ARGUMENT ANALYSIS

Justices ponder narrow ruling in student speech case

By Amy Howe
on Apr 28, 2021 at 3:28 pm

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Lisa Blatt argues for the Mahanoy Area School District (Art Lien)

The Supreme Court on Wednesday appeared conflicted over a school district's plea to be allowed to discipline students for their speech outside of school. Some justices expressed concern about whether allowing schools to regulate off-campus speech could sweep in too much speech by young people, while others worried that – particularly in the internet era – a contrary rule would give too little weight to the harmful effects that some speech, such as

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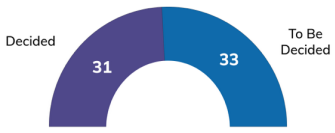

Cases Advoc Major

cyberbullying, can have at school even when it happens off campus. After nearly two hours of oral argument, the landmark First Amendment ruling that many had expected seemed much less certain, particularly in light of widespread skepticism among the justices about whether the student at the heart of the case should have been disciplined at all.

The case, ***Mahanoy Area School District v. B.L.***, was filed by Brandi Levy, who in 2017 was a sophomore at a public high school in Pennsylvania when, much to her disappointment, she did not make the varsity cheerleading team. Levy decided to take out her frustration with a "snap" – a message on the social media app Snapchat – in which she posted a picture of herself and a friend with their middle fingers raised, along with the caption "Fuck school fuck softball fuck cheer fuck everything."

Levy's snap was visible for 24 hours to approximately 250 of her friends on Snapchat. But a screenshot of the snap made its way to a cheerleading coach, who suspended Levy from the team for a year on the ground that the snap had violated team and school rules.

Levy and her parents went to federal court, arguing that her suspension violated the First Amendment. When the lower courts agreed, the school district asked the Supreme Court to weigh in, which the justices agreed to do earlier this year.

The question before the court on Wednesday was whether the Supreme Court's 1969 ruling in **Tinker v. Des Moines Independent Community School**

District, holding that public school officials can regulate speech that would substantially disrupt the school's work, applies to speech by students that occurs off campus.

Arguing for the school district, lawyer Lisa Blatt told the justices that *Tinker* should apply off campus because off-campus speech can also cause disruption, particularly when it comes to social media. "Time and geography are meaningless" when it comes to the internet, Blatt emphasized.

Justice Samuel Alito, however, suggested that the school district rule's was too vague. Noting that Blatt had assured the justices that schools could not discipline students for their speech outside the school on topics like politics or religion, and that the key question was whether the speech "targets" the school, Alito said, "I have no idea what that means." If whether the speech targets the school depends on the context in which the speech occurs, Alito continued, "I worry about how it would be implemented. If schools are going to have any authority under *Tinker* outside of school," he concluded, the rule needs to be clear.

Chief Justice John Roberts made a similar point in a question for Malcolm Stewart, the deputy U.S. solicitor general who argued on behalf of the federal government in support of the school district. "I wonder how you parse," Roberts queried, whether speech is "directed" at a school and therefore something for which a student could be disciplined. Roberts observed that for most teenagers, their friends are their classmates. Is anything that they send to their friends on social

media, Roberts asked, “directed at” a school?

Justice Elena Kagan also worried that, under the rules proposed by the school district and the federal government, a wide swath of off-campus speech would be fair game for school discipline. She asked Stewart if Levy’s snap was “school speech.” When Stewart said it probably was, Kagan declared that essentially all speech would be, “because this is pretty generic.”

Although the justices may have had concerns that the school district’s rule was too vague or too sweeping, they also challenged lawyer David Cole of the American Civil Liberties Union, who represented Levy. Several justices suggested that it can be difficult in practice, and not always desirable, to draw a bright line between on- and off-campus speech.

Roberts wanted to know how a bright line between the two kinds of speech can be reconciled with modern technology. If a snap is sent from the park but is read in the school cafeteria, he asked Cole, is it regarded as “on campus” or “off campus” for purposes of whether the school can discipline a student for it?

Cole responded that the key question is whether the student is under the school’s supervision or at a school-sanctioned event. If so, Cole argued, the school has the authority that the Supreme Court has already given it, and the internet doesn’t change that. If anything, Cole continued, the internet underscores the importance of assuring that kids have freedom of speech

outside of school, because they need to be able to share freely without worrying that someone will read their messages at school and open them up to discipline as a result.

Roberts appeared unconvinced. So no matter how disruptive, Roberts asked, if a student's speech is off campus or on Snapchat, a school has to tolerate that speech because it can't take any action against the student?

Justice Clarence Thomas echoed Roberts' skepticism about trying to draw a bright line between on-campus and off-campus speech in the era of social media. A student could send the same messages with the same effects, Thomas said, from a local 7-11 or over the weekend, but the messages would still have a permanence that could be seen in class. Under your test, Thomas told Cole, an email sent over the weekend that was opened on Monday morning in class would not be regarded as "student speech" because the speaker would not have been under the school's supervision.

Kagan disputed Cole's interpretation of *Tinker* as a "geographic test." Although you could read it that way, she said, the court's decision could also be understood as allowing schools to discipline students on campus when needed for a school's learning environment. If things outside of school can also cause disruption, Kagan inquired, why shouldn't the school be allowed to address them?

Kagan (along with Justice Sonia Sotomayor) also raised a related concern: the prospect that if schools can't discipline off-campus speech, it will hamper their

ability to address genuine problems like cyberbullying. Kagan acknowledged that Cole had offered other avenues, such as school behavioral codes and state and federal laws, to deal with such problems. And there may well be, she noted, but schools have more latitude to address these issues than other government officials. Kagan cited as an example a website created by boys at a school to rank the girls at the school on their appearance or to discuss their sexual activities. “We wouldn’t put people in jail for it,” Kagan noted, but it seems like a school should be able to intervene.

Layered on top of the court’s struggles with identifying the appropriate rule in this case was considerable skepticism about whether, even if *Tinker* should apply to off-campus speech, the school should have punished Levy for her snap at all. After telling Blatt that neither side’s test was “easy to apply,” Justice Amy Coney Barrett pointed out that nothing in the First Amendment prohibits “soft discipline”: Instead of kicking Levy off the team for a year, Barrett suggested, give her a warning.

Justice Stephen Breyer described Levy’s snap as using “unattractive swear words” off campus. But, Breyer continued, he didn’t see evidence that the snap caused the kind of “material and substantial disruption” that *Tinker* requires. If Levy can be punished for this snap, he suggested, “every school in the country would be doing nothing but punishing.”

Sotomayor stressed that the cheerleading coach had spent a few minutes talking to other students about Levy’s snap. How,

Sotomayor asked, is that a "substantial disruption," and how can Levy's snap be regarded as something intended to provoke disrespect when Levy put it on an app that was supposed to disappear after 24 hours?

Alito again emphasized that if the Supreme Court ultimately weighs in on the broader issues in Levy's case, then it should establish clear rules in favor of freedom of speech. However, Alito mapped out a narrower route that would not require the court to address the broader issues at this time. The court, Alito proposed, could reiterate that *Tinker* applies in school, without saying more about a school's power to discipline off-campus speech. And the court could make clear that although the comments in Levy's snap are "colorful language," they "boil down" to disliking the cheer team and her private softball team, and the school can't discipline Levy for having no respect for the school.

Justice Brett Kavanaugh – who coaches girls' basketball in his spare time – agreed with his colleagues that Levy's full-year suspension seemed like "a bit of an overreaction" by the cheerleading coach. Reminding listeners that basketball great Michael Jordan recounted the story of being cut from the varsity basketball team when he was inducted into the Basketball Hall of Fame, Kavanaugh suggested that Levy simply "blew off steam" with her snap like many teenagers do, particularly student-athletes in the heat of competition.

In his questioning for Stewart, Kavanaugh proposed a different narrow ruling, in which the court would hold – contrary to what the U.S. Court of Appeals for the 3rd

Circuit ruled – that the First Amendment does not categorically bar schools from disciplining students for their off-campus speech. It may also matter, Kavanaugh added, that Levy's case involves discipline for her speech in connection with a team, rather than the school as a whole. The court would then send the case back to the 3rd Circuit for it to take another look.

Stewart responded that he thought such a ruling "would be enough" to resolve this case. We'll know by summer whether Kavanaugh's colleagues agree.

This post was originally published at Howe on the Court.

Posted in Merits Cases

Cases: Mahanoy Area School District v. B.L.

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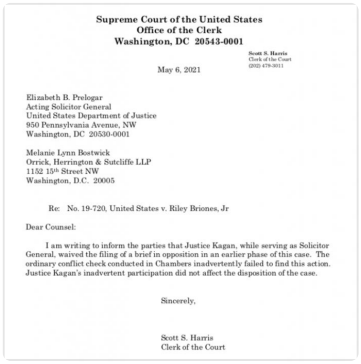
The clerk of the court just notified counsel in a juvenile sentencing case—that was sent back to a lower court this week in light of the court's decision in Jones v. Mississippi—that Justice Kagan unwittingly failed to recuse herself after participating in part of the case as SG.



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Office of the Clerk
Washington, DC 20543-0001

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May 6, 2021

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Re: No. 19-720, United States v. Riley Briones, Jr

Dear Counsel:

I am writing to inform the parties that Justice Kagan, while serving as Solicitor General, waived the filing of a brief in opposition in an earlier phase of this case. The ordinary conflict check conducted in Chambers inadvertently failed to find this action. Justice Kagan's inadvertent participation did not affect the disposition of the case.

Sincerely,

Scott S. Harris
Clerk of the Court

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