Nebraska Student Discipline and the Supreme Court "Cheerleader Free Speech" Case

On Wednesday, June 23, 2021, the United States Supreme Court ruled in favor of a student's free speech rights for the first time in 50 years.

What was the case about? A student cheerleader - after school, not on school grounds, and not at a school function – was upset she was denied participation in varsity cheer for what she felt were unfair reasons. While at a Cocao Hut one evening, she posted a picture on Snapchat with her middle finger raised and the words "F*school F* softball F* cheer, F* everything." When the school found out, they disciplined her for her words. They kicked her off the cheerleading team. She sued on the basis that she had a constitutional free speech right to speak her mind. The Supreme Court agreed with her.

Prior to this case, the Supreme Court had outlined three specific ways that schools CAN regulate speech: lewd/vulgar speech at school assembly on school grounds; speech, during a class trip, promoting illegal drug use; and speech that others could perceived as school-sponsored (like the school newspaper). In addition, in the famous *Tinker* case (where students wore armbands to protest the Vietnam war) the Supreme Court stated that this was speech at school, but it was not to be disciplined because it did not materially disrupt classwork or involve a substantial disorder or invade the rights of others. In other words, in the past the Supreme Court has said that while a student does not lose all constitutional rights when she walks into school, schools have special leeway to regulate certain speech that occurs under its supervision.

But what about speech that occurs NOT under the supervision of the school, such as the cheerleader's Snapchat? Can schools tell kids what they can say 24-7? The answer is no. While the Supreme Court didn't close the door entirely on discipline of off-campus speech, noting that severe bullying, threats, and on-line school activities might merit discipline, in essence it said that (a) school districts do not have the power to discipline off-campus speech as a general matter, and that a school rarely will stand "in the shoes of the parent" when a student speaks off campus; (b) school districts do not get to discipline students for unpopular student expression and in fact, they have an interest in protecting unpopular expression, especially when it takes place off campus; and (c) there must be a true substantial disruption of the school environment before students can be disciplined for their speech and the "f-bomb" Snapchat of the cheerleader just wasn't that.

How does this fit into current Nebraska law concerning student discipline? In Nebraska, districts are "creatures of statute" which means that they only have the authority given to them by the Legislature. The Student Discipline Act governs a school's ability to discipline. Generally, the rules limit discipline of a student to conduct on school property, in school vehicles, or at school-sponsored activities. The Legislature does permit school personnel to take actions regarding student behavior, other than those specifically provided in the Student Discipline Act, which are "reasonably necessary to…further school purposes or prevent interference with the educational process." While this additional action should also be read as limited to conduct on school property, in school vehicles, or at school-sponsored activities, school districts in

Nebraska have undertaken 'mission creep' which the Supreme Court has now addressed. For example, a local Omaha-metro area district's Code of Conduct says that any conduct prohibited *on* school property, in school vehicles, or at school-sponsored activities that actually occurs *off* school grounds, in any vehicle, or at *any* activity "constitutes grounds" for disciplinary action "where the conduct could reasonably be expected to reach the school or impact the school environment or where there is such other connection to the school that permits disciplinary action to be taken." This is likely a bridge too far.

The Supreme Court noted that when schools try to regulate student speech 24 hours a day, courts must be very skeptical. In analyzing the cheerleader's speech they noted that her criticism of the school did not place it outside of First Amendment ordinary protection, because her words were not "fighting words," her language was vulgar but not "obscene" as the Court has understood that term, and in fact, if the student were an adult, it would be clear that the First Amendment would protect her pure speech. In addition, the Supreme Court noted that her post did not target any particular people, and she transmitted the speech to a limited group of people (those who were on her Snapchat list). The Supreme Court found that the school's interest in punishing the use of profanity was weak, because it wasn't on school time/property. The Court also found that the school could not stand "in loco parentis" (acting like a parent) in this case because there was no reason to believe the parents had delegated their own control of their daughter's behavior at Cocao Hut to the school. The school argued that it was trying to prevent disruption of school activities (cheerleading) but frankly, the Court found this argument to be weak. The Court said that a few minutes talking about it at school, and a few students upset about the content of the Snapchat simply did not rise to the "demanding standard" it set in the *Tinker* case because "[u]ndifferentiated fear or apprehension…is not enough to overcome the right to freedom of expression."

As the Concurring Opinion of Justices Alito and Gorsuch in the cheerleader case clarifies: "The First Amendment permits public schools to regulate *some* student speech that does not occur on school premises during the regular school day; this authority is more limited than the authority that schools exercise with respect to on-premises speech; courts should be "skeptical" about the constitutionality of the regulation of off-premises speech; the doctrine of *in loco parentis* rarely applies to off-premises speech; public school students, like all other Americans, have the right to express "unpopular" ideas on public issues, even when those ideas are expressed in language that some find "inappropriate" or "hurtful"; and public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of government."

In essence, the amount of authority that a school has to regulate a child's speech is limited to what is necessary to be able to carry out their state-mandated educational mission. Speech cannot be suppressed unless it involves substantial disorder or invasion of the rights of others. "It would be far-fetched to suggest that enrollment [in public school] implicitly confers the right [of the school] to regulate what a child says or writes at all times of day and throughout the calendar year." So, while speech at home that is part of online instruction, assigned essays,

etc., may be regulated, student speech that is not expressly and specifically directed at the school, its staff or students and that addresses matters of public concern is protected.

Where does that leave school districts in Nebraska? Well-meaning districts that have, by policy, over-extended their reach must proceed cautiously going forward, with the understanding that regulation of many types of off-premises speech raises serious First Amendment concerns.

Education Rights Counsel advocates for educational equity so that all children stay in school and thrive. If you believe your child has suffered inappropriate discipline, please feel free to contact us for a free consultation.