On June 23, 2021, the U.S. Supreme Court held that the Mahanoy Area School District violated the First Amendment rights of Brandi Levy, a high school student who went to Snapchat to voice her frustrations when she didn’t make the varsity school cheerleading team.

Ms. Levy posted on her personal Snapchat a few photos showing the middle finger, one with the caption, “F*** school f*** softball f*** cheer f*** everything,” and the other saying, “Love how me and [another student] get told we have another year of JV before we make varsity but that doesn’t matter to anyone else.” which was visible to about 250 people at the time, many of whom were fellow students. Snapchat messages, by design are meant to go away not long after they are sent.

In this circumstance, at least one other student took a screenshot of the post(s) and shared it with her mother, who was also a coach, to express concern, the school
district decided Ms. Levy violated school and team rules, and was ultimately suspended from the junior varsity cheer squad for the remainder of the year.

Ms. Levy and her parents sued Mahanoy School District (“School District”) under 42 U.S.C. § 1983, stating that her suspension violated the First Amendment, and Mahanoy’s team and school rules were overbroad and unconstitutionally vague. The School District argued that they were within their rights to suspend Ms. Levy because of the previous Supreme Court decision *Tinker v. Des Moines Independent Community School District*, which ultimately held that school officials could regulate speech that would disrupt the work and discipline of the school.

Both the United States District Court for the Middle District of Pennsylvania and the Third Circuit Court of Appeals sided with Ms. Levy, and the Mahanoy School District filed a petition for *certiorari*, asking whether *Tinker* standard did or did not apply to this case.

The Supreme Court needed to decide whether the First Amendment prohibits public schools from regulating off-campus speech, and whether the Third Circuit correctly held that the school violated Ms. Levy’s first amendment rights. It was an 8 to 1 decision, with Justice Stephen Breyer drafting the majority opinion and Justice Clarence Thomas authoring the dissenting opinion.

The Supreme Court previously outlined three instances where a school may regulate student speech: (1) incident, lewd or vulgar speech uttered during a school assembly on school grounds, (2) speech uttered during a class trip that references illicit drug use, and (3) speech that others may perceive as bearing the imprimatur of the school, such as in a school newspaper.

Ms. Levy’s words of criticism were outside of school hours and not on school property, and although they were vulgar, they were not threatening in nature, so the Supreme Court held the School District did not have the right to punish Ms. Levy and she was not outside of her First Amendment rights.

**What are the Free Speech Implications?**

*While the Supreme Court ruled in favor of Ms. Levy in this case,* the ruling does not necessarily protect all off-campus speech. For example, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court said schools may regulate speech that disrupts the order of the school or infringes on others’ rights. In his dissenting opinion, Justice Thomas said schools have the authority to regulate speech off-campus when it harms the school and threatens its faculty.

The Court said exceptions to the ruling in *Mahanoy Area School District v. B.L.* would be limited, and would have to be worked out in future cases. *Justice Samuel Alito said in his concurring opinion* 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.”

According to previous precedent, students do not lose their First Amendment rights when they set foot on school grounds.
“I think this result is foreseeable insofar as the Court seemed unlikely during oral argument to adopt the Third Circuit’s broad view that schools can’t regulate off-campus speech at all, but they also seemed to think the school had overreached here,” said Gautam Hans, assistant clinical professor of law and director of the Stanton Foundation First Amendment Clinic at Vanderbilt University Law School in a statement to the National Law Review.

The Court outlined three facets that distinguish schools’ efforts to regulate off-campus speech. First, it’s the parents’ responsibility to regulate students’ speech off campus. Additionally, if a student is subjected to speech regulations on and off campus, then their speech is regulated 24 hours a 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,” per Justice Breyer writing for the majority. Lastly, the Court said schools are America’s “nurseries of democracy,” and therefore have an interest in protecting students’ unpopular opinions.

“Justice Breyer’s adoption of a flexible standard for when schools can regulate speech off-campus demonstrates the real challenges for schools and the need to balance competing interests. I suspect this will get litigated a fair amount in the coming years as courts try to figure out what to do with the standard articulated here,” Professor Hans said.

The Court specifically pointed out that in this case, Ms. Levy’s Snapchats were sent outside of school hours on her own time and were not sent on school grounds. She also did not identify the school itself in the posts, and did not target any person in particular. Therefore, the school did not have the right to suspend her.

“Likewise, there is little to suggest a substantial interference in, or disruption of, the school’s efforts to maintain cohesion on the school cheerleading squad,” the Court said.

What are the Implications for School Boards & Administrators?

In his dissenting opinion, Justice Thomas criticized the Court’s majority opinion for being too vague, and for its lack of guidance to schools on how to discipline students moving forward.

“Because the Supreme Court declined to set forth a uniform rule and give leeway to schools to regulate off-campus speech, the lower courts will further shape the landscape of First Amendment application to student speech,” per Christine V. Hamiel, Chair of the School Law Section at von Briesen & Roper. “School boards and administration must be mindful that such further interpretation will continue to lay the foundation for what action a school may take with respect to student off-campus speech.”

Due to the ruling’s lack of uniformity, school administrators will have to think about the specific characteristics of off-campus speech when deciding whether or not to respond with disciplinary action.
“While acknowledging that there can be circumstances where off-campus speech may be regulated, it is clear from the decision that the characteristics of off-campus speech that differentiate it from speech at school or at a school function will make it more difficult to pass constitutional muster when dealing with off-campus speech,” per Robert Burns, Chair of the School and Higher Education Team at Davis Kuelthau. “School administrators will have to analyze such issues carefully when contemplating responding to off-campus speech.”

Moving forward, schools will have to consider multiple factors of the impact of students’ speech when determining if and how to respond.

“The Supreme Court recognized that there can be circumstances where off-campus speech implicates the regulatory interests of schools,” Mr. Burns said. “It concluded that the facts in Mahanoy did not rise to that level, but going forward school districts are in a position to respond to such speech if they conclude it is creating a substantial disruption of learning or threatening the protection of the school population.”

Should a school decide to take action against a student for off-campus speech, they must also determine the circumstances around the student’s speech.

“Schools must carefully consider each situation and the unique circumstances of each situation on a case-by-case basis, taking into consideration three key features: the authority a school has over the off-campus student; the content of the speech at the time it is made (given that off-campus regulation opens the door to school regulation of all student speech); and a school’s responsibility in maintaining a free ‘marketplace of ideas,’” Ms. Hamiel said.

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