Professional Liability Defense QUARTERLY

Let's Give a Cheer for Free Speech: U.S. Supreme Court Holds School District Cannot Discipline Cheerleader for Off-Campus Snapchat Posts

Christopher J. Conrad, Esq. | *Marshall Dennehey Warner Coleman & Goggin*

We've got spirit, yes we do!

Brandi Levy is a former student and cheerleader who attended high school in the Mahanoy Area School District, located in Mahanoy City, Schuylkill County, PA. During her freshman year, Ms. Levy was a member of the junior varsity cheerleading squad. In May of her freshman year, Ms. Levy tried out for the varsity cheerleading squad for the next school year. Before she could try out, however, Ms. Levy was required to agree to a number of "Cheerleading Rules" that would apply if she made the team again. These Rules in part stated: "Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures." The Rules also cautioned: "There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." Ms. Levy reviewed the Rules with her mother and signed a document acknowledging she would be bound by them.

Tryouts did not go well. Ms. Levy did not make the varsity team and instead she was selected again for junior varsity. Ms. Levy was disappointed. While visiting a local convenience store in town the Saturday after tryouts, Ms. Levy expressed her disappointment by posting images from her cell phone to her personal Snapchat story, which could be viewed by her nearly 250 "friends," including several cheerleaders. One post depicted a selfie of Ms. Levy and a friend with raised middle fingers and included profanity-laced remarks about cheerleading and school in general ("f– school, f – softball, f– cheer, f– everything"). A second post was a blank image but for commentary from Ms. Levy questioning why a freshman student was selected to the varsity squad though she and a friend were not ("Love how me and [my friend] get told we need a year of jv before we make varsity but that doesn't matter to anyone else?"). This post was coupled with an upside-down smiley-face emoji.

One friend and cheerleader, who also was the daughter of a cheerleading coach, captured a screenshot of the posts and brought them to the coaches' attention. And once the weekend was over, the posts quickly made their way around school. Several cheerleaders and other students approached the cheerleading coaches and were "visibly upset" by Ms. Levy's posts.

After learning about the posts, the coaching staff discussed the matter with the high school principal, and they determined that because Ms. Levy had used profanity in a post in connection with cheerleading, a school activity, she had violated the team's "Cheerleading Rules." As punishment, the coaches suspended Ms. Levy from the junior varsity squad for the upcoming school year. Ms. Levy apologized for her conduct, but the school district's athletic director and superintendent were unmoved and upheld the coaches' decision. Ms. Levy and her parents next appealed to the board of school directors, asking them to overturn the suspension, but the board declined to intervene.

S-U-C-C-E-S-S. That's the way we spell success!

Ms. Levy and her parents then filed suit against the school district in federal district court, claiming her suspension from the junior varsity squad violated her First Amendment rights; that the school and team rules that she allegedly violated were overbroad and viewpoint discriminatory; and that the rules were unconstitutionally vague. Initially, the district court found that Ms. Levy had a reasonable likelihood of success on the merits of her claims and granted her request for a temporary restraining order and preliminary injunctive relief. *B.L. by Levy v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607 (M.D. Pa. 2017). As a result, the school district reinstated Ms. Levy to the junior varsity cheerleading squad.

Ms. Levy later prevailed on summary judgment as well. In relying on the seminal First Amendment case *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969), which in pertinent part held that schools can regulate student speech only if it "substantially disrupts the work and discipline of the school," the federal district court concluded that Ms. Levy's posts had not caused a substantial disruption in school, and therefore the school district had violated Ms. Levy's First Amendment rights by suspending her from the squad. *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019). Ms. Levy was awarded nominal damages and attorney's fees, and the school district was ordered to expunge her disciplinary record.

Brr! It's cold in here!

The school district appealed but fared no better before the Third Circuit. In affirming the district court's decision, the Third Circuit likewise found for Ms. Levy and concluded the school district violated Ms. Levy's First Amendment rights. The Third Circuit majority held, as a matter of first impression, "that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *B.L. v. Mahanoy Area Sch. Dist.*, 964 F. 3d 170, 180, 189 (3rd Cir. 2020). The Third Circuit reasoned that Ms. Levy could not be disciplined because the posts were "off campus" speech that fell outside of the school context, noting the posts did not take place in a school-sponsored forum, or in a context that "bears the imprimatur of the school," nor was it a case in which the school operated the online forum. "Instead, B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school." *Id.* at 180.

In a concurring opinion, however, one member of the Third Circuit panel disagreed with the majority's holding and reasoned, as did the district court, that Ms. Levy's First Amendment rights had been violated because the posts had not created a substantial disruption in school: "It caused complaints by a few other cheerleaders but no 'substantial disruptions,' and the coaches testified that they did not expect the Snap would substantially disrupt any activities in the future." *Id.* at 195. The concurring member of the panel also expressed concern about creating a blanket rule that *Tinker* does not apply to off-campus speech:

> Yet we do so here in a case bereft of substantial disruptions within the school. I fear that our decision will sow further confusion. For example, how does our holding apply to off-campus racially tinged student speech? Can a school discipline a student who posts off-campus Snaps reenacting and mocking the victims of police violence where those Snaps are not related to school, not taken or posted on campus, do not overtly threaten violence and do not target any specific individual, yet provoke significant disruptions within the school? Hard to tell. We

promulgate a new constitutional rule based on facts that do not require us to entertain hard questions such as these.

B.L., 964 F. 3d at 197.

Victory is sweet! Say it again, now!

Undeterred, the school district petitioned for writ of *certiorari*. The U.S. Supreme Court granted the school district's petition in order to answer the question: "whether *Tinker*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044 (2021).

The U.S. Supreme Court, in an 8-1 decision, once again found for Ms. Levy, though on somewhat different grounds from the Third Circuit. Writing for the majority, Justice Breyer first explained that while public schools have the ability to regulate some student speech that occurs off campus, still the Court was not inclined to "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045. Instead, the Court focused squarely on the fact-specific nature of Ms. Levy's posts:

> Consider B.L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B.L.'s posts, while crude, did not amount to fighting words. And while B.L. used vulgarity, her speech was not obscene as this Court has understood that term. To the contrary, B.L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.

Id. at 2046-2047 (citations omitted). Also, the Court examined the time, place and manner of B.L.'s posts:

> Consider too when, where, and how B.L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless … diminish the school's interest in punishing B.L.'s utterance.

Id. at 2048.

The Court ultimately was unpersuaded by the school district's arguments that it had paramount interest in teaching good manners and punishing the use of vulgarity directed toward the school community; in trying to prevent disruption in a school-sponsored extracurricular activity; and in promoting team morale. Though the Court recognized the school district's concerns were legitimate, still B.L.'s First Amendment rights prevailed: "It might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2048.

Justice Alito (joined by Justice Gorsuch), in a concurring opinion, agreed with the majority, but he sought to clarify the scope of the majority's decision and "the framework within which efforts to regulate off-premises speech should be analyzed." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2049 (Alito, J., concurring). First, Justice Alito stated that for purposes of First Amendment analysis, it is important to understand that enrollment in a public school naturally results in a diminution of a student's free speech rights because "by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights," whether that consent is express or implied. *Id.* at 2051. Yet, Justice Alito reasoned that "[w]hile the decision to enroll a student in a public school may be regarded as conferring the authority to regulate some off-premises speech … enrollment cannot be treated as a complete transfer of parental authority over a student's speech. In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children." *Id.* at 2053. Given this delicate balance, Justice Alito cautioned that public schools should be wary before attempting to regulate—and punish—off-campus student speech:

> The overwhelming majority of school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand. If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

Mahanoy Area Sch. Dist., 141 S. Ct. at 2058-2059 (Alito, J., concurring).

Justice Thomas dissented, and he was supportive of the coaches' decision to suspend Ms. Levy from the junior varsity squad. Justice Thomas reasoned that historically, a "school can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs," and he saw no justification to deviate from this historical rule. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2061 (Thomas, J., dissenting). He commented that "the purpose and effect of B.L.'s speech was to degrade the program and cheerleading staff in front of other pupils, thus having a direct and immediate tendency to ... subvert the cheerleading coach's authority. As a result, the coach had authority to discipline B.L." *Ibid.* (internal citations and quotations omitted).

Hold that line! Push 'em back!

Given the majority's somewhat limited and fact-specific holding, what if anything can public schools do now to regulate student speech that occurs off campus? Fortunately, the majority did provide schools with some guidance to consider before deciding whether to regulate—and punish—off-campus speech.

First, public schools must know that efforts to regulate off-campus student speech generally will be viewed by courts with suspicion, because "a school, in relation to off-campus speech, will rarely stand *in loco parentis*," and "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046. So, when it comes to monitoring off-campus student speech, particularly through social media accounts and texting on personal devices, the first line of defense should rest with the parents and guardians, not school personnel.

Second, public schools must be aware that courts are likely to disfavor efforts to regulate off-campus speech because it may have the effect of suppressing student speech altogether. Stated otherwise, when coupled with on-campus speech, off-campus speech will "include all the speech a student utters during the full 24-hour day. That means courts must be

more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." *Mahanoy Area Sch. Dist.,* 141 S. Ct. at 2046. In this context, the Supreme Court remarked that public schools will have an especially "heavy burden to justify intervention" in political or religious speech that occurs outside school or a school program or activity. *Ibid.* Therefore, public schools must be cautious before they attempt to quell, prohibit, or discipline off-campus speech, especially if the speech occurred outside of school hours or sponsored activities. And even more so, public schools must show particular restraint before attempting to regulate off-campus speech in which a student espouses religious or political views, no matter what they may be.

Third, public schools should work to foster among its students a free exchange and "marketplace of ideas," and to that end "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus… That protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy Area Sch. Dist.,* 141 S. Ct. at 2046. If a public school's efforts to regulate off-campus speech result in a stifling of a free exchange of ideas, even if the school deems the student's commentary to be unpopular, courts will not look favorably.

Ultimately, however, the Supreme Court's decision leaves *Tinker* firmly intact. Therefore, public schools still must be guided by the well-established mandate of determining whether the student's off-campus speech materially and substantially disrupted the work and discipline of the school. As always, this remains a fact-sensitive, case-by-case inquiry, and as Justice Alito warned, schools "should proceed cautiously before venturing into this territory."

About the Author

Christopher J. Conrad is a shareholder in the Camp Hill, PA office of *Marshall, Dennehey, Warner, Coleman & Goggin, PC*, and he is a member of the firm's Professional Liability Department. As part of his practice, Mr. Conrad defends school districts, intermediate units, charter schools and other academic institutions in employment and civil rights litigation and in all phases of special education litigation, from administrative due process hearings to federal court appeals. Mr. Conrad is a 1998 graduate of The Pennsylvania State University and a 2001 graduate of The Pennsylvania State University Dickinson School of Law. He is admitted to practice law in federal and state courts in Pennsylvania, New Jersey and Maryland. He can be reached at CJConrad@MDWCG.com.

About the PLDF

The Professional Liability Defense Federation™ is a not-for-profit organization designed to bring together attorneys, claims professionals and risk management specialists to share expertise and information helpful to the successful defense of professional liability claims.

Membership in the PLDF includes delivery of the *Professional Liability Defense Quarterly*, which is devoted to current legal defense and claims handling issues. Articles of topical interest spanning a wide range of malpractice defense subjects are presented to add value to effective defense preparations for the claims handler and defense counsel. We encourage member submission of articles proposed for publication to: Editor-in-Chief, *Professional Liability Defense Quarterly*, PO Box 588, Rochester IL 62563-0588, sandra@PLDF.org.

To learn more about the PLDF and all that we have to offer, please visit www.PLDF.org or contact our management team: Managing Director Sandra J. Wulf, CAE, IOM, sandra@pldf.org; Deputy Director Sara Decatoire, CAE, IOM, sarad@pldf.org.