STUDENT FREE SPEECH EXAMINED BY U.S. SUPREME COURT CASE WITH RULING THAT ALTHOUGH PUBLIC SCHOOLS MAY HAVE A SPECIAL INTEREST IN REGULATING OFF-CAMPUS SPEECH THE MAHANOY AREA SCHOOL DISTRICT COULD NOT OVERCOME A STUDENT'S FIRST AMENDMENT PROTECTIONS IN THIS CASE

On June 23, 2021, the Supreme Court decided that suspension of a student from a school district's junior varsity cheerleading team based upon two Snapchat stories posted by the student was improper under the First Amendment. B.L., a high school student, had tried out for both varsity cheerleading and a private softball team. B.L. did not make the varsity cheerleading team and did not get the specific position for which she tried out on the softball team. The Court opined that "B.L. did not accept the coach's decision with good grace…," and that weekend used her smartphone to post two separate stories to Snapchat, a social media platform. The stories were limited to her friend group of approximately 250 friends. The first was an image of B.L. and a friend with middle fingers raised and a caption "F--- school f---- softball f---- cheer f--- everything." The second had a caption which read "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" and an upside-down smiley face emoji. Both were posted outside of school hours, off school property, and not during a time that B.L. was participating in an activity. One friend in B.L.'s friend group took pictures of the posts with her own personal cell phone, shared them with members of the cheerleading team, and the pictures eventually reached other students and the cheerleading coaches. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about the posts. Questions about the posts were discussed for approximately five to ten minutes during a few algebra classes that were taught by one coach. B.L. was then suspended from participation on the junior varsity cheerleading squad for a year, citing the profanity in connection with a school extracurricular activity, which violated team and school rules. After appealing the decision through the Board of Education, which upheld the suspension, B.L. filed a lawsuit.

The lower trial court found in B.L.'s favor, and granted a preliminary injunction ordering the school to reinstate B.L. to the cheerleading team. The District court also held that B.L.'s Snapchats had not caused a substantial disruption at the school, and that the punishment was in violation of the First Amendment. Upon appeal, the Third Circuit affirmed the trial court, holding that the special characteristics that give schools license to regulate student speech disappear when a school regulates speech that takes place off campus. Upon further request for review, the Supreme Court accepted the school district's petition for certiorari.

After analyzing relevant existing law related to restriction of student speech under the First Amendment including *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), the Supreme Court disagreed with the Third Circuit's broad holding which effectively eliminated a school's authority to discipline a student for off-campus speech. Instead, the Court found that public schools may have a special interest in regulating off-campus speech in certain circumstances. However, the Court declined to adopt a specific rule for the type or circumstances of off-campus speech that may warrant discipline.

The Court did illustrate three "features" to consider in analyzing the school's authority to regulate speech. First, schools will rarely stand *in loco parentis* with respect to off-campus speech. While school districts maintain the *in loco parentis* position during school hours, "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." Second, regulation of off-campus speech when coupled with regulations of on-campus speech, include all the speech that a student utters during the entire day. Courts must be more skeptical of a school's effort to regulate off-campus speech because otherwise a student would never be able to engage in the kind of speech B.L. made. The Court further noted that a school will have a heavy burden to justify intervention where the off-campus speech is political or religious. Third, the Court cited the school's interest in protecting a student's unpopular expression as "public schools are the nurseries of democracy."

The Court analyzed the facts of this case under the elements of the abovementioned features it laid out. B.L.'s speech was outside of school hours, not on school property, did not name the school district or any individuals, and was made to a closed Snapchat group. Therefore, B.L. "spoke under circumstances where the school did not stand *in loco parentis*." The Court noted that the disruption in school was minimal, in that it impacted an Algebra class for just a couple of days, and a few students were upset. Further, the Court found that the argument that the school district was trying to prevent a disruption lacked merit as the record did not support a substantial disruption or threatened harm in the schools or the school-sponsored extracurricular activity. The school district "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The school's argument that the discipline was issued in part based on the negativity that could impact students in the school was also not persuasive to the Court, again because the "undifferentiated fear or apprehension …. is not enough to overcome the right to freedom of expression." Ultimately, the Court found that Mahanoy Area School District violated B. L.'s First Amendment rights in this case. The Court described this case as only "one example" of an outcome that may be reached when a student speaker's off campus speech is regulated by a school district. However, the Court declined to go any further and did not eliminate the ability of public schools to discipline students for any and all off-campus speech.

Pointedly, the Court stated that a "school's regulatory interests remain significant in some off-campus circumstances," and provided examples of several types of off-campus behavior that may call for regulation by the school, including "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's decision in *Mahanoy* is tailored to the facts of the student speech and school district response in that case, but does also provide a framework for school districts to analyze whether off-campus speech should be protected. As such, school districts will continue to benefit from conducting case by case review and analysis of student off-campus speech prior to discipline to determine whether or not it is behavior that may call for regulation by the school or whether it is protected speech. Please contact your Robbins Schwartz attorney with any questions.