

The Ability of a School To Punish Lewd Or Profane Speech Disappears Once A Student Exits School Grounds

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B.L. by Levy v. Mahanoy Area School District (“Levy”), Case No. 3:17-CV-1734, 2017 WL 4418290 (M.D. Pa. Oct. 5, 2017). District Court for the Middle District of Pennsylvania grants cheerleader’s Motion for Preliminary Injunction and enjoins school district from dismissing her from the high school cheerleading squad for posting a profane “Snap” on Snapchat outside of school.

BACKGROUND

Plaintiff, a high school cheerleader, posted a “Snap” featuring a photo of her and a friend holding up their middle fingers with the text, “[***] school f[***] softball f[***] cheer f[***] everything” superimposed on the image. Plaintiff took the Snap at a local convenience store on the weekend when she was not participating in any school activity. The Snap did not specifically mention the high school or picture the high school. Further, the Snap was only shared with Plaintiff’s friends on SnapChat (a social media platform), and thus was not available to the general public.

Shortly after Plaintiff sent the Snap, one of the cheerleading squad’s coaches informed Plaintiff that she was being dismissed from the cheerleading squad. The coach produced a printout of Plaintiff’s Snap and told Plaintiff that the Snap was “disrespectful” to the coaches, the school and the other cheerleaders.

At the preliminary injunction hearing, the coach testified that she suspended Plaintiff from the cheerleading squad because of Plaintiff’s use of profanity. The school district (“District”) acknowledged that the Snap was produced off of school property during the weekend when no school event was in progress.

DISCUSSION

The U.S. Supreme Court in the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) 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.” *Tinker* sets the general rule for regulating school speech, and that rule is subject to several narrow exceptions. One exception is set out in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), which permits school officials to regulate “‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive’ speech *in school*.”

The District did not allege that it had punished the Plaintiff because Plaintiff’s Snap *materially and substantially interfered* with the operation of the school. Instead, Plaintiff was punished solely for her use of profanity. As noted above, the exception set forth in *Fraser* is limited to profane on-campus speech and does not apply to off-campus speech. Therefore, in *Levy*, the court confirmed that schools cannot punish students for private, out-of-school speech that does not cause substantial, material disruption to school activities.

The court held that this case was controlled by *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011), where a student created a fake online profile of her principal that accused the principal of having sex in his office, hitting on students and being a “sex addict.” Additionally, the student in *Blue Mountain* specifically named and personally attacked members of the school’s staff and their families. The Third Circuit held that the speech was protected because it originated outside of the control of the school district.

Like the plaintiff in *Blue Mountain*, the Plaintiff in *Levy* created content that was distributed through use of the internet during the weekend on a device that was not owned or controlled by the District. Additionally, the Plaintiff was not on school property when the speech was generated. Therefore, the court held that if the explicit speech in *Blue Mountain* was protected, the generic statement in this case was protected as well.

The court rejected the District’s argument that a student may be punished for out-of-school speech so long as the punishment does not encroach on what the District referred to as a “protected property interest.” In other words, the District argued that Plaintiff did not have a protected interest in participating in extracurricular activities and that it could levy any punishment it chose so long as it did not suspend or expel the Plaintiff. The court found this argument to be “unseemly and dangerous” and noted that when presented with cases where students were removed from an extracurricular activity due to their speech, the Third Circuit has not distinguished such punishment from a student’s suspension or expulsion.

The court also rejected the District’s argument that Plaintiff’s Snap should be construed as on-campus speech. The court noted that the Third Circuit has plainly stated that profane speech created off-campus cannot be “imported” on-campus to invoke *Fraser*. Instead, off-campus speech must meet the *Tinker* standard by materially interfering with and disrupting the school in order to justify punishment.

PRACTICAL ADVICE

The *Levy* case serves as an important reminder that the First Amendment limits the ability of school districts to punish students for protected speech. With respect to student speech, courts have established the following general principles:

- Student speech that materially and substantially interferes with the educational process, or reasonably may cause such interference, may be prohibited and/or subjected to disciplinary response. However, student speech that expresses an unpopular viewpoint or merely causes discomfort and unpleasantness for others is not subject to regulation by school officials.
- On-campus student speech that is vulgar or plainly offensive may be prohibited and/or subjected to disciplinary response regardless of whether such speech has disrupted or substantially interfered with school operations. However, off-campus student speech that is potentially lewd or vulgar cannot be regulated or punished unless it materially and substantially interferes with the educational process.
- School-sponsored student speech may be regulated and restricted to the extent reasonably related to educational concerns.
- Student speech at school events and field trips off school grounds is subject to the school’s rules for student conduct.

While these principles appear to be straightforward, they are often difficult to apply in practice because the question of whether a school district can punish student speech is often fact-sensitive. For example, the result in *Levy* could have been different if the Plaintiff’s Snap featured her in her cheerleader’s uniform at a school event. Similarly, the punishment may have been upheld if the Snap caused a substantial disruption in the school. School districts should work closely with their solicitors when determining when speech can be punished and when it is protected by the First Amendment.

For additional information contact Chris Voltz.