



# Snap Judgment

*Should schools act as community hall monitors?*

by JOSHUA DUNN

To what extent does the First Amendment apply to students' off-campus communications on the Internet? Do schools have the authority to punish students for offensive messages they send via social media? Four years ago, Martha Derthick and I argued that the U.S. Supreme Court would eventually be drawn into the debate over off-campus cyber-speech (see "Digital Discipline," *legal beat*, Summer 2013). The court has yet to step in, but a recent federal case out of Pennsylvania illustrates the growing controversy around the issue.

In *B.L. v. Mahanoy Area School District*, a high school sophomore was kicked off the junior-varsity cheerleading squad for a vulgar image she sent via Snapchat, a messaging platform that is supposed to protect against rash juvenile behavior by deleting photos soon after one sends them. As "B.L." learned, though, social media is forever, even with Snapchat, since users can take and share screenshots of any images they receive.

The squad rules stated that cheerleaders were "representing" their school "at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures. . . . There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." However, in May 2017, B.L. shared a Snap of herself and a friend holding up their middle fingers, with the words "f--- school f--- softball f--- cheer f--- everything" superimposed on the image.

B.L. took the picture at a local convenience store on a weekend, but the image made its way to her coaches, who kicked her off the team, prompting her lawsuit.

The relevant case law appeared to be on B.L.'s side. Student speech, according to the Supreme Court, can only be punished if it causes a substantial educational disruption, violates the rights of others, is lewd, or is pro-drug. These exceptions, the court has made clear, do not apply to out-of-school speech. Hence, B.L.'s vulgarity should not be punishable.

But the school district argued that other cases sanctioned the student's dismissal. In 2002, for instance, the Supreme Court of Pennsylvania held that a school could expel a student for a website he created off campus that contained "derogatory, profane, offensive and threatening comments" about a teacher and the principal. Because at least one student had accessed the website via a school computer, the court said, one could "consider the speech as occurring on campus."

Similarly, in 2011 the U.S. Court of Appeals for the Fourth Circuit upheld the suspension of a student for a Myspace page mocking a fellow student's alleged contracting of herpes. The court held that the speech was "sufficiently connected to the

school environment" to justify the school's action.

In *B.L.*, the school district argued that since her Snap referred to a school activity, these two precedents applied. The district also claimed it was within its rights because B.L.'s punishment—dismissal from an extracurricular activity—did not infringe on a "protected property interest," as a suspension or expulsion might.

In October 2017, federal district court judge A. Richard Caputo rejected the school district's defense. The Pennsylvania website case, he said, did not apply, since the student had made death threats that could have caused a substantial disruption of school activities. He also dismissed the Fourth Circuit decision, since Pennsylvania falls under the Third Circuit. The latter court had, in fact, ruled in 2011 that a student could not be punished for a

Myspace page on which he implied that his principal was an alcoholic with an affinity for marijuana. Caputo said that this decision controlled in *B.L.* He also noted that, by the district's reasoning, a student could conceivably be "barred from an extracurricular activity if they were at home with friends and uttered a profanity that was subsequently reported to the school," which would amount to deputizing "school children to serve as Thought Police" for the district.

With significant conflicts dividing the lower federal courts, it's time for the Supreme Court to resolve them, especially given that some district administrators fear schools could be held liable for *not* regulating off-campus speech if, say, online bullying should culminate in violence.

One hopes the justices will share Caputo's skepticism toward the practice of punishing students' out-of-school speech. *In loco parentis* on campus is supposed to be dead, and it would be unwise to resurrect it for off-campus behavior. Educators should of course refer student speech that rises to the level of criminal conduct—say, for example, a true threat—to appropriate authorities. But schools are not community hall monitors, and the Constitution requires the protection of First Amendment rights, even when they are exercised by young people of questionable judgment.

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