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Lessons on Students' First Amendment Rights From the Supreme Court's *Mahanoy Area School* District Decision

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This article will discuss the U.S. Supreme Court's 2021 decision *Mahanoy Area School District v. B.L. by and through Levy* and will provide guidance on American public schools' ability to regulate students' off-campus speech moving forward.

In *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court recognized that students' First Amendment rights can be limited at school because schools have a substantial interest in regulating student on-campus speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The *Mahanoy* decision neither challenged nor altered this settled law. Instead, the Supreme Court undertook a fact-specific analysis to determine whether the interests that schools have in regulating on-campus speech extend to students' *off-campus* speech. Although the Supreme Court ultimately found that Mahanoy Area High School violated Brandi Levy's First Amendment rights, not all student off-campus speech will be free from school regulation going forward. The circumstances of Levy's's case will remain helpful to understand how courts will analyze future student First Amendment cases.

Facts and Procedural Posture

Brandi Levy was a student at Mahanoy Area High School, a public school in Pennsylvania. At the end of her freshman year, she tried out for the school's varsity cheerleading squad. When Levy heard that she had not made the varsity team, but an incoming freshman did, she expressed her frustrations on social media. On a Saturday evening at a local convenience store, Levy took a photo with a friend on her personal cellphone and posted it onto her private Snapchat story. In the photo, Levy raised her middle fingers and added the text, "f**k school f**k softball f**k cheer f**k everything." She then made another post stating, "Love how me and [friend] get told

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we need a year of jv before we make varsity but that[] doesn't matter to anyone else?" These posts were viewable for 24 hours to her roughly 250 Snapchat "friends," including fellow students and teammates on the cheerleading squad.

Although Levy's Snapchat story was temporary and private, her classmates took screenshots of the posts to show them to their parents and cheer coaches. Other students also expressed to the coaches that they thought the posts were inappropriate, and a brief five-minute discussion about the posts occurred during an algebra class. The cheer coaches determined thereafter that Levy had violated the cheer team conduct rules, which Levy had acknowledged before joining the team, that required cheerleaders to "have respect for [their] school, coaches, . . . [and] other cheerleaders"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet." They also felt that Levy's posts violated a school rule requiring student athletes to "conduct[] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." Consequently, the coaches suspended Levy from the squad for one year.

Levy's father met with the school's athletic director, principal, superintendent, and school board to appeal for her reinstatement, but the school board affirmed the suspension. Levy, together with her parents, then filed suit in a Pennsylvania Federal District Court. The district court found in Levy's favor and instructed the school to reinstate her to the cheerleading squad. Relying on *Tinker* and Third Circuit precedent, the district court concluded that the school's conduct violated the First Amendment, reasoning that Levy's posts had not caused substantial disruption at the school because "'general rumblings' do not amount to substantial disruption."

On appeal, the Third Circuit affirmed the judgment but reasoned that *Tinker* does not apply at all because schools do not have special license to regulate student speech made off campus. The school district appealed to the Supreme Court and asked the Court to decide "[w]hether [*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." The Supreme Court agreed to hear the case.

The Supreme Court's Holding

The Supreme Court affirmed the motion for summary judgment granted to Levy but refused to endorse the Third Circuit's reasoning that the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. Instead, the Supreme Court recognized that a school's regulatory interest remains

significant in some off-campus circumstances, including, but not limited to, (1) serious or severe bullying or harassment targeting particular individuals, (2) threats aimed at teachers or other students, (3) the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities, and (4) breaches of school security devices.

However, the Supreme Court explicitly refused to create or limit a list of appropriate exceptions or carveouts to when schools' special interests disappear off campus. The exact boundary between student speech protected under the First Amendment and off-campus speech that may be regulated by schools is an open question under *Mahanoy*. Even so, the Supreme Court explained that there are three features of student off-campus speech that, when taken together, often, if not always, diminish schools' interests in and abilities to regulate such speech.

First, a school will rarely stand *in loco parentis* when a student speaks off campus. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility. Second, courts must remain skeptical of schools' efforts to regulate off-campus speech; otherwise, schools would regulate student speech 24 hours a day. Third, schools themselves have an interest in protecting students' unpopular expressions, especially when such expressions take place off campus, because America's public schools are the "nurseries of democracy."

The Supreme Court then turned to rule on Levy's circumstances, which now provide just one example of how courts should evaluate these multiple features to determine if a school has a legitimate interest in diminishing students' First Amendment rights by regulating their off-campus speech.

First, the context of Levy's speech weighed heavily in the Supreme Court's determination that the school could not regulate it—she used her personal cellphone to communicate privately with friends while off campus and outside of school hours. Further, the Supreme Court found that Levy's posts reflected criticisms of her team, her coaches, and her school—communities of which she was a member. While the Court acknowledged that Levy's posts contained vulgarity, it held that they did not contain "obscene" words—expressions that must be, in some significant way, erotic—or "fighting words"—directed epithets that are inherently likely to provoke violent reaction. Further, Levy neither identified the school nor targeted any member of the school community, thus removing her speech from the school's concern. Therefore, Levy's Snapchat posts contained the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.

Given the time, place, and content of the Snapchat posts, the Supreme Court held that the school neither stood *in loco parentis* when Levy posted on Snapchat nor had sufficient interests in teaching good manners to overcome her right to free expression. Additionally, the Supreme Court found that the short discussion that occurred during an algebra class and the few complaints by teammates to coaches did not constitute sufficient evidence demonstrating that Levy's off-campus speech created the sort of on-campus disruption of school activity, threats to the rights of others, or serious decline in team morale to justify the school's actions. In sum, the Mahanoy Area High School did not identify adequate reasons for it to have such a strong interest in regulating Levy's off-campus speech to overcome her First Amendment rights.

Considerations Moving Forward

Since Levy's case is but one example of how courts will apply the *Mahanoy* features going forward, this guide will outline lessons that students and their parents should take into consideration before communicating off campus. However, it is worth bearing in mind that the vast majority of school speech issues will not be resolved in court. Further, although Levy ultimately won, by the time the Supreme Court ruled, she had served her year-long suspension from the cheer team. Therefore, all students should side with caution when speaking off campus and understand that just because a school cannot regulate certain off-campus speech does not mean that it will not try to.

This guide concerns only truly off-campus speech, not on-campus or school-sponsored speech. Further, the guide is intended to help only students in American K-12 public schools; different legal analyses might apply for private school and university students. This is not a checklist, and the lessons should be thought of in context with one another, rather than as individual elements. Additionally, certain of the below lessons could be weighed against one another. For example, in *Mahanoy*, the Supreme Court considered the time and place of Levy's speech *against* her school's interest to show that such an interest was diminished considering the elements in the aggregate. With that in mind, we encourage students and parents to consider the following:

- Wearing school-affiliated attire while engaging in off-campus speech may be interpreted as school-sponsored speech and thus weigh against First Amendment protection. Avoid including any school symbols or items in posts that could lead others to presume that you are a representative of your school.
- Schools will likely have more control over the content of your off-campus speech if you post it on a school-provided electronic device, particularly if you have signed or been made aware of any guidelines to use such electronic device.
- Schools will also likely have more power to regulate off-campus speech that is posted using the school's server, such as via a school email address or school portal.
- Posting during school hours, even if you are off campus, will weaken your First Amendment protection against school regulation as the school will likely still stand *in loco parentis*.
- Schools will have a strong interest in regulating any off-campus speech that targets an individual, a specific group of individuals, or the school itself.
- Consider who your audience is or could be; schools will not be very concerned with private communications between friends after school hours but will have a strong interest in regulating student speech that is both inappropriate and widely available to the school community.
- While the Supreme Court has held that, unequivocally, unpopular opinions, political speech, religious speech, and other types of pure speech need to have a space to be heard, such speech can still be regulated if it impermissibly targets other students or causes substantial disruption on campus.
- If your school maintains a mission statement, has a strict policy on bullying, or has any other requirements for off-campus conduct, your school may be in a stronger position to regulate your speech. Consult your student code of conduct and any other team or club rules that you have agreed to be bound by.