ALERTS

The Mahanoy Area School District Supreme Court Decision: Impact on Private Schools

August 4, 2021

On June 23, 2021, the United States Supreme Court ("Court") ruled 8-1 that a Pennsylvania public high school violated a student's First Amendment free speech rights by disciplining her for sharing a profane critique of her school's cheerleading team on social media.

Brandi Levy, a Mahanoy Area High School student, was frustrated by her failure to make her school's varsity cheerleading team. Outside of school hours and from an off-campus location, she transmitted vulgar language and gestures criticizing the school and its cheerleading team. Levy took a photo of herself and her friend raising their middle fingers, captioned "F*** school f*** softball f*** cheer f*** everything." Levy posted the image to Snapchat, where it was visible to approximately 250 people, including fellow students and cheerleaders. The cheerleading coaches learned of Levy's post and suspended her from the team for one year after deeming the posts in violation of team and **school** rules, which required cheerleaders to have "respect for [their] school, coaches, teachers, [and] other cheerleaders," and to avoid "foul language and inappropriate gestures." The public school board affirmed Levy's suspension from the team.

Levy's parents filed suit against the public school district, alleging that Levy's suspension from the team amounted to a violation of her First Amendment rights. A Pennsylvania federal district court found for Levy. The Third Circuit Court of Appeals affirmed, ruling that *Tinker v. Des Moines Independent Community School District* — a 1969 Supreme

Court case holding that public schools could punish student speech that substantially disrupted the school community — did not apply to off-campus speech.

The Supreme Court affirmed the Third Circuit's holding, but rejected the conclusion that *Tinker* does not apply to off-campus speech. Declining to adopt a bright-line rule that schools cannot regulate student speech that takes place off-campus, the Court emphasized three features that diminish public schools' authority to regulate off-campus speech. First, public schools have a diminished interest in regulating student speech when the school does not stand *in loco parentis*, or in the place of parents. The Court noted that in relation to off-campus speech, schools will rarely stand *in loco parentis* because such speech is typically within the purview of parental, rather than school-related, supervision. Second, when paired with on-campus regulations, off-campus regulations of speech could potentially be all-encompassing and prevent students from "engag[ing] in that kind of speech at all," consequently requiring schools to meet a heavier burden to justify regulation. Third, the Court noted that public schools are "nurseries of democracy" and that unpopular opinions uttered off-campus should be protected in order to foster the marketplace of ideas upon which democracy depends.

The Court identified several examples where schools maintain a significant interest in regulating off-campus speech, such as: "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." The Court stated that it is "uncertain as to the length or content of any … list of appropriate exceptions as carveouts," particularly given the advent of computer-based learning. The Court also indicated that the list may change depending on the student's age, the type of off-campus activity or the impact on the school itself.

Although *Mahanoy* is not binding on private schools, private schools should carefully reconsider whether, in light of this Supreme Court decision, they should alter their approach to discipline of students for off-campus speech. For example, the Court noted that the posts appeared outside of school hours from a location outside the school; Levy did not identify the school in her posts or target any members of the school

community with vulgar or abusive language; and she transmitted the message through a personal cellphone to an audience consisting of her private circle of Snapchat friends. Many private schools have been confronted by angry parents who do not understand that the First Amendment does not apply to private educational institutions and question why the school is taking disciplinary action relating to off-campus social media posts. While private schools have broad authority to set rules and discipline their students, in light of *Mahanoy Area School District*, private schools should review their social media and disciplinary policies and consider limiting discipline to conduct which has a significant impact on the school community and which the school has a significant interest in regulating.

Authored by Mark E. Brossman and Donna K. Lazarus.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

Related People

Mark Brossman

Partner

New York

Donna Lazarus

Partner

New York

Practices

EMPLOYMENT AND EMPLOYEE BENEFITS

Attachments

Download Alert