03.11.21

Weber Gallagher

Electronic Speech: Can Schools Regulate it?

Over the last 20 years, social media platforms such as Facebook, Twitter, Snapchat, and Instagram have changed the way we connect with friends and family, engage in business, and socialize. As schools increase their use of technology for learning, school administrators have been faced with the possibility of disciplining students for making offensive posts, even though the acts occur off school grounds. Further complicating matters is that the relevant Supreme Court precedent regarding the First Amendment rights of students in public schools is over 50 years old and does not address free speech related to electronic speech, and there is no clear precedent for school administrators to follow.

This issue becomes even more important because COVID-19 has forced almost all schools to operate online, and whether or not schools have the power to discipline students for speech that occurs away from school is an issue that will continue to arise as virtual schooling may continue, even after the pandemic resolves.

Recently, the Supreme Court agreed to hear a Pennsylvania school district's appeal in ***B.L. v. Mahanoy Area School District*, No. 19-1842 (3rd Cir. 2020)** to clarify whether school administrators can discipline students for internet speech. The issue before the Supreme Court is whether *Tinker v. Des Moines Independent Community School District*, 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 high court's decision will provide guidance on student free speech rights on social media, and whether public schools are constitutionally within their rights to punish student speech that takes place outside of school hours and off school grounds.

In ***B.L. v. Mahanoy Area School District*,** the court found that a school had violated a student's First Amendment rights by suspending her from the junior varsity cheer team because of a picture she posted on Snapchat.

In this case, a student, B.L., who failed to make the high school varsity cheerleading team posted a picture, on a weekend and away from school, showing her and a classmate with middle fingers raised with the caption "f%^& cheer" on Snapchat. The cheerleading coaches found out about the "snap" and determined that B.L. violated school and team rules which required cheerleaders to "have respect for [their] school, coaches… [and] other cheerleaders" and "avoid foul language and inappropriate gestures." The coaches also felt that B.L violated a school rule the required student athletes to "conduct themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." As punishment, B.L. was removed from the junior varsity team for the entire season.

On appeal, the Third Circuit affirmed the District Court's grant of summary judgment in favor of B.L.'s ruling that the school district violated B.L.'s First Amendment rights. The Third Circuit synthesized that there were two inquiries to be resolved to decide the appeal. First, whether B.L.'s "snap" was protected speech, and if it were not, the inquiry would end. If the speech was protected, the Third Court concluded that it must determine whether B.L. waived that protection.

In determining whether B.L.'s speech was protected speech, the court relied on the seminal case of *Tinker v. Des Moines Independent Community School District*, where the Supreme Court held that schools could regulate speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Despite that pronouncement, in *Tinker*, the Court allowed students to wear black armbands to protest the Vietnam War but acknowledged that disruptive speech, at least on school grounds, could be punished.

In moving to its analysis of whether the “snap” was “on” or “off-campus” speech, the Court held that B.L.’s speech was “off campus” speech. In so holding, the court recognized the difficulty in assessing the distinction between “on” and “off-campus” speech in the age of electronic communications but explained that speech is not deemed “on campus” solely because it involves “the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment.” Based on those principles, the court held that the “snap” fell outside of the school context because there was no “nexus,” or connection to the school.

The court next assessed whether B.L. could be punished for her “off-campus” speech by the school district under the First Amendment. The school district argued that its actions were justified because of its power “to enforce socially acceptable behavior” by “banning vulgar, lewd, obscene or plainly offensive speech by students.” The court rejected the school’s argument finding that its reliance on *Bethel School District v. Fraser*, 478 U.S. 675 (1986) which held that a school could regulate vulgar and lewd on-campus speech, was misplaced because *Fraser* did to apply to “off campus” speech.

This case serves as an important reminder that the First Amendment limits the ability of school districts to punish students for protected speech. The Supreme Court is tasked with attempting to resolve this important constitutional issue in the digital age where technology changes so very quickly. The B.L. court recognized that “[s]tudents use social media and other forms of online communication with remarkable frequency and social media,” and that “social media has continued its expansion into every corner of modern life.”

Oral arguments will be held in April 2021.