
Ninth Circuit Upholds Student Discipline for Social Media Posts

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In *Chen v. Albany Unified School District* (9th Cir. 2022) 56 F.4th 708, a panel of Ninth Circuit judges agreed with a lower court ruling that the school district's decision to discipline students who created and commented on racist social media posts attacking classmates and school staff did not violate those students' free speech rights when those off-campus posts circulated among other students at the school, disrupting classes and causing academic issues and emotional distress for the students they targeted.

The decision provides school districts with a concrete example of permissible student discipline for social media posts in the wake of the U.S. Supreme Court decision in *Mahanoy Area School District v. B.L.*, which did not create a bright-line rule on point.

Background

Several Albany High School students filed federal lawsuits after being suspended or expelled for their participation in electronic communications via a private social media account that contained racist posts and comments, including some that targeted individual Black students and staff at the school. The lawsuits claimed that school administrators and the school district violated the participating students' free speech and due process rights by disciplining them for their involvement with the social media account.

The trial court held that the school district *improperly* disciplined students who only followed the account or "liked" offensive posts that did not feature specific students, but that it *properly* disciplined those who created, commented on, or "liked" those posts which targeted specific students. (See [2017 Client News Brief Number 87.](#)) Students involved in the four original lawsuits appealed the lower court's decision in two separate filings.

While the appeal cases were pending, in 2021, the U.S. Supreme Court held in *Mahanoy Area School District v. B.L.* that a Pennsylvania school district violated a student's First Amendment free speech rights when it disciplined her for expletive-laden social media posts that criticized her school and cheerleading team. While the decision affirmed that schools may still regulate student expression occurring off-campus on a case-by-case basis under the *Tinker* standard, albeit to a lesser degree than when regulating on-campus student expression, the Supreme Court stated that

such discipline will be met with skepticism and requires a highly fact-specific analysis. (See [2021 Client News Brief Number 16](#).) Notably, in *B.L.*, there was no evidence of a substantial disruption to the educational environment or that the posts caused more than discomfort and unpleasantness that accompanies an unpopular viewpoint.

In deciding *Chen*, the Ninth Circuit first looked at whether its own three-factor test (outlined in *McNeil v. Sherwood Sch. Dist. 88J* (9th Cir. 2019) 918 F.3d 700) for determining whether a school could discipline students for off-campus speech was inconsistent with the Supreme Court's approach set forth in *B.L.*. It determined that the two approaches were compatible, finding that the high court relied on some of the same factors contained in the Ninth Circuit's test, which considers whether there is a "sufficient nexus" between the off-campus speech and the school, whether it is reasonably foreseeable that the speech will reach the school, and the degree and likelihood of harm.

The appellate court then considered the specific conduct of two student-appellants, finding in both cases that the school was entitled to impose discipline. The court found that while the student who owned the account intended for the social media posts to remain private, it was reasonably foreseeable that content posted there would reach and cause disruption at school due to the ease with which electronic communications can be copied and shared with others. The court further determined the degree of harm the posts caused was significant as students targeted by the posts felt "devastated," "scared," and "bullied;" student grades suffered; and even students who were not targeted by the posts became distraught and were too upset to go to class after learning about them.

The Ninth Circuit rejected the account owner's claim that the school improperly disciplined him for unpopular speech, noting that he was expelled for the speech-neutral offense of bullying. While the second student had more limited involvement with the social media account, the panel determined that schools could properly discipline students who affirmatively participate in and support another student's "abusive harassment" targeting specific students.

Takeaways

While the Ninth Circuit's decision provides some clarification regarding when schools may discipline students whose online, off-campus speech causes disruption at school or infringes on the rights of specific students, it also confirms that the three-factor test outlined by the Ninth Circuit in *McNeil* can still be a helpful tool for school administrators even in the wake of the Supreme Court's *B.L.* opinion. School administrators should balance their role of ensuring the safety of other students and staff against the over-regulation or infringement of students' strong free speech rights when assessing the appropriateness of disciplining students for their speech on social media. As such, disciplining students for their social media speech requires very specific facts and analysis, with clearer authority for student speech that violates district policies against bullying, harassment, and discrimination.

If you have any questions about the *Chen* decision or about disciplining students for social media speech in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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