's behavior, she was not permitted to run for student council for the following school year.

Doninger, 527 F.3d at 45-46.

The Third Circuit cited the *Doninger* court's ruling as constitutionally flawed because it employed a "rule[ ] untethered from the context[ ] in which [it] arose." Yet the facts of *Doninger* demonstrated that the student was insubordinate after expressly agreeing to correct an earlier misstatement to exacerbate the confusion. The district court concluded, following a hearing, that the blog had caused a substantial disruption in school operations.

Perhaps the Third Circuit would have taken issue with that finding to define "substantial disruption" as requiring more than an onslaught of emails and phone calls that made teachers late to events. That might be a fair criticism warranting a more precise definition of "substantial disruption." But should dishonest, insubordinate behavior qualify as protected speech simply because it also includes an expression of opinion and a call to action?

The Third Circuit indirectly answers this question in the final paragraph of its lengthy opinion in *B.L. by Levy* as follows:

[T]he primary responsibility for teaching civility rests with parents and other members of the community. As arms of the state, public schools have an interest in teaching civility by example, persuasion, and encouragement, but they may not leverage the coercive power with which they have been entrusted to do so. Otherwise, we give school administrators the power to quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism. Instead, by enforcing the Constitution's limits and upholding free speech rights, we teach a deeper and more enduring version of respect for civility and the "hazardous freedom" that is our national treasure and "the basis of our national strength." *Tinker*, 393 U.S. at 508–09.

B.L. by Levy, supra., at *45-46.

What About Harassment, Intimidation and Bullying?

This lofty rhetoric about the wisdom of teaching respect for civility by refraining from punishing incivility does not answer a question that is likely to vex New Jersey school administrators and education lawyers addressing complaints under the Anti-Bullying Bill of Rights Act (ABBRA), whose definition of HIB (Harassment, Intimidation and Bullying) expressly encompasses electronic communication off school grounds that: (1) is reasonably perceived as motivated by an actual or perceived characteristic; and (2) substantially disrupts or interferes with the orderly operation of the school or the rights of other students.

Following *B.L. by Levy*, what are administrators to do when a student, parent or teacher reports an electronic communication that satisfies this definition? The Third Circuit has told us that "substantial disruption" is no longer sufficient grounds to punish a student.

The most practical answer is textual: while substantial disruption or interference with "orderly operation of the school" is no longer a constitutionally appropriate consideration, consideration of substantial disruption or interference with "the rights of other students" does not appear to have been prohibited by *B.L. by Levy*.

From a constitutional perspective, the *B.L. by Levy* court expressly "reserve[ed] for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others." *B.L. by Levy*, *25. As practitioners and advisors to school districts, then, we would suggest that the Third Circuit's de facto abrogation of an important phrase within the ABBRA—which we would encourage the New Jersey Legislature to revise as soon as possible to prevent unnecessary litigation—simply requires a focus on what is left of the two-prong definition.

Off-campus electronic communication of a student, then, will constitute HIB if it is: (1) reasonably perceived as motivated by an actual or perceived characteristic; and (2) substantially disrupts or interferes with … the rights of other students.

What About Other Off-Campus Code of Conduct Violations?

As for code of conduct violations outside the scope of the ABBRA—such as the behavior of the disgruntled cheerleader in *B.L. by Levy* who posted "f*ck cheer" on Snapchat—the Third Circuit's opinion leaves open the possibility that discipline for violation of a clearly applicable conduct rule could be constitutionally permissible. Yet in *GDM v. Bd of Ed. of Ramapo Indian Hills Regional High School*, 427 N.J. Super. 246 (App. Div. 2012), the Appellate Division struck down a rule disqualifying students from extracurricular activities following arrest for criminal activity. The basis for the court's decision? The absence of a "nexus between the alleged violation and school order or safety"—the precise factor whose consideration the Third Circuit has now prohibited schools from considering when addressing off-campus activity.

We therefore recommend that Board policies and regulations addressing off-campus electronic communication and discipline be reviewed and revised as necessary to comport with both the letter of *B.L. by Levy* and the spirit of *G.D.M. v. Ramapo-Indian Hills*, mindful of the fact that when it comes to off-campus electronic communication, school staff now have no authority to discipline students solely on the basis that their conduct has caused a substantial disruption to school operations.

Eric Harrison *is a partner and* ***Kajal Patel*** *is an associate at Methfessel & Werbel in Edison. Both serve on the firm's Civil Rights team, where they specialize in counseling and defending school districts and other public and private entities against civil rights and tort claims.*