

Supreme Court Signals Strong Concern in Cheerleader Free-Speech Case

But stops short of a clear rule on students' off-campus speech

By JOSHUA DUNN

IN JUNE 2021, the U.S. Supreme Court decided its much-anticipated student speech case, *Mahanoy v. B.L.* Those looking for the court to announce a bright-line rule on whether schools can punish students' off-campus and online speech will be disappointed. In an eight-to-one opinion written by Justice Stephen Breyer, the court explicitly refused to do so. Instead, it offered a set of guideposts. Thus, there is still some uncertainty about what speech is protected. However, it is clear that the guideposts all lean in favor of protecting student speech. Going forward, public schools will have to be very cautious when claiming authority to regulate what their students say on the internet.

In *Mahanoy*, a disgruntled cheerleader sent a vulgar “snap” on Snapchat to some of her friends expressing dissatisfaction with her school’s cheerleading program after she was denied a position on the varsity team. (For earlier *Education Next* coverage of the case, please see “Supreme Court Hears Argument in Student Speech Case” (April 2021, web only) and “Snap Judgment,” *legal beat*, Spring 2018.) Even though snaps are deleted, a picture of B.L.’s found its way to coaches and school officials. They suspended her from the junior varsity cheerleading squad for the next year. B.L. sued. She won before both a federal district court and a panel of the Third Circuit Court of Appeals.

The Third Circuit decision said that schools have essentially no authority to regulate off-campus speech. The Supreme Court rejected that position but still ruled that the school’s punishment of B.L. was unjustified.

Writing for the majority, Breyer said that schools still must retain some authority to regulate students’ off-campus speech. Bullying, harassment, use of school equipment, communication through a school email account, and working on school projects were just some of the areas that could authorize school supervision and control. Indicating the justices’ uneasiness, Breyer wrote, “we are uncertain as to the length or content of any such list of appropriate exceptions or carveouts,” and that “we hesitate to determine which of many school-related off-campus activities belong on such a list,” and “we do not now set forth a broad, highly general First Amendment rule stating just what counts as ‘off campus’ speech.”

But Breyer then immediately turned to “three features” of off-campus speech that weigh in favor of student speech rights: 1) Schools “will rarely stand *in-loco parentis*” when it comes to off-campus speech. 2) Because schools already can regulate much student speech on campus, courts “must be more skeptical of schools’ efforts to regulate” off-campus speech, as doing so would give schools authority to prevent students from engaging in certain kinds of speech “at all.” Breyer specifically mentioned



Brandi Levy, a former cheerleader at Mahanoy Area High School in Mahanoy City, Pennsylvania, was suspended for a year from her junior-varsity cheerleading squad.

that schools must meet a “heavy burden” when regulating off-campus political or religious speech. 3) Schools themselves “have an interest in protecting a student’s unpopular expression” since they are “nurseries of democracy” and are supposed to prepare students for the rough and tumble of democratic life outside of school where unpopular ideas have a right to be expressed.

When it came to B.L.’s speech in particular, the court noted that it did not fall into any of the traditional categories that can justify school’s regulation of speech. Previously, the court has held that schools can regulate student speech that causes a substantial disruption to the learning process, is school-sponsored, or is vulgar or lewd. B.L.’s speech clearly did not fall into the first two categories. The school had, feebly, maintained that B.L.’s snap had caused a disruption, but the court said that having a few students talk for a few minutes for a couple days in an algebra class hardly constituted a disruption. When it came to the authority of the

school to regulate vulgar or lewd speech in the interest of promoting good manners, the court said that, because B.L.'s speech was off campus and that the school was not *in loco parentis*, the school's interest was insufficient to justify B.L.'s punishment.

In a concurrence, Justice Samuel Alito, joined by Justice Neil Gorsuch, obviously wanted the court to emphasize more strongly that "student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations" is almost always beyond the authority of schools to regulate. He acknowledged that most controversies over student speech would not fall into such clear categories but worried that overzealous officials might try to exercise authority over them nonetheless. His conclusion seemed to capture the overall spirit of the court: "If today's decision teaches any lesson, it must be 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."

The one dissenter was Justice Clarence Thomas, who continued his lonely quest to convince the court that under

in loco parentis students should not have free speech rights, meaning that *Tinker v. Des Moines*, the lodestar for student speech, was wrongly decided. In this dissent, he took that position even farther, saying that school administrators' authority should extend off campus. He admitted that that authority could not be as comprehensive off campus as on, but

wrote that in his view, the school must have more authority than the majority would allow. Thomas argues that when the 14th Amendment was ratified, that was the understanding of the public and should thus control the application of the First Amendment to students. Given Thomas's isolation on the issue, one doesn't expect the rest of the court

to adopt this position anytime soon.

The decision undoubtedly means that there will be more litigation. The court all but invited it with its language. However, the litigation should tilt in favor of students. Even though the court obviously thinks there's no alternative but to muddle through, the muddle now has a definite drift.

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Breyer: Schools "have an interest in protecting a student's unpopular expression" since they are "nurseries of democracy."



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