

No. 20-255

In the Supreme Court of the United States

MAHANoy AREA SCHOOL DISTRICT,
PETITIONER,

v.

B.L., A MINOR, BY AND THROUGH HER FATHER
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: AUGUST 28, 2020
CERTIORARI GRANTED: JANUARY 8, 2021

TABLE OF CONTENTS

	Page
Court of appeals docket entries, 3d Cir. No. 19-1842	1
District court docket entries, M.D. Pa. No. 3:17-cv-1734	5
Mahanoy Area High School Cheerleading Rules for 2017-2018 School Year	15
Text message from B.L. to Luchetta-Rump (May 26, 2017)	19
Snapchat messages posted by B.L. (May 27, 2017)	20
Excerpts of B.L. testimony at preliminary injunction hearing (Oct. 2, 2017)	22
Excerpts of Luchetta-Rump testimony at preliminary injunction hearing (Oct. 2, 2017)	31
Memorandum opinion regarding motion for preliminary injunction (Oct. 5, 2017)	39
Excerpt of Defendant's Objections and Responses to Plaintiff's First Set of Interrogatories (Apr. 17, 2018)	54
Excerpts of deposition of Nicole Luchetta-Rump (Oct. 10, 2018)	62
Excerpts of deposition of April Gnall (Oct. 10, 2018)	90
Excerpts of deposition of Dr. Joie Green (Oct. 10, 2018)	92
Excerpts of deposition of B.L. (Oct. 24, 2018)	96
Excerpts of deposition of Betty Lou Levy (Oct. 24, 2018)	107
Excerpt of deposition of Lawrence Levy (Oct. 24, 2018)	111
Excerpts of Defendant's Statement of Undisputed Facts (Dec. 20, 2018)	113

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 19-1842

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS-APPELLEES

v.

MAHANoy AREA SCHOOL DISTRICT,
DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
04/16/2019	CIVIL CASE DOCKETED. Notice filed by Appellant Mahanoy Area School District in District Court No. 3-17-cv-01734. (DW) [Entered: 04/16/2019 04:07 PM] * * * * *
06/28/2019	ECF FILER: ELECTRONIC BRIEF on behalf of Appellant Mahanoy Area School District, filed. Certificate of Service dated 06/28/2019 by ECF, US mail. [19-1842] (DWB) [Entered: 06/28/2019 03:08 PM]
06/28/2019	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant

Mahanoy Area School District, filed. Certificate of service dated 06/28/2019 by ECF, US mail. [19-1842] (DWB) [Entered: 06/28/2019 03:12 PM]

* * * * *

07/03/2019 ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of National School Boards Association et al. in support of Appellant/Petitioner, filed. Certificate of Service dated 07/03/2019 by ECF. F.R.A.P. 29(a) Permission: YES. [19-1842] (FMN) [Entered: 07/03/2019 01:20 PM]

* * * * *

08/21/2019 ECF FILER: ELECTRONIC BRIEF on behalf of Appellee B. L., filed. Certificate of Service dated 08/21/2019 by ECF. [19-1842] (APH) [Entered: 08/21/2019 07:50 PM]

* * * * *

08/28/2019 ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of Electronic Frontier Foundation in support of Appellee/Respondent, filed. Certificate of Service dated 08/28/2019 by ECF. F.R.A.P. 29(a) Permission: YES. [19-1842] (SSC) [Entered: 08/28/2019 02:18 PM]

* * * * *

08/28/2019 ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of FOUNDATION FOR

INDIVIDUAL RIGHTS IN
 EDUCATION in support of Appellee/
 Respondent, filed. Certificate of Service
 dated 08/28/2019 by ECF. F.R.A.P. 29(a)
 Permission: YES. [Entry edited to reflect
 that this brief has consent from all parties]
 [19-1842]—[Edited 08/29/2019 by EMA]
 (MTB) [Entered: 08/28/2019 03:55 PM]

* * * * *

09/11/2019 ECF FILER: ELECTRONIC REPLY
 BRIEF on behalf of Appellant Mahanoy
 Area School District, filed. Certificate of
 Service dated 09/11/2019 by ECF, US mail.
 [19-1842] (DWB) [Entered: 09/11/2019
 04:51 PM]

* * * * *

11/12/2019 ARGUED on Tuesday, November 12, 2019.
 Panel: AMBRO, KRAUSE and BIBAS,
 Circuit Judges. Michael I. Levin arguing
 for Appellant Mahanoy Area School
 District; Sara J. Rose arguing for Appellee
 B. L. (CMH) [Entered: 11/12/2019 09:50
 AM]

* * * * *

11/26/2019 ECF FILER: Transcript of oral argument
 on 11/12/2019 prepared at the direction of
 the Court. [19-1842] (DWB) [Entered:
 11/26/2019 04:12 PM]

06/30/2020 PRECEDENTIAL OPINION. Coram:
 AMBRO, KRAUSE and BIBAS, Circuit

Judges. Total Pages: 51. Judge: KRAUSE
Authoring, Judge: AMBRO Concurring.
We will affirm the judgment of the District
Court. (DW) [Entered: 06/30/2020 08:22
AM]

06/30/2020 JUDGMENT, Affirmed. Costs will be
taxed against Appellant. (DW) [Entered:
06/30/2020 08:26 AM]

06/30/2020 Archived PDF of website(s) cited in
opinion. (SB) [Entered: 07/01/2020 01:45
PM]

07/22/2020 MANDATE ISSUED. (DW) [Entered:
07/22/2020 10:15 AM]

* * * * *

09/03/2020 NOTICE from U.S. Supreme Court.
Petition for Writ of Certiorari filed by
Mahanoy Area School District on
08/28/2020 and placed on the Supreme
Court docket on 9/1/20. Supreme Court
Case No. 20-255. (CRG) [Entered:
09/03/2020 02:38 PM]

* * * * *

01/11/2021 NOTICE of U.S. Supreme Court
disposition at No. 20-255. Petition for Writ
of Ceriorari filed by Mahanoy Area School
District granted on 01/11/2021. (AWI)
[Entered: 01/11/2021 02:47 PM]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

Docket No. 3:17-cv-01734-JPW

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANAY AREA SCHOOL DISTRICT, DEFENDANT

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
09/25/2017	<u>1</u>	COMPLAINT against Mahanoy Area School District (Filing fee \$400, Receipt Number 0314-4207767), filed by B.L.. (Attachments: # <u>1</u> Civil Cover Sheet)(rm) (Entered: 09/26/2017)
09/25/2017	<u>2</u>	MOTION for Temporary Restraining Order and Preliminary Injunction, filed by Pltf B.L.. (Attachments: # <u>1</u> Proposed Order)(rm) (Entered: 09/26/2017)

09/25/2017 3 BRIEF IN SUPPORT of Pltf's 2
 MOTION for Temporary
 Restraining Order and
 Preliminary Injunction, filed by
 Pltf B.L.. (rm) (Entered:
 09/26/2017)

* * * * *

09/26/2017 5 TEMPORARY RESTRAINING
 ORDER – See order for details.
 A hearing on the motion for
 preliminary injunction will be
 held on MONDAY, OCTOBER 2,
 2017 AT 9:30 A.M., Courtroom
 #3, Max Rosenn United States
 Courthouse, 197 South Main
 Street, Wilkes-Barre,
 Pennsylvania. Signed by
 Honorable A. Richard Caputo on
 9/26/17. (dw) (Entered:
 09/26/2017)

* * * * *

10/01/2017 9 BRIEF IN OPPOSITION re 2
 MOTION for Temporary
 Restraining Order *and Response*
to Motion filed by Mahanoy Area
 School District. (Attachments:
 # 1 Memo)(Brown, David)
 (Entered: 10/01/2017)

* * * * *

10/05/2017	<u>12</u>	MEMORANDUM (Order to follow as separate docket entry) re: motion for preliminary injunction. Signed by Honorable A. Richard Caputo on 10/5/17. (dw) (Entered: 10/05/2017)
10/05/2017	<u>13</u>	PRELIMINARY INJUNCTION ORDER: (1) Plaintiffs Motion for a Preliminary Injunction is GRANTED. (2) Defendant, together with its representatives, agents, servants, and all others acting on its behalf or in concert with it, are hereby ENJOINED and RESTRAINED, until further Order of the Court, from: (a) enforcing the Cheerleading Rules pertaining to out-of-school speech against Plaintiff B.L.; and (b) excluding Plaintiff B.L. from the cheerleading squad on account of her out-of-school speech. See Order for full details. Signed by Honorable A. Richard Caputo on 10/5/17. (dw) (Entered: 10/05/2017)
		* * * * *
10/23/2017	<u>15</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of proceedings held on Monday, October 2, 2017, before Judge

Caputo. Court Reporter Diana Gilbride, Telephone number (570)498-7552. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/13/2017. Redacted Transcript Deadline set for 11/24/2017. Release of Transcript Restriction set for 1/22/2018. (cr1,) (Entered: 10/23/2017)

11/17/2017 16 ANSWER to 1 Complaint by Mahanoy Area School District. (Brown, David) (Entered: 11/17/2017)

* * * * *

12/20/2018 33 MOTION for Summary Judgment by B.L.. (Attachments: # 1 Proposed Order, # 2 Certificate of Nonconcurrence) (Tack-Hooper, Molly) (Entered: 12/20/2018)

12/20/2018 34 BRIEF IN SUPPORT re 33 MOTION for Summary Judgment filed by B.L.. (Tack-Hooper, Molly) (Entered: 12/20/2018)

12/20/2018 35 MOTION to Exclude *Expert Report and Testimony of Lawrence J Mussoline, PhD* by B.L.. (Attachments: # 1 Proposed Order, # 2 Certificate of Nonconcurrency) (Tack-Hooper, Molly) (Entered: 12/20/2018)

12/20/2018 36 BRIEF IN SUPPORT re 35 MOTION to Exclude *Expert Report and Testimony of Lawrence J Mussoline, PhD* filed by B.L.. (Attachments: # 1 Exhibit(s))(Tack-Hooper, Molly) (Entered: 12/20/2018)

12/20/2018 37 MOTION for Summary Judgment by Mahanoy Area School District. (Attachments: # 1 Certificate of Nonconcurrency) (Brown, David) (Entered: 12/20/2018)

12/20/2018 38 BRIEF IN SUPPORT re 37 MOTION for Summary Judgment filed by Mahanoy Area School District.(Brown, David) (Entered: 12/20/2018)

12/20/2018 39 STATEMENT OF FACTS re 33 MOTION for Summary Judgment filed by B.L.. (Attachments: # 1 Exhibit(s) A through J, # 2 Exhibit(s) K

through Q) (Helfer, Arleigh)
 (Entered: 12/20/2018)

12/20/2018 40 STATEMENT OF FACTS re 37
 MOTION for Summary
 Judgment filed by Mahanoy Area
 School District. (Attachments:
 # 1 Declaration, # 2 Exhibit(s)
 D-1, # 3 Exhibit(s) D-2, # 4
 Exhibit(s) D-3, # 5 Exhibit(s) D-
 4, # 6 Exhibit(s) D-10, # 7
 Exhibit(s) D-11, # 8 Exhibit(s) D-
 12, # 9 Exhibit(s) D-16, # 10
 Exhibit(s) D-17, # 11 Exhibit(s)
 D-18, # 12 Exhibit(s) D-19, # 13
 Exhibit(s) D-20, # 14 Exhibit(s)
 D-21, # 15 Exhibit(s) D-22, # 16
 Exhibit(s) D-24, # 11 Exhibit(s)
 D-25) (Brown, David) (Entered:
 12/20/2018)

12/20/2018 41 AMENDED DOCUMENT by
 B.L.. Amendment to 39
 Statement of Facts (*amended*
Exhibit K with corrected cover
sheet). (Helfer, Arleigh)
 (Entered: 12/20/2018)

* * * * *

02/08/2019 48 BRIEF IN OPPOSITION re 35
 MOTION to Exclude *Expert*
Report and Testimony of
Lawrence J Mussoline, PhD filed
 by Mahanoy Area School District.

(Brown, David) (Entered: 02/08/2019)

02/08/2019 49 BRIEF IN OPPOSITION re 37 MOTION for Summary Judgment *with certificate of compliance* filed by B.L..(Helfer, Arleigh) (Entered: 02/08/2019)

02/08/2019 50 ANSWER TO STATEMENT OF FACTS re 40 Statement of Facts,, filed by B.L..(Helfer, Arleigh) (Entered: 02/08/2019)

02/08/2019 51 BRIEF IN OPPOSITION re 33 MOTION for Summary Judgment filed by Mahanoy Area School District.(Brown, David) (Entered: 02/08/2019)

02/08/2019 52 ANSWER TO STATEMENT OF FACTS re 39 Statement of Facts filed by Mahanoy Area School District.(Brown, David) (Entered: 02/08/2019)

02/22/2019 53 REPLY BRIEF re 33 MOTION for Summary Judgment filed by B.L.. (Attachments: # 1 Unpublished Opinion(s))(Tack-Hooper, Molly) (Entered: 02/22/2019)

02/22/2019 54 REPLY BRIEF re 35 MOTION to Exclude *Expert Report and Testimony of Lawrence J Mussoline, PhD* filed by B.L.. (Attachments: # 1 Unpublished

Opinion(s))(Tack-Hooper, Molly)
(Entered: 02/22/2019)

02/22/2019 55 REPLY BRIEF re 37 MOTION for Summary Judgment filed by Mahanoy Area School District. (Attachments: # 1 Exhibit(s) D-7)(Brown, David) (Entered: 02/22/2019)

03/21/2019 56 MEMORANDUM (Order to follow as separate docket entry).Signed by Honorable A. Richard Caputo on 3/21/19. (dw) (Entered: 03/21/2019)

03/21/2019 57 ORDER (memorandum filed previously as separate docket entry). (1) The Motion for Summary Judgment filed by Plaintiff B.L. 33 is GRANTED. (A) Judgment is ENTERED in favor of B.L. and against Defendant Mahanoy Area School District. (B) The Court DECLARES that Mahanoy Area School Districts disciplinary action against B.L. for her out-of-school speech violated B.L.s rights under the First Amendment to the United States Constitution. (C) The Court AWARDS B.L. nominal damages of \$1. (D) Mahanoy Area School District SHALL expunge any record of its disciplinary action

against B.L. (2) The Motion for Summary Judgment filed by Mahanoy Area School District 37 is DENIED. (3) The Motion to Exclude the Expert Report and Testimony of Lawrence J. Mussoline, PhD, filed by B.L. 35 is DENIED as moot. (4) The Preliminary Injunction issued on October 5, 2017 13 is DISSOLVED as of the date of entry of this Order. (5) B.L. SHALL file any application for reasonable attorneys fees and costs pursuant to 42 U.S.C. § 1988 or any other provision of law or any motion for extension of time to file such an application within fourteen (14) days of the date of entry of this Order. (6) The Clerk of Court is directed to mark this case CLOSED. Signed by Honorable A. Richard Caputo on 3/21/19. (dw) (Entered: 03/21/2019)

* * * * *

04/12/2019 60 NOTICE OF APPEAL in NON-PRISONER Case as to 57 Order (memorandum filed previously as separate docket entry),,,,, by Mahanoy Area School District. Filing Fee and Docket Fee PAID.

Filing fee \$ 505, receipt number 0314-4730516. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Brown, David)
(Entered: 04/12/2019)

* * * * *

2017-2018

Mahanoy Area High School Cheerleading Rules

All of the information below is at the coaches' discretions and rules may be subject to change. If there is a situation with extreme circumstances, it will be addressed at that time.

ATTENDANCE

- All cheerleaders must attend every practice and workshop. Vacations and absences from school are the only acceptable excuses. Coaches must be given a written notice at least one week in advance for vacations/trips to be considered excused. Non-school related activities and work are not acceptable excuses. (Internships are not excused). Other sporting activities will be accommodated as much as possible. If you are too sick to attend practice/game and were present in school, a doctor's note is required or you will be benched for the next game.
- All games are mandatory. Only acceptable excuses are as above.
- If unable to attend practice or a game you (yourself) must call or text Miss Luchetta or Mrs. Gnall. If a coach is not contacted prior to the practice/game you will be benched for the next game.
- All cheerleaders will ride to and from the games on the bus. If you would like to leave with a parent or guardian, you must fill out the transportation form and hand it in to the office prior to the game. See coaches for such forms.

- Buses are scheduled to leave at a certain time. The bus will not wait. If you are not on the bus at the scheduled time, the bus will leave without you. This will be considered an unexcused absence.

ACADEMIC POLICY

- All cheerleaders must be academically eligible (you are ineligible if you are failing two or more classes) to participate at games.
- Eligibility reports are usually created every Sunday Evening and will be in effect until the following Sunday when the new report is run.
- If you are academically ineligible for three consecutive weeks, you will be dismissed from the team.

UNIFORMS

- Uniforms are to be worn at cheerleading functions only.
- Uniforms should be machine washed **weekly** and line dried during regular season.
- All uniforms, including sneakers, must be kept clean at all times
- When going to and from games you must wear your uniform and warm-ups.
- Absolutely **NO JEWELRY** should be worn at practice or games.
- Any tattoos or piercings should not be visible.
- Artificial nails are not allowed at any time, polish must be removed for games (unless using clear polish).
- Chewing gum is not allowed at practice/games

- Hair must be pulled back at all times. A cheerleading bow must be worn at all games. Headbands or other hair accessories are not allowed. If your hair is too short for a pony tail you must have the sides pulled up off your face.
- All hair color must be natural.

SPORTSMANSHIP AND RESPONSIBILITIES/FUNDRAISING

- Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember, you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures.
- All other school rules apply when at sporting events.
- If a cheerleader is benched three times they will be dismissed from the squad.
- Each cheerleader must have a physical completed between June 1st and August 15th in order to be able to participate. If unable to participate this is considered an unexcused absence. Please see the high school nurse for forms and more information.
- Fundraising is mandatory. Each cheerleader must raise at least \$60 per year (or pay the boosters this fee) to remain on the squad. If the \$60 is not met the cheerleader will not be able to cheer the following year until their debt is paid off. Several fundraiser will take place throughout the year to meet this requirement.

TECHNOLOGY

- The use of cell phones is prohibited during games and other events.
- There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.



Hey it's [REDACTED] Just wondering do you have to dk a year of jv before you could make varsity? My mom was wondering

No

Read 5/26/17

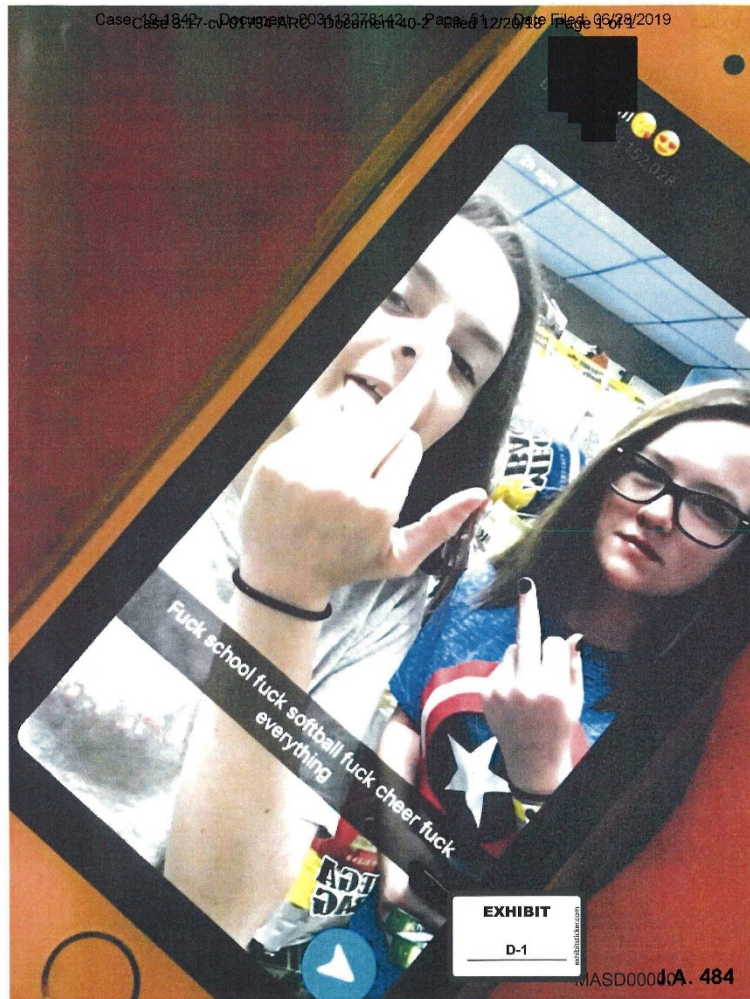
That's stupid

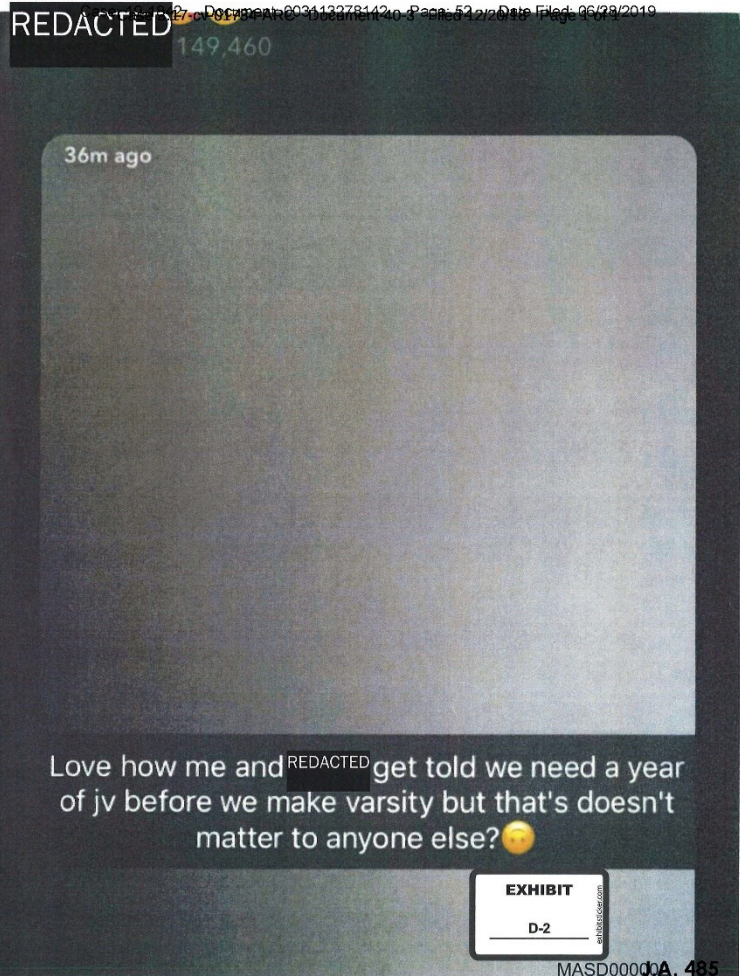
But okay

She was just wondering how [REDACTED] made varsity

Mon, May 29, 9:34 AM

We wear bows right?





UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – B.L.
TESTIMONY AT PRELIMINARY INJUNCTION
HEARING

OCTOBER 2, 2017

* * * * *

[13] BY MS. TACK-HOOPER:

Q. Did you find it? Great. Brandi, is this a photo of the Snapchat that you made?

A. Yes.

Q. Okay. I want to talk a little bit about what Snapchat is and how it works. So how do you post something on Snapchat?

[14] A. Like you go onto the app and click on a button and take a picture or a video. And then you could type something, anything you want, and then you can post it to your story, which is all of your friends, or send it to like an individual person.

Q. Okay. And how long do Snaps last?

A. If you send it to an individual person it only lasts ten seconds. But if you put it on your story it will last 24 hours.

Q. And is there a website you can go to to see someone's Snapchat posts?

A. No.

Q. So how do you — you have to — you mentioned an app. You have to have the app, is that how it works?

A. Yes.

Q. So what do you use Snapchat for?

A. To rant or post funny stuff.

Q. Okay. How does it compare to the things you would say to your friends in person?

A. How I would talk to them normally.

Q. So it's the same way you would talk to them on Snapchat as a person?

A. Yeah.

Q. Are you on other social media, like facebook or Instagram?

A. Yeah.

[15] Q. And how does Snapchat compare to those other sites, platforms?

A. On my facebook, like the stuff you make is permanent unless you delete it and stuff. And then with Snapchat it only lasts 24 hours.

Q. Okay. So let's talk about this particular Snap that you have in front of you. When did you post this?

A. It was on a Saturday after tryouts for cheerleading.

Q. Do you know like roughly what month that was or season?

A. The end of May.

Q. All right. So you said it was after tryouts. Were there — was cheerleading — were there practices going on at that time?

A. No.

Q. Okay. Were there games that you were cheering for at that time?

A. No.

Q. All right. How — when does cheerleading happen during the school year?

A. Practices would start like a week after school ended, like somewhere around there. And then they'd go like throughout the entire school year.

Q. Okay. So this was in the period between the end of cheerleading and the start of practices for the next season?

A. Yes.

[16] Q. All right. And where was this photo taken?

A. The Cocoa Hut.

Q. What's a the Cocoa Hut?

A. It's like a store, a small store.

Q. Is it part of the school?

A. No.

Q. All right. Were there any school activities that you were participating in while you took this photo?

A. No.

Q. All right. And what are you wearing in this photo? First of all, is that you on the left there?

A. Yes.

Q. And the girl on the right?

A. My friend Devon.

- Q. Does she go to school with you?
- A. Yeah.
- Q. Is she a cheerleader?
- A. No.
- Q. And what are you wearing in that?
- A. A gray shirt.
- Q. Is that your school uniform?
- A. No.
- Q. Is your school uniform what you're wearing today?
- A. Yeah.
- Q. Okay. Are there any school logos in this photo?
- [17] A. No.
- Q. And why did you make this post?
- A. I was angry about a lot of stuff that day.
- Q. What were you angry about?
- A. That I didn't make varsity for cheerleading, and I didn't get the spot I wanted for softball.
- Q. What spot did you want for softball?
- A. Right field.
- Q. And what were you playing?
- A. The left.
- Q. Okay. And why were you angry about school?
- A. Because of finals.
- Q. Okay. And this language on this Snap, how does that compare to the way you speak when you're at school?
- A. Different. Because I know I'd get in like big trouble if like a teacher or something hears it.
- Q. So that's not the kind of language you use at school?

A. No.

Q. Okay. How did you think your friends would react to the Snap?

MR. LEVIN: Objection, irrelevant and speculative.

THE COURT: What's the purpose of the question?

MS. TACK-HOOPER: Your Honor, the district's brief emphasizes that she was being disrespectful and that this impacted her coaches and her team. So, asking about the intent [18] of the post is —

THE COURT: Well I think you can rephrase the question and ask her what she intended to happen rather than what she expected the result to be.

MS. TACK-HOOPER: Certainly.

BY MS. TACK-HOOPER:

Q. What did you intend when you posted this Snapchat?

A. What does that mean?

Q. It means — were you trying to send a message to someone with this?

A. I was just mad about everything.

Q. Okay. Was it directed at a particular person?

A. No.

Q. All right. And do you know how this photo came to be?

A. No.

Q. All right. How do you — so if a Snapchat only lasts ten seconds or 24 hours, is there a way to make them last longer?

A. Other than taking a picture of it like this, no.

Q. So how do you take a picture of somebody's Snapchat?

A. You'd have to get another phone to take a picture of it from someone else's phone.

Q. Okay, all right. So you posted this on a Saturday. Was there school the following Monday?

A. Yes.

Q. And how did your friends react to this post?

[19] A. No one said anything to me about it.

Q. Not on the weekend?

A. No.

Q. Not on Monday?

A. No.

Q. What about on Tuesday? Did anyone say anything to you about the post on Tuesday?

A. No.

Q. What about Wednesday?

A. No.

Q. Okay. When was the first time anyone said anything to you about this post?

A. Thursday Morning.

Q. And what was that conversation?

A. Mrs. Luchetta called me to her room at homeroom, and she showed me the picture and said it was disrespectful towards her, the school, and everyone — like all the students. And then she told me I wasn't allowed to do cheerleading that year.

Q. Okay. Did she say what in particular about the Snap was disrespectful?

A. No — oh yeah. She pointed at it.

Q. What did she point to?

A. The words fuck cheer.

* * * * *

[28] [BY MR. LEVIN:]

Q. How many people had access to these Snaps? You said you sent it to your friends. How many were there?

A. About like two-fifty.

[29] Q. Two hundred and fifty?

A. Yeah.

Q. And many of those 250 were students at the Mahanoy Area School District, right?

A. Yeah.

Q. Some of the people who were among the 250 people were on the cheerleading squad, right?

A. Yeah.

* * * * *

[30] [BY MS. TACK-HOOPER:]

Q. Okay. Brandi, I've handed you what has been marked as P-1. Do you recognize that?

A. Yes.

Q. Is that the handbook that the lawyer for the district referred to earlier?

A. Yeah.

Q. And can you tell me how many pages are in that handbook?

A. A lot.

Q. Are they numbered?

A. Yeah.

Q. Sure. What's the highest page number there?

A. 85.

Q. Did you read all 85 of those pages?

A. No.

Q. Do you remember everything that you did read in it?

[31] A. No.

Q. All right. Was there anything in there that said that students have no right to speak freely with their friends on the weekends?

A. No.

Q. And those permission slips that the lawyer for the district showed you, did you sign anything saying you agreed to give up your rights to speak freely with your friends on the weekends?

A. No.

Q. Would you have signed something that said that?

A. No.

Q. The district lawyer asked if you were angry when you made that — that Snap. Did you take out your anger at your teammates during — during tryouts?

A. No.

Q. Did you use the kind of language in your Snapchat at tryouts because you were angry?

A. No.

Q. You didn't swear at the coaches?

A. No.

Q. You didn't swear at your teammates?

A. No.

Q. When you made this post several days later were you trying to upset people?

[32] A. No.

Q. Okay. And the district lawyer mentioned that when you spoke with the school officials about being removed from the team you were crying?

A. Yeah.

Q. Did you apologize for having posted this on Snapchat?

A. Yeah, multiple times.

Q. And why were you crying Brandi?

A. Because I was upset that I got kicked off.

Q. Why were you upset?

A. Because I really enjoy cheerleading.

* * * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – LUCHETTA-
RUMP TESTIMONY AT PRELIMINARY
INJUNCTION HEARING

OCTOBER 2, 2017

* * * * *

[33] [BY MR. LEVIN:]

Q. Would you state your full name for the record, please?

A. Nicole Luchetta-Rump.

Q. By whom are you employed?

A. The Mahanoy Area School District.

Q. In what capacity or capacities?

A. I'm a secondary mathematics teacher and a cheerleading co-advisor.

Q. And what do you teach?

A. I teach high school mathematics.

Q. And how long have you been a public school teacher?

A. This is my eighth year.

Q. How long have you been a cheerleading coach?

A. This is my third year.

[34] Q. Did you have any role in writing the cheerleading rules?

A. The cheerleading rules were adopted from the previous coaches, but April and I revised them to meet our needs.

Q. Did you review the rules with the cheerleaders?

A. We reviewed them during the cheerleading workshops during our tryouts. In addition to that, the cheerleaders were required to read and sign a form saying that they will abide by the cheerleading rules before starting cheerleading tryouts.

Q. Was Brandi present when you reviewed the rules?

A. Yes.

Q. Are there any pedagogical purposes for the rule?

A. The main purpose of the rules is to not only teach our students that they have to follow rules, and if they don't follow them there's consequences, but in addition to that we want to teach them team-building skills and skills that they will take with them after they graduate.

Q. Did Brandi try out for varsity cheerleading for the 2017/18 school year?

A. Yes.

Q. Did she make varsity?

A. No.

Q. How did she react to not making varsity?

A. After the tryouts, after the results were given Brandi seemed visibly upset. She did ask me to see her tryout score. I showed them to her then she handed them back.

[35] Q. Did she send you any texts about the subject?

A. Yes.

Q. Please take a look. On your desk there is a packet of defense exhibits. Please take a look behind Tab 10 at the document called D-10. Do you have it in front of you?

A. Yes.

Q. Do you recognize that as several texts between you and whom?

A. Hum, this is between myself and B.L.

Q. That's Brandi?

A. Yes.

Q. And some of these texts are in gray and one of the texts is in blue. Do you see that?

A. Yes.

Q. Who sent the texts that are in gray?

A. Hum, Brandi sent the ones in gray.

Q. And the redacted word, is that the word Brandi in the first one, Hey, it's —

A. Yes.

Q. Okay. So Brandi said, Hey, it's Brandi. Just wondering, do you have to DK a year of JV before you can make varsity? My mom was wondering. Is that what she asked you?

A. Yes.

Q. And how did you respond?

A. I respond with No.

[36] Q. And how did Brandi respond to your statement?

A. She replied with, That's stupid, but okay.

Q. And then she also stated the rest of the texts that are in gray, is that correct?

A. Correct.

Q. And on what date did she send these texts?

A. This was on Friday, May 26, one day after the tryouts.

Q. Did you subsequently learn about Brandi's, quote, fuck cheer, end of quote, Snap and her giving the middle finger to whoever was looking at that Snap?

A. Yes.

Q. How did you learn about it?

A. April Gnall.

Q. And what did April do?

A. April had tried to contact the high school principal, but was unable to. So she dropped this Snap off at my classroom.

Q. When you say this Snap, please look at Exhibit D-1. Is that the Snap you're referring to?

A. Yes.

Q. Okay. Did you learn about that Snap before April gave a copy of it to you?

A. Yes. I had students approach me throughout the school day saying that there were things being posted on line. I did not know the details until April shared them with me.

Q. In addition to telling you that there were things posted [37] on-line, did they say anything else about it? Did they describe it in any way?

A. They just described it as being something that was inappropriate, that shouldn't be posted on-line.

Q. Who made the decision to remove Brandi from the squad?

A. Both April and I made the decision with the support of Tom Smith, the high school principal.

Q. And could you explain to the Judge the factors that you took into account?

A. The fact that there was profanity in the Snap and it was directed towards cheerleading.

Q. Do you know what viewpoint, if any, Brandi was trying to express when she gave the middle finger to everybody and said, Fuck cheer?

A. I did not.

Q. Was it the profanity and the profane gesture alone that caused the removal?

A. Yes.

* * * * *

[39] [BY MS. TACK-HOOPER:]

Q. All right. You mentioned that the profanity and the obscene gesture were enough to remove Brandi from the cheerleading team, right?

A. Correct.

Q. If she had said, Cheer is fucking awesome, would that have violated the cheerleading rules in your opinion?

A. Yes.

Q. Okay. And if she had said something that didn't involve profanity but was still negative about cheerleading, such as, I don't really like cheerleading that much anymore, would that have violated the rules?

MR. LEVIN: Objection, speculative.

THE COURT: Overruled.

THE WITNESS: It would have violated the rules, but the consequences for that would have been different.

BY MS. TACK-HOOPER:

Q. What would the consequences have been?

A. If that were the statement, we would have probably just met with Brandi and discussed the issue.

Q. And where in the rules does it explain what things violate the speech — violate the rule and what the consequence is [40] going to be?

A. We don't have specific consequences. We have that it will be determined by the coaches.

Q. Okay. What if she had posted, Cheerleaders are at high risk for eating disorders. Would that have violated the rule about posting negative information regarding cheerleading on-line?

A. No.

Q. No, that's in your opinion not negative information about cheerleading?

A. That would most likely be a statistic that she's posting that she found somewhere.

Q. What if she had criticized the selection process for cheerleaders?

A. Hum, I would refer her to me to talk to me about it.

Q. Would that violate the rule about posting negative information about cheerleading on-line?

A. I don't feel that that's a negative comment, no.

Q. Okay. What if she had said, Why don't we cheer for the women's sports teams? Fuck that. Would that violate the rule?

A. Yes, because there's profanity.

Q. Okay. What if she had just said, Why don't we cheer for the women's sports teams? That's crazy?

A. Then that would not violate it because there's no profanity.

* * * * *

[41] Q. Okay. Students get a lot out of extracurriculars, is that right?

A. Yes.

Q. They make kids well-rounded, right?

A. Correct.

Q. Sports promote healthy students, right?

A. Yes.

Q. They teach leadership, right?

A. Correct.

Q. And good sportsmanship, correct?

A. Yes.

Q. And because of all this, colleges usually favor applicants who have participated in extracurriculars, right?

A. Yes.

Q. And If you get kicked off of an extracurricular that's going to impact your future, right?

A. I'm not sure I agree with that.

[42] Q. Potentially it could? That wouldn't be surprising to you, would it?

A. I'm not aware of any colleges that are aware of when you get kicked off the sports team.

Q. Okay. It would negatively impact a students well-being though most likely, right?

A. Temporarily.

Q. Okay. And if you — if a student decided not to participate in extracurriculars because they wanted the right to say whatever they wanted on the weekends with

their friends, they wouldn't get the benefit — all those benefits that you mentioned, right? Like learning leadership and good sportsmanship, right?

A. Yes.

* * * * *

[43] Q. Can you look at the section on the second page that says Sportsmanship and Responsibilities/Fundraising?

A. Yes.

Q. And the last sentence of the first bullet point says, Good sportsmanship will be enforced. This includes foul — I'm sorry, I'm going to read the whole bullet point. The first bullet point says, Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember, you're representing your school when at games, fundraisers and other events. Good sportsmanship will be enforced. This includes foul language and inappropriate gestures. Did I read that right?

A. Yes.

Q. Okay. It only — it mentions using foul language and inappropriate gestures in a rule about representing your school at games, right?

A. Correct.

Q. It doesn't say anything about not being able to use foul language or inappropriate gestures when you're away from school, does it?

A. It does not specifically state that, no.

* * * * *

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

B.L. a minor, by her father,
LAWRENCE LEVY, and her
mother, BETTY LOU LEVY,

Plaintiffs,

v.

MAHANoy AREA SCHOOL
DISTRICT,

Defendant.

CIVIL ACTION
NO. 3:17-CV-1734

(JUDGE CAPUTO)

MEMORANDUM

Presently before this Court is a Motion for a Preliminary Injunction (Doc. 2) filed by B.L., Lawrence Levy, and Betty Lou Levy (collectively “Plaintiffs”). This action stems from B.L.’s removal from Mahanoy Area High School’s junior varsity cheerleading squad for her use of profanity off-campus on a weekend. Plaintiffs are able to establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in their favor; and (4) an injunction is in the public interest. Specifically, Plaintiffs establish their likely success on the merits because the District is unable to punish its students for profane, off-campus speech. For these reasons, this Court will grant Plaintiffs’ Motion for a Preliminary Injunction.

I. Background

A. Factual Background

Plaintiff B.L. (“Plaintiff”), is currently an honor student and sophomore at Mahanoy Area High School. B.L. began cheerleading in fifth grade, and has been on the junior varsity cheerleading squad at Mahanoy Area High School since she enrolled as a freshman. As a member of the cheerleading squad at the High School, Plaintiff attends practices at least twice a week, and cheers at football, basketball, and wrestling matches. Additionally, she has been tasked with raising money to support the financial needs of the District’s cheerleading program.

The District’s school board empowered the cheerleading coaches to adopt rules and regulations governing the conduct of students participating in the cheerleading program. In pertinent part, the rules developed by the squad’s coaches state:

“Please have respect for your school, coaches, teachers, and other cheerleaders and teams. Remember, you are representing your school *when 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.”

(Defs. Ex. 3 (emphasis added).)

On May 28, 2017, Plaintiff posted a “Snap” featuring a photo of her and a friend holding up their middle fingers with the text, “fuck school fuck softball fuck cheer fuck

everything” superimposed on the image.¹ Plaintiff took the Snap at the Cocoa Hut—a local convenience store—on the weekend when she was not participating in any school activity. Notably, this Snap did not specifically mention the High School or picture the High School.² Further, the Snap was only shared with Plaintiff’s friends³ on SnapChat, and thus was not available to the general public.

Five days after Plaintiff sent the Snap, on June 1, 2017, one of the cheerleading squad’s coaches, Ms. Luchetta, pulled Plaintiff out of class to inform her that she was being dismissed from the cheerleading squad. At that time, Luchetta produced a printout of Plaintiff’s Snap and told Plaintiff that the Snap was “disrespectful” to the coaches, the school, and the other cheerleaders.

Following Plaintiff’s dismissal from the cheerleading squad, Plaintiff’s parents made a number of attempts to

¹ A “Snap” is a digital image that may be accompanied by text sent through an application developed by the company, SnapChat. The SnapChat application is available on smart phones and is unique because it only allows users to send “Snaps” to specific individuals for a short amount of time (generally under 10 seconds). Notably, a “Snap” is self-deleting. After an image is sent, users may not access it again.

² Not only was the High School not directly pictured, but the two students pictured were not wearing their High School uniforms or any apparel containing the School’s insignia. Put simply, there is no explicit reference to the High School in the Snap.

³ It is not clear exactly how many people had access to this Snap. However, Plaintiff B.L. suggested during her testimony at the Preliminary Injunction hearing that the Snap could have reached roughly 250 individuals.

get the District to reconsider their daughter's punishment. During these attempts to return to the cheerleading squad, Plaintiff was told that the school had the right to discipline her for "disrespecting the school," and that the coaches believed that her Snap was "demeaning to [the coach], the school, and the rest of the cheerleaders."

At the hearing before this Court, Luchetta testified that she suspended plaintiff from the cheerleading squad because of her use of profanity.

There is no question that the District knew the Snap was produced off of school property during the weekend when no school event was in progress.

B. Procedural Background

On September 25, 2017 Plaintiffs filed the instant Complaint against the Mahanoy Area School District. (Doc. 1.) Accompanying the Complaint was a Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction. (Doc. 2.) This Court granted Plaintiffs' Motion for a TRO at 11:05am on September 25, 2017, and scheduled a hearing on the Motion for a Preliminary Injunction ("hearing"). That hearing occurred on October 2, 2017 at 9:30am.

Plaintiffs' Motion for a Preliminary Injunction is ripe for review.

II. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "Awarding preliminary relief,

therefore, is only appropriate ‘upon a clear showing that the plaintiff is entitled to such relief.’” *Id.* (quoting *Winter*, 555 U.S. at 22). “A plaintiff seeking a preliminary injunction must establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. The “failure to establish any element . . . renders a preliminary injunction inappropriate.” *NutraSweet Co. v. Vit-Mart Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999) (citing *Opticians Ass’n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990)). Notably, the “movant bears the burden of showing that these four factors weigh in favor of granting the injunction.” *Ferring Pharms., Inc v. Watson Pharms., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (citing *Opticians*, 920 F.2d at 192).

III. Discussion

A. Plaintiffs are Likely to Succeed on the Merits

Plaintiffs contend that this action is likely to succeed on the merits for two⁴ distinct reasons: (1) Schools cannot punish students for private, out-of-school speech that does not cause substantial, material disruption to school activities, and (2) the cheerleading rules are vague, overbroad, and give school officials an impermissible

⁴ While Plaintiffs’ Brief in Support of their Motion for a Preliminary Injunction contains three distinct grounds for supporting their position, Plaintiffs abandoned one during the hearing: schools lack the authority to punish students under a policy that discriminates against alternate viewpoints. In fact, Plaintiffs’ counsel noted at the hearing that this case was now solely about the District’s censure of profanity as opposed to viewpoint discrimination.

amount of discretion to censor student speech.⁵ On the other hand, the District has made the sweeping argument that “this is not a First Amendment case.” But, the District has also argued that it has the authority to punish students for profane, out-of-school speech, and further that speech directed at the School District should be considered on-campus speech.

- (1) The School District may not punish a student for profane speech generated out-of-school

Plaintiff first contends that this case is likely to succeed on the merits because the school may not punish students for private, out-of-school speech that does not cause a substantial, material disruption to school activities. This is correct.

As an initial matter, there is no question that the First Amendment limits that ability of a school to impose punishment for speech protected under the Amendment’s ambit. As has been repeated a number of times since the Supreme Court decided *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Rather, the Court has held that schools may only⁶ limit speech or punish students for

⁵ This Court will not address Plaintiffs’ second argument because the grant of preliminary relief can be supported solely on the finding that the School District violated Plaintiff B.L.’s First Amendment right when it punished her for profane speech that originated outside of school. Further, this Court remains unconvinced that the policy is in fact void-for-vagueness or unconstitutionally overbroad.

⁶ Notably, the Supreme Court has provided other scenarios in which a school may limit student speech, but the two types of speech

speech that is (1) “vulgar, lewd, profane, plainly offensive” or (2) “is reasonably expected to substantially disrupt the school.”⁷ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Tinker*, 393 U.S. at 514.

Notably, the decisions rendered by the Supreme Court in *Tinker* and *Fraser* dealt with speech made on a school’s campus. While courts have allowed schools to punish a student for out-of-school speech that was reasonably expected to substantially disrupt the school, the Supreme Court has noted that schools have no power to punish “lewd or profane” speech—as described in *Fraser*—when it occurs outside of the school context. *See Fraser*, 478 U.S. at 688 (“If [the student] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate. . . .”); *Morse v. Frederick*, 551 U.S. 393, 405 (2007). In fact, the Third Circuit—in a case almost identical to the instant action—held that “*Fraser* does not apply to off-campus speech.” *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (en banc); *see also Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (en banc) (noting that a principal could not punish a student

identified are the only two relevant to the instant matter. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262-64 (1988) (allowing a principal to withhold two pages of a high school student-run newspaper from publication because schools have greater control over speech that appears school-sponsored.).

⁷ The District has made no argument that the Snap sent by Plaintiff B.L. would substantially disrupt the operation of the school, instead the District solely relies on Plaintiff’s use of profanity. Therefore, the District will have to rest on the argument that she may be punished for the content of her Snap under *Fraser*.

for speech that was “degrading, demeaning, demoralizing, and shocking” because the speech was made online, out-of-school.). There, a School District suspended a student for creating an online profile that made fun of her school’s principal. *Id.* at 920. The student created the online profile during the weekend, and on her home computer. *Id.* While the Third Circuit believed that the student’s conduct could be construed as “lewd or profane,” the school still violated the student’s First Amendment right when it punished her because the speech was made off-campus. *Id.* at 932; *see also Cohen v. Cal.*, 403 U.S. 15 (1971) (noting that in a non-school setting, the state may not make a “single four-letter expletive a criminal offense.”). Simply put, the ability of a school to punish lewd or profane speech disappears once a student exits school grounds.

Here, the conduct of Plaintiff directly parallels the conduct of the Plaintiff in *J.S. v. Blue Mountain Sch. Dist.* (“*Blue Mountain*”); both students created content⁸ that was distributed through use of the internet during the weekend, and on a device that was not owned or controlled by the school district. Additionally, neither student was on school property when the speech was generated. As such, the same rule that prevented the school district from

⁸ It is important to note that the content in *Blue Mountain* was substantially more explicit than in the instant matter. In *Blue Mountain* the online profile created by the student accused her principal of having sex in his office, hitting on students, and being a “sex addict.” Additionally, the student in *Blue Mountain* specifically named and personally attacked members of the school’s staff and their families. It is this speech that was protected by the Third Circuit because it originated outside the control of the school district. In comparison, here, the Plaintiff made a generic statement: “fuck school fuck softball fuck cheer fuck everything.”

levying punishment in *Blue Mountain* should be restated here: a student’s potentially lewd or profane speech created off-campus must not subject that student to punishment by a public school district. It is important to note that the cheerleading coach, who was in part responsible for the discipline of Plaintiff, testified that discipline was imposed because of Plaintiff’s use of profanity.

While this Court believes the Third Circuit has made clear the limits placed on a School District seeking to restrict a student’s out-of-school speech, Defendant seeks to have this Court hold that a student may be punished for out-of-school speech so long as the punishment does not encroach on what the District refers to as a “protected property interest.” In other words, the District can levy any punishment it chooses so long as they do not suspend or expel a student.⁹ As the District’s counsel made clear

⁹ The District principally relies on a single Third Circuit case to support its proposition: *Blasi v. Pen Argol Area Sch. Dist.*, 512 Fed. App’x 173 (3d Cir. 2013). However, that case is distinguishable from the instant case for a number of reasons. There, a father was banned from a single basketball game taking place on school grounds after he sent 17 “scathing and threatening” emails to coaches of the school’s basketball team. Thus, a student’s out-of-school speech was not at issue in *Blasi*. Second, the content of the emails in *Blasi* is drastically different than the content of the Snap at issue here. As the *Blasi* Court noted, the emails could properly invoke the *Tinker* doctrine because the threatening nature of the emails could have lead a reasonable person to believe disruption of the school’s operation may follow. But here, the District has already admitted that B.L. was only punished because of the profanity contained within her Snap, not because they had a reasonable fear of disruption. Finally, in *Blasi* the emails were directed at a specific individual at the school. Remember, B.L.’s Snap was sent to friends on the weekend and was deleted before school was ever in session.

at the hearing, such holding would mean that a student could be barred from an extracurricular activity if they were at home with friends and uttered a profanity that was subsequently reported to the school. In essence, counsel suggests interpreting this Circuit's jurisprudence to allow school children to serve as Thought Police—reporting every profanity uttered—for the District. Such construction is “unseemly and dangerous.” *Layshock*, 650 F.3d at 216.

The Third Circuit has not offered a separate standard to analyze student speech in cases where the punishment was removal from an extracurricular. In fact, when presented with cases where students were removed from an extracurricular due to their speech, the Third Circuit has commingled such punishment with a student's suspension or expulsion. *See, e.g., id.* at 210, 212-14, 216 (finding a student's First Amendment right was violated when a school district imposed punishment that included suspension and a ban from extracurricular activities due to the student's out-of-school speech) (“It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child *when he/she participates in school sponsored activities.*” (emphasis added)); *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 300 (3d Cir. 2013) (applying both *Fraser* and *Tinker* to find that a student's First Amendment right was violated when she was punished with a one-and-a-half day in-school suspension, and a ban from at least one extracurricular activity); *see also Tinker*, 393 U.S. at 512-14 (“A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus

during the authorized hours, he may express his opinions, even on controversial subjects.”). This Court will refuse to offer a different framework for analyzing student speech cases where the punishment for speech involved a suspension from an extracurricular activity as opposed to a suspension or expulsion from school. Therefore, *Blue Mountain* and *Layshock* apply to prevent a student from being punished for profane speech originating outside of school.

Defendant also argues that Plaintiff’s Snap should be construed as on-campus speech, and thus the *Fraser* doctrine would enable the District to punish her for the profanity contained within her Snap. While an *identical* argument was made and rejected by the Third Circuit in *Layshock*, this Court will make clear why the District’s cited authority fails to support its position. *See id.* at 216-18. To support the application of *Fraser* to out-of-school speech Defendant points to just two cases. First, Defendant cites a Pennsylvania Supreme Court case: *J.S. ex rel H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002). There, the Court held that off-campus speech, specifically speech generated on the internet, could be “imported” onto school grounds if the speech was directed at a specific audience at the school and was accessible on school property. *Id.* at 685. The Third Circuit has plainly stated that this case does not support the idea that profane speech created off-campus can be “imported” on-campus to invoke *Fraser*. *Layshock*, 650 F.3d at 217. Rather, the Circuit held that the death threats made by the student in that case could have caused a substantial disruption at the school and thus invoked *Tinker*, not *Fraser*. *Id.* And here, District’s counsel proffered, “this is not a *Tinker* case.” Therefore, the District’s reliance on

Bethlehem Area School District is misplaced. Second, Defendant cites to a decision rendered by the United States Court of Appeals for the Fourth Circuit: *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011). This case, like *Bethlehem Area School District*, is not instructive here. In *Kowalski*, the Fourth Circuit made a point to note that the Third Circuit sitting en banc concluded that “a school could not punish a student for online speech merely because the speech was vulgar and reached the school.” 652 F.3d at 573 (citing *Layshock*, 650 F.3d at 205). Since the Third Circuit precedent cited by the court in *Kowalski* remains in place, this Court’s decision will not be swayed by the decision of a sister Circuit. Additionally, the District again misconstrues this case as one providing the District authority under *Fraser* to prohibit profane speech, rather than as a case meeting the criteria set forth in *Tinker*. *Id.* (“We need not resolve, however, whether this was in-school speech and therefore whether *Fraser* could apply because the School District was authorized by *Tinker* to discipline [Plaintiff]. . .”).

Finally, the District advanced the argument that the Snap did not implicate the First Amendment because it was not expressive speech. In this Court’s view, the words and gesture in the Snap qualify as expressive speech.

Because this Circuit has made clear that *Fraser*’s profanity exception to *Tinker* does not apply to off-campus speech and Plaintiff B.L.’s speech cannot be considered on-campus speech, Plaintiffs are likely to succeed on the merits.

B. Irreparable Harm

Plaintiffs will suffer irreparable harm if preliminary relief is not granted. “[T]o show irreparable harm a

plaintiff must demonstrate potential harm which cannot be redressed by a legal or equitable remedy following a trial.” *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). The Supreme Court has stated that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1973). The Third Circuit has held similarly. *See, e.g., K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013) (noting that a restriction on students’ exercise of their right to freedom of speech “unquestionably constitutes irreparable harm.”); *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 409, *aff’d* 725 F.3d 293 (3d Cir. 2013).

Here, as Plaintiffs note, Plaintiff B.L. has been “barred from her chief extracurricular activity on an ongoing basis as punishment for her protected self-expression.” (Doc. 3, at 20.) Further, if the cheerleading rules remain in place, Plaintiff B.L. would be subject to continuing censorship of her protected speech.¹⁰ (*Id.*) Because these alleged harms refer directly to a restriction on Plaintiff B.L.’s exercise of her right to freedom of speech, she has “unquestionably” established that irreparable harm would exist absent preliminary relief. *See Pocono Mountain Sch. Dist.*, 710 F.3d at 113.

C. Balance of the Hardship Favors Plaintiffs

“To determine which way the balance of hardship tips, a court must identify the harm to be caused by the preliminary injunction against the possibility of the harm

¹⁰ The District seems to ignore the fact that B.L. would return to tryout for the team even if the suspension for this cheerleading season remains in place.

caused by not issuing it.” *Buck v. Stankovic*, 485 F. Supp. 2d 576 (M.D. Pa. 2007) (citing *Los Angeles Memorial Coliseum Commission v. NFL*, 634 F.2d 1197, 1203 (9th Cir. 1980)); see also *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002).

The District will suffer no harm as a result of the preliminary injunction. The District only proffers a single potential harm, the loss of the speech policy in question. The District suggests that if the speech policy is eliminated the District will have no means to discipline other cheerleaders who “[follow] B.L.’s example” and use profanity while not in school or engaging in a school sponsored activity. (Doc. 9, at 23.) However, this is not a cognizable harm to the district because “school discipline does not depend on the necessity of a speech code” like the one at issue here. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002). On the other hand, Plaintiff faces continued censure due to her earlier speech, and future punishment based on her out-of-school speech if preliminary relief is not granted.

Because the District offers no legitimate harm that could be caused by the preliminary injunction, the balance of hardship tips in favor of the Plaintiffs.

D. Relief is Favored by the Public Interest

If a party can demonstrate “both a likelihood of success on the merits and irreparable injury,” the public interest will typically favor that particular party. *Miller v. Skumanick*, 605 F.Supp.2d 634, 647 (M.D. Pa. 2009) *aff’d sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010). However, courts should still weigh all four factors before deciding whether to grant the injunction. *Id.* So, even though this Court will find that Plaintiffs are likely

to succeed on the merits and will suffer irreparable harm absent preliminary relief, the public's interest must be considered.

Plaintiffs assert that granting preliminary relief will be in the public interest because "the public's interest favors the protection of constitutional rights in the absence of legitimate countervailing concerns." *Easton Area Sch. Dist.*, 827 F. Supp 2d at 409 (citing *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997)). Plaintiffs correctly note that this is a First Amendment case, and that this case deals directly with the protection of speech within the Amendment's ambit. Further, the only countervailing concern evident on these facts, and presented by the District, is the suspension of the cheerleading speech policy. But, as already noted, "school discipline does not depend on the necessity of a speech code." *Sypniewski*, 307 F.3d at 259. Therefore, Plaintiff is correct in noting that the interest of the public weighs in favor of granting her Motion.

IV. Conclusion

This Court will grant Plaintiffs' Motion for a Preliminary Injunction because Plaintiffs are able to establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in their favor; and (4) an injunction is in the public interest.

An appropriate order follows.

October 5, 2017
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

<p>B.L., a minor, by her father, LAWRENCE LEVY, and her mother, BETTY LOU LEVY, Plaintiffs, v. MAHANoy AREA SCHOOL DISTRICT, Defendant.</p>	<p>Civil Action No. 3:17-cv-1734 (The Hon. A. Richard Caputo)</p>
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**DEFENDANT’S OBJECTIONS AND RESPONSES
TO PLAINTIFF’S FIRST SET OF
INTERROGATORIES**

* * * * *

3. Identify all MASD employees, representatives, or agents involved in deciding to punish B.L. for posting the Snap or involved in upholding the decision to punish B.L., identify the extent of such person’s involvement in deciding to punish B.L. or in implementing such punishment, identify when such involvement of decisions occurred, and identify all of the reasons and bases (including, *e.g.*, school conduct codes) for each such person’s decision and related actions.

Response: After viewing the Snap, cheerleading co-advisors April Gnall and Nicole Luchetta-Rump

discussed the situation on May 30, 2017 and agreed that B.L. should be removed from the junior varsity cheerleading team for violating team rules. However, they decided to discuss the matter first with then-Principal Thomas Smith. On May 31, 2017, Luchetta-Rump showed pictures of B.L.'s posts to Smith and explained that B.L. had apparently posted the Snap as a result of failing to make the varsity cheerleading team. She also said that she and Gnall were planning to remove B.L. from the team. Smith told Luchetta-Rump that he supported their decision, but he would need to investigate if B.L. had actually posted the Snap.

On June 1, 2017, B.L. was called down to the office. Luchetta-Rump showed B.L. a photo of the Snap, told her that posting the Snap was unacceptable, and that she would be dismissed from the team. On June 29, 2017, B.L. and her parents asked the Mahanoy Area School District's Board of School Directors (the "School Board") to overturn B.L.'s removal. The School Board took no action on the matter.

The Mahanoy Area High School Cheerleading Rules state, "There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet."

School Board Policy 218 states that the Code of Student Conduct applies to off-campus activities, *inter alia*, "if the student is a member of an extracurricular activity and has been notified that particular off-

campus conduct could result in exclusion from such activities.”

The Handbook entry on “Co-Curricular Activities” states: **“PERSONAL CONDUCT: Participation on an athletic team or cheerleading squad in the Mahanoy Area School District is a privilege and the participants must earn the right to represent Mahanoy Schools by conducting themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner. Any participant whose conduct is judged to reflect a discredit upon himself/herself, the team, or the Mahanoy Schools, whether or not such activity takes place during or outside school hours during the sports season, will be subject to disciplinary action as determined by the coach, the athletic director and/ or the school principal.”**

The entry goes on to state, **“REMOVAL FROM A TEAM: Removal from a team will be made by the coach of the sport, athletic director, or school administrator. The athletic director and/or principal will confer with the coach before any removal action is taken. Causes for removal from a team may include, but not be limited to the following:**

- Use of alcohol, illegal use or possession of drugs not prescribed for the individual by a physician.
- Violations of the Mahanoy Schools Code of Student Conduct and Discipline which are significant.
- Repeated violations of school athletic or team policies.

- **Personal misconduct that involves police or court action wither during or outside school hours and sessions of the sport season.**
- **Verbal or physical attack upon an opponent, contest official, teacher, fan, coach, or any other person.**
- **Continued acts of unsportsmanlike conducts.”**

4. Identify all communications between any MASD employee, representative, or agent and any other person relating to any decision to punish B.L. for the Snap, including who participated in the communication, when the communication occurred, the form of the communication, and what was discussed.

Response: The District objects to this Interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. The District also objects to the extent that the communications in question involved any of the plaintiffs since that information would already be in the plaintiffs’ possession. The District further objects to the extent that this interrogatory seeks information protected by the attorney-client privilege. Subject to and without waiving these objections, the District states that the following nonprivileged communications occurred:

On May 30, 2017, Gnall called Luchetta-Rump and informed her about the posts by B.L. They tentatively agreed that B.L. should be removed from the cheerleading team, but agreed that they should first

discuss the situation with Principal Smith and provided him a copy of the Snap.

On May 31, 2017, after receiving photographs of the Snaps from Gnall, Luchetta-Rump met with Smith. She showed him pictures of B.L.'s posts, and explained that B.L. had apparently posted the Snap as a result of failing to make the varsity cheerleading team. She also said that she and Gnall were planning to remove B.L. from the team. Smith told Luchetta-Rump that he supported their decision but needed to investigate if Levy actually posted the Snap.

On June 1, 2017, B.L. was called to meet with Luchetta-Rump, who showed her the photograph and explained that she was being removed from the cheerleading team. B.L. apologized and asked to speak to her mother. B.L. called her mother, who then asked to speak to Luchetta-Rump. Mrs. Levy asked if Luchetta-Rump knew why B.L. posted the Snap. Luchetta-Rump responded that she believed it was because B.L. was upset over not making the varsity team. Mrs. Levy agreed and asked if the coaches might change their mind and allow B.L. to remain on the team. Luchetta-Rump explained that B.L. had not represented the school in an appropriate manner. B.L. then asked to speak with Principal Smith.

When B.L. went in to meet with Smith, Luchetta-Rump returned to her classroom. Later that day, she informed Gnall that she had told B.L. she was being removed from the team. Meanwhile, when Smith met with B.L., he asked if she had posted something on

social media against the cheerleading squad in a negative manner and she stated, “Yes.” Smith showed her the Snap and asked if she posted it, and she answered, “Yes.” Smith asked her why she had posted the Snap, and B.L. said she was angry she did not make the varsity squad. B.L. asked Smith if there was anything she could do to get back on the junior varsity cheerleading team. Smith said that he was not going to overturn the coaches’ decision, and that B.L. would have to speak to the coaches about the matter.

Also on June 1, Smith received a telephone call from Betty Lou Levy asking him to call Larry Levy to set up a conference to discuss the issue. Smith told Mrs. Levy that her husband should first talk to the cheerleading coaches. Smith then called Luchetta-Rump, explained the situation, and gave her Mr. Levy’s telephone number.

Smith e-mailed Superintendent Joie Green and Athletic Director Kieran Cray at 8:53 a.m. on June 1. In the e-mail, he described the meeting with B.L. and the phone call from Mrs. Levy.

On June 9, 2017, Mr. Levy delivered a letter to Green, Smith, and Cray requesting that they “review this case and overrule the decision of Mrs. Luchetta.”

On June 14, 2017, Luchetta-Rump, Gnall, Green, and Cray met with Mr. Levy and B.L. in the high school conference room. Mr. Levy claimed that B.L.’s First Amendment rights had been violated, and he referenced several court cases on the issue. Gnall,

Green and Cray explained that it is a privilege to be a cheerleader and that because B.L. had tarnished the reputation of the school and the cheerleaders, that privilege was being taken away. Mr. Levy requested a meeting with the board. Also on June 14, Mr. Levy submitted a “Right to Know” request to the District regarding the Snap incident. On June 26, the District hand-delivered documents responsive to the Right to Know request to the Levy’s home. Mrs. Levy signed a letter acknowledging receipt of the documents.

On or about June 27, 2017, Mr. Levy went to the business office of School Board member Daniel Lynch and asked Lynch if he was aware of the situation with B.L. Mr. Levy provided Lynch with a copy of his June 9 letter to the District and asked Lynch how the School Board might react to his appearance at the upcoming School Board meeting. Lynch informed Levy that the School Board would take the matter under consideration.

On June 29, 2017, Mr. Levy addressed the School Board at a regularly scheduled monthly meeting to ask that B.L. be returned to the cheerleading team.

On September 19, 2017, Levy visited Lynch at his office on an unrelated matter, but then began to discuss the situation with B.L. Lynch told Levy that because he was threatening to bring a lawsuit against the District that it would be inappropriate to discuss the matter. Although Levy pressed Lynch to discuss the matter further, Lynch declined.

On August 11, 2017, Green sent a text to Mr. Levy stating, in pertinent part, “Larry...fyi...the board decided to support the cheer coaches and their decision to remove your daughter from the team. However, she is able to try out again next year.”

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – DEPOSITION
OF NICOLE LUCHETTA-RUMP

OCTOBER 10, 2018

* * * * *

[BY MS. TACK-HOOPER:]

[123] Q. Okay. Let's go back to D3, the 2017, 2018 cheerleading rules. Okay? I'd like to look at the first bullet under sportsmanship and responsibilities/fundraising. It says please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school when at games, fundraisers and other events. Good sportsmanship will be enforced. This includes foul language and inappropriate gestures. Did I read that correctly?

A. Yes.

Q. I am going to refer to this as the respect provision; okay? Is that fair?

A. Yes. Yes.

Q. Okay. The phrase please have respect, is that a suggestion or a request, or is it a rule?

A. That's a rule. These are all rules.

Q. Okay. Is respect expected at all times as opposed to just during cheerleading?

A. At all times they're a cheerleader, whether they're in uniform or not. So they're expected to act accordingly toward their school.

Q. Okay. How do you decide what is respectful and what [124] is not?

A. I mean that's a large variety of different situations that you can be put on. So — or, you know what I mean. Like a lot of different situations that can come up. So really it depends on the situation. At that time the coaches evaluate and see, you know, how we feel, if it's something that is punishable or not. So it's on a kind of case by case basis when it comes to that.

Q. The second sentence there, remember you're representing your school when at games, fundraisers and other events, you agree with me that this does not say you're representing your school even when you are not at games, fundraisers and events?

A. Yes.

Q. Is it your position that students are in fact representing their school all of the time?

A. When they mention cheerleading or wearing anything Mahanoy related, yes.

Q. Is that true of cheerleaders or all students?

A. Well, I would say cheerleaders or anyone that's on a team.

Q. Okay. If they're not wearing any school paraphernalia, is it fair to say they're not representing the school if it's outside of school hours?

A. It depends on the situation. But I would say if [125] they're not bringing anything school related into the situation, then yes.

Q. Okay. What is good sportsmanship?

A. Good sportsmanship is — I believe that's outlined in the PIAA regulations as well. But in my opinion, that is also again a wide variety of topics. But any negativity toward other team and cheerleaders and other schools, all of that is considered bad sportsmanship. So good sportsmanship, that's hard to define because obviously that's treating other teams properly and other cheerleaders and your school properly. But it's more what is bad sportsmanship defined as.

Q. Okay. How do you decide if something is bad sportsmanship?

A. If it's anything that is posted negatively that would demean a school, a team, a teacher on that team or a coach on a team, anything such as that.

Q. Do you read the PIAA regulations when you're trying to decide if something is good sportsmanship or bad sportsmanship?

A. I do refer to — back to them at times, yes. They are in the school handbook.

Q. Oh, okay. So you don't read anything separate from the handbook and the cheerleading rules?

A. No. I use what is outlined in the handbook.

Q. Okay. Is good sportsmanship required at all times [126] whether or not a cheerleader is at cheer?

A. Just as long as they are not referring to anything cheerleading related. So if cheerleading is involved into it, yes, I expect good sportsmanship to occur.

Q. What language is foul?

A. Any type of cursing, anything derogatory, anything that would be considered racist or in that type of category.

Q. I ask because I know that TV networks have entire departments that do nothing but try to determine if something is outside the bounds of good taste and thus can't go on T.V. or not. So I was wondering how you decide what is foul language.

A. Right. And we hold them — since they are teenagers, we hold them to a higher standard. Because at that age, more types of language is considered inappropriate as to something an adult would watch on television.

Q. Okay. Is saying that's stupid foul language?

A. No. I would say it's inappropriate, but not foul.

Q. Okay. What are inappropriate gestures?

A. Things such as giving the middle finger, anything that insinuates something inappropriate. I don't know how to answer that. But anything that is sexual in nature, something that is — that represents something that's inappropriate.

Q. Okay. I'd like to look at the second bullet point under technology.

[127] A. Okay.

Q. It says there will be no toleration of any negative information regarding cheerleading, cheerleaders or coaches placed on the internet. I may

refer to this as the negative information provision if that's okay with you?

A. Yes.

Q. Okay. What is negative information?

A. Anything that demeans a school, another cheerleader, another team.

Q. Or cheerleading itself, correct?

A. Correct.

Q. Okay. Now, at the preliminary injunction hearing, you testified that you did not think that it would be negative information to say cheerleaders are at high risk for eating disorders, correct?

A. Correct.

Q. Why isn't that negative information regarding cheerleading?

A. That would be something that research has posted. This would be fact that someone had found.

Q. Okay.

A. But I don't feel like that's saying that — that's just one person's research. Do you know what I mean?

Q. I am — I think so. But I am not sure. So let me make sure I do. If something is a statement of fact, then it [128] does not count as negative information?

A. I am going to be honest, I don't even remember you asking me that question.

Q. Okay.

A. But I don't — it's someone from the outside giving their expression on cheerleading, but not a specific team, not my team. But — I honestly don't know how to answer that question.

Q. Okay. Okay.

Do you — well, since you don't remember me asking you before, do you — am I correct that you think that saying cheerleaders are at high risk for eating disorders would not violate the negative information provision?

A. Well, that's not a cheerleader stating that, so. . . .

Q. Well, let's say a cheerleader stated that. Let's say B. posted on Snapchat cheerleaders are at high risk for eating disorders?

A. She was just repeating something from someone else that she found. She's — do you know what I mean? She's repeating facts that she found on line.

Q. And your understanding is that it's not negative information unless you are injecting your own personal views into the statement, is that right?

A. Right. She's not posting negative information toward our cheerleading squad. She's just posting facts that [129] are insinuating negative information.

Q. Okay. Okay. So generally factual statements would most likely not violate this rule, is that right?

A. It depends on what type of facts she's posting.

Q. Okay.

A. Or whoever.

Q. Okay. Can you think of a fact about cheerleading that go would violate this? And you can feel free to make up a fact. It doesn't need to be true.

A. My goodness. I honestly can't think of something.

Q. Okay. Fair enough.

You also testified that posting I don't really like cheerleading that much any more would violate this rule. Is that correct?

A. It would be considered negative. So it would be something that would be addressed, but not to the extent of removal from the squad.

Q. What — how would you address that?

A. That would be a situation where the coaches, whether it was a JV coach, member or myself, would talk to them and ask them, you know, why do you feel this way, is there something that can be done about it. I don't feel that that is a means for removal. But it is a situation that should be addressed.

Q. Okay. So you would talk to the student about that [130] statement?

A. Yes.

Q. What would you say to the student in that discussion?

A. I would ask them why they feel that way. See what the reasons behind it are. If there is something that can be changed so that they feel more comfortable. Because this situation has arised before, people have said, you know, I just don't want to do it any more. And we would ask them why.

Q. What is the purpose of having a rule that you can't say something like I don't really like cheerleading that much any more?

A. Well, it's not that they can't say it, but it's something that's negative which would need to be addressed.

Q. Okay. Would you agree that the rules are generally supposed to tell people what they can and can't do?

A. Yes.

Q. Okay. You also testified that if a cheerleader posted something that criticized the selection process for cheerleading that would not violate the negative information provision, is that correct?

A. (Witness nodding).

Q. I am sorry, you have to say yes or no.

A. Yes. Sorry.

Q. Thank you.

[131] What if a student posted criticism of the fact that some cheerleaders had to do JV before making varsity while others didn't, does that violate the negative information provision?

A. No.

Q. What do you understand the phrase, quote, placed on the internet, close quote, to mean?

A. Anything that is — anything that appears on the internet. Anything that is submitted to the internet. Because anything that's on the internet can be seen by anyone, whether it is in a group, whether it is posted on someone's Facebook wall, everyone can see that some way or another.

Q. What do you mean by everyone can see that? Thinking specifically some Facebook groups, for example, are closed. Right?

A. But nothing is really closed.

Q. Okay.

A. Everything says that it is private, that it is closed, but it's really not.

Q. So what do you — how would say a private message sent over the internet to a closed group of people, how would that become public to everyone?

A. All someone needs to do is take a screen shot and share that, and then everyone sees it.

Q. Does the phrase placed on the internet include any [132] communications that travel over the internet, like emails or text messages?

A. Well, yes. But I mean it's very rare that you would see an email or a text message.

Q. Doesn't that pose the same risk though, that someone would take a screen shot and share it?

A. Yes. But I am just stating that that is less likely that we would be notified of that.

Q. Are you trying to prohibit information that is most likely to be shared with the coaches? Is that what you're trying to do with the phrase placed on the internet?

A. I don't know what you mean by that.

Q. You explained that your concern with things being posted on line, even if they're posted privately, is that private communications can still move beyond their intended audience. Did I understand that correctly?

A. Private conversations could move beyond the intended audience. We're most concerned about public. But private things would still be addressed, not necessarily disciplined. But as a team, they need to be addressed so that we don't have issues within our team.

Q. Okay.

A. Does that make sense?

Q. I think so.

So if someone shared negative information regarding [133] cheerleading, cheerleaders or coaches in a private conversation, would you consider that to possibly violate the rules as well?

A. It is posting negative information. We usually do find out about it. And we do usually do need to

address it to some extent so that we don't have chaos within our squad. But when things are posted publically, then that's a different situation.

Q. How often do you have to deal with fallout from someone saying something negative about cheerleaders or cheerleading?

A. Like this typical situation, this was the second time I have come across this.

Q. What do you mean by this?

A. A situation where a cheerleader posted something negative on the internet that we had to punish them for it.

Q. What was the first time?

A. The first time was actually when April's daughter, SG, posted something on the internet. This was my first year as a coach.

We were at a Minersville game, and there were parents making comments about our uniforms. And then S. posted on the internet something to the effect of, now don't quote me on this, but something to the effect of they're just jealous that they don't look as good in their uniforms as we [134] do. So then based on how this was worded, it said specifically any negative information no matter what it was, automatic dismissal from the squad. So she was suspended for the remainder of the regular seasons game which I believe was four basketball games at that time.

Q. What are — what do you mean by regular season games? Are there non-regular?

A. Well, there is scheduled games, then there is play off games. The rest of the scheduled season games. And then she was able to return for the playoff games. So that was how that worked.

Q. Okay.

A. And then after discussing that with Tom Smith, we felt that this should be more of a situation by situation punishment, not just every single person who posts anything negative should automatically be dismissed. Because I feel like — we felt like the situation between what happened between B. and her daughter were completely different, and they should be handled differently.

Q. Okay. So you considered whether to you thought B. should be punished more harshly and removed including the playoff games, correct?

A. Because profanity was used in this situation, yes.

Q. Okay. You earlier said something about having to prevent chaos. I believe you were referring to sort of [135] being the referee in between negative comments. Is that correct?

A. Yes.

Q. Okay. Are there — can you describe what you meant by chaos?

A. Can I give you an example?

Q. Absolutely.

A. Okay. This year now I didn't handle as much as our JV coach. She's not here. But we had situations where the girls were texting one another arguing over a song that they wanted to use for a pep rally. So one of them said something mean to another girl. I don't even remember exactly what. But she said something mean in this text message. So although we didn't punish them because it was a private message that we weren't in, but we did, you know, sit them down. We had to have multiple conversations because we need to put

the fire out, so to say, within the team. Because we don't something like that to continue. So although it's not something we can control, it's still something that needs to be addressed so we can have a team-like environment.

Q. Is that a fairly typical occurrence?

A. With teenage girls, yes.

Q. Okay. So just so I am — I make sure I understand what you — how you apply this negative information rule. Do I understand correctly that if something is private, it may [136] cause, to use your word, chaos, you might have to deal with the fallout, but it would not be a violation of this rule, is that correct?

A. Right.

Q. Okay. And is there some middle gray area where something is not say a private team text message, but is not public on the internet?

A. Well, when things are posted on social media, I consider that public.

Q. Okay.

A. When things are shared between one another within a single email, or a single the text message, I consider that private. But when things are sent in groups, like a group message, I consider that public because you are sharing it with an entire group of people.

* * * * *

[144] Q. Okay. At the preliminary injunction hearing, you testified that the main purpose of the cheerleading rules was so that the cheerleaders would learn to follow rules and learn rules have consequences. Do I remember that correctly?

A. Yes.

Q. Okay. You also testified that rules teach these — rules teach team building skills and other skills that students will take with them when they graduate?

A. Right.

Q. Is there any other purpose of the cheerleading rules?

A. In addition to that, just that we can function as — so that we can function as a team and present ourself accordingly as representatives of our school.

Q. Okay. And I believe that you mentioned earlier that some of the rules are about safety, like tying your hair back?

A. Yes.

Q. And some of them are about uniformity?

A. Yes.

Q. Okay. Any other purpose for any of these?

If you want to take a minute and look at them, [145] please do.

A. And then as — the academic policy, we also want to put school first. So that's very important as well. So we definitely want our cheerleaders to make sure that their grades are where they need to be first before we worry about the cheerleading aspect. So that rule is in there as well because again, school is very important.

Q. Okay. What are the other skills other than team building that you want your cheerleaders to take with them when they graduate?

A. Just basic understanding that you need to follow rules when you are part of something, whether it is at the workplace, whether it's at — in a college, that there are different rules that you have to follow in society.

Q. I am trying to understand how that connects to punishing students for what they do when they're not at cheerleading.

A. I can give you an example.

Q. Sure.

A. Okay. My husband works at a distribution center, and someone hacked into his Twitter account. And they were posting negative things about Auto Zone on the internet. They were about to fire him for his job because they were saying negative things about Auto Zone on the internet until he was able to prove that it was not him posting these things on [146] line. So I have heard of that, in addition to people during job applications looking up peoples Facebook pages and using that to hold it against them for their character. So there are situations where people do look at things on the internet and use that to make their decisions for punishment.

Q. So the lesson is, even things that you do on your own time can still effect other people and go beyond your control, is that the lesson?

A. Absolute. Absolutely.

Q. Okay. Do you think there is value in teaching kids that different rules apply to different activities?

A. That is true. They do, and yes.

Q. Okay.

A. For example, students and cheerleaders are held to different rules. Students obviously have to follow the handbook rules. But as cheerleaders, they — they're representing our entire school and all of our team, so they're held to a higher standard.

Q. So that consideration is sort of specific to cheerleaders as opposed to kids on other teams or other extra-curriculars?

A. Every coach can make their own set of rules. So we don't have a uniform set of rules. So each coach has a different standard as to how they want to set their rules for their team.

[147] Q. Yes. I am just trying to understand if something about the nature of cheerleading justifies some of these rules as opposed to general lessons for — that all students would benefit from

A. As cheerleaders, they have to be leaders and representatives of their school. They often have younger kids looking up to them. So I feel that they really need to put forth a positive representation for their school more so than just your average student.

Q. And swearing is incompatible with that positive representation?

A. Absolutely.

Q. Okay. So am I right that you don't try to monitor your cheerleaders' behavior when they're not at cheerleading?

A. Not intentionally, no.

Q. So you rely solely on other students reporting you — reporting to you things that have happened outside of school?

A. Yes.

Q. Do you encourage students to report other rules violations to you?

A. No.

Q. Okay. Why not?

A. I would never specifically say if you see something else someone posts on the negative to tattle on

them. That's [148] just what they're taught when their young. Don't tattle on someone else. It's just something that I have never enforced. But if someone does come to me with negative information, I feel that in some capacity, I would have to address it, whether it's just speaking with the person, or if going through the rules and see if it applies to a rule.

Q. And is — as you feel that you would have to address it, only if you think it is going to impact the team?

A. For the most part, yes, or the school.

Q. Okay.

A. Or the well being of any student in the school.

Q. So if someone did something the equivalent of tattling, to use your words, say a cheerleader came to you and said another cheerleader stubbed their toe and said shit, would you consider punishing that?

A. I would have to have proof that they said it. But I would definitely talk to them, especially if they're in uniform and explain to them when you are in uniform, you cannot curse.

Usually in a situation like that when I am not sure they said it, it's just one single person reporting it, I would address them as a team, I would just say just remember you are in uniform, you have to remember that you make sure you're not using profanities and stuff like that.

Q. Okay.

[149] A. But I would need to be sure before I actually punish them that they said it.

Q. Okay. What if the incident that was being reported to you was not when they were in uniform, it was say B. at the Cocoa Hut using the F word, not on

Snapchat, but to a group of all of cheerleaders, they were hanging out, someone reported that to you, would you consider punishing B. for that?

A. Just as long as it's not anything to — really cheerleading related, then no. Like, for example —

Q. Okay.

A. — if there was a teacher in there, she was like F cheerleading. Do you know what I mean? I would, at that time, pull her aside, be like I heard that you said this, is there a reason that you said this. I just want you to know that people hear what you said. But she wouldn't necessarily be punished. But I would address it at that time.

Q. So at the preliminary injunction hearing, you testified that it was just the profanity alone and the middle finger that were punishable even if there had been no connection to cheerleading?

A. No. If it was, it had to be connected to cheerleading in order for it to be punishable.

Q. Okay. So when you testified at the preliminary injunction hearing, you were asked, was it the profanity and the profanity gesture alone that caused the removal, you [150] answered yes.

A. I think what I thought you meant by that question was there other factors that we took into consideration other than the Snap for her removal from the squat. But it was the gesture and the Snap linking to cheerleading which was the reason of the removal.

Q. Okay. But even if it had not been negative, I asked you if it had said cheerleading is fucking awesome, if that also violated the rules. You said yes.

A. Yes, because it's profanity linked with cheerleading.

Q. Okay. So if B in the Cocoa Hut says to the cheerleaders, cheerleading is fucking awesome, you would consider punishing that if somebody told you about it?

A. I would address it. Again, it wasn't something that was posted for the public to see. So that's a different situation. But it would still be something that would be addressed.

Q. Not because it violated the rules, but because you think that you would to deal with the fallout, is that right?

A. To an extent. And because although that's not — it's not actually addressed in here because it wasn't at a game. It wasn't unsportsmanlike conduct, it wasn't on technology, but it would be something that's — that I feel would need to be addressed just so that they know that even [151] though you may not think that there are people around that are watching you, people hear what you are saying.

Q. Okay. But if B. had just stubbed her toe in the Cocoa Hut and said fuck to all of the cheerleaders and whoever else was in Cocoa Hut, would that be something that you would feel that you need to address?

A. No.

Q. Are you concerned that you will end up hearing more reports of rule violations about kids who are unpopular or are having some kind of fight with their teammates than kids who generally get along better with their teammates or happen on a particular day to be getting along better with their teammates?

MR. BROWN: Objection to the form. But if you understand, go ahead and —

THE WITNESS: I don't —

MS. TACK-HOOPER: If you don't understand that, I could unpack it a little bit.

MR. BROWN: I didn't understand it.

BY MS. TACK-HOOPER:

Q. Fair enough. Fair enough.

So you said that you're not trying to monitor kids' behavior when they're outside of school, you mostly just hear about what students report to you that happens outside of school; correct?

[152] A. Yes.

Q. Okay. It seems to me like that would end up in a situation where the things that you hear about are not things that were said by students that everybody agreed with, but things that were said by someone that their teammates didn't like. So that your — seems to me like you might end up hearing more about rule violations by kids who at that particular moment are less popular with their teammates than others. Does that seem accurate to you?

A. Not necessarily. I mean they let me know no matter what, so and so has jewelry on, so and so is wearing the wrong shirt, so and so forgot their bloomers. So it's across the board that I hear things from. It's not any particular group, anyone being singled out that's unpopular. It's just across the board. It's just this is the most popular instance, this is what most people are I guess talking about, the situation with B. and whatnot. But I get texts from all different girls all times of the day about different situations.

Q. Okay.

A. So it's no specific group, no specific person that's considered unpopular. It's just — it's just how it goes.

* * * * *

[161] Q. Okay. When you made the decision to punish B., what was your understanding of who had been negatively impacted by the Snap?

A. The decision wasn't made based on who was negatively impacted, it just was made based on the fact that there was negativity put out there that could impact students in the school.

Q. Okay. In your view, was the impact — well, did B's Snap have any impact on students that you were aware of?

A. To an extent, yes.

Q. What? And what was that impact?

A. I had several students come up to me throughout the day while I was teaching saying to me did I see it, what was I going to do about it, saying that it was inappropriate. And these were cheerleaders and non-cheerleaders that did approach me.

Q. And was — you earlier described a lot of students telling you about things that other students had done?

A. Yes.

Q. Was this different from the usual back and forth [162] that you hear about every day from the cheerleaders?

A. At the time, I didn't understand the extent of it, so I thought it was just something minor. So at the time, I didn't treat it with as much severity when they approached me in class.

So at the initial time, the very first time the student approached me before I saw it, before April came to me, I did not understand the severity of the situation.

Q. And what was it that you didn't understand?

A. I didn't see the post. They were just telling me there was a post. They were asking me if I saw it.

Q. And you felt differently after you saw the Snap?

A. After I understand the contents of it, yes.

Q. Okay. And why did you feel differently about it once you saw the Snap?

A. Because I didn't realize it included profanity. I didn't see the gesture at the time.

Q. Okay. So just the idea that she had posted something negative about cheerleading didn't seem like a big deal to you, but the profanity and gesture made it more serious in your mind?

A. Yes. Absolutely.

Q. Okay. In your view, did the Snap actually disrupt any school activities of any kind?

A. Other than taking class time away from my students [163] briefly, I cannot think of anything other than that.

Q. And that was because they were telling you about the Snap?

A. Yes. There were several different students that approached me at different times throughout the day, yes.

Q. Is it fair to say that reporting the Snap to you disrupted class more than the Snap itself?

A. Well, the Snap itself is why they reported, because they were upset about it. But I guess you can say that, that the reporting is what took time away from class.

Q. On a daily basis, how much time do you spend with your students just hearing about things that they were upset about? Is that something that happens on a daily basis?

A. Not so much. Maybe after school, but not during the day.

Q. Okay. So in your view, if there was disruption, it was the class time that the students spent telling you about the Snap, correct?

A. Yes.

Q. Was there any other — anything else that was disrupted?

A. It was continuous over several days that they were approaching me about the Snap. So it did take away essentially in my algebra class, the one that D. was in. That one was disrupted quite a bit for just a couple days after it [164] happened. But then we continuously told them that we could not discuss it, then it settled down.

Q. Okay. And who is D.?

A. D.F. She was a varsity cheerleader at the time.

Q. Okay. And what did those conversations during class, how did they go?

A. They were more like have you seen it, what is happening. And just like — April and I just kept addressing the situation the same way, we can't talk about it, we can't talk about it, I am not sure what you want me to say.

Q. Okay. And so how long was this conversation each day?

A. Five, ten minutes.

Q. How do you fill five to ten minutes with I can't talk about it?

A. They would just keep going on and on and on. I just kept repeating that there is nothing that I can do, nothing that I can tell you right now. But they were

visibly upset, like can't you do anything, what are you going to do, have you seen it.

Q. Okay. And did the fact that some students were visibly upset by this influence your decision about how to punish B. at all?

A. No.

Q. Okay. Have you previously experienced disruption of [165] class or any school activities because of something a student said outside of school?

A. No.

Q. Have you previously experienced disruption of class or school activities because a student swore outside of school?

A. No.

Q. Did you have any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking you about it?

A. No.

Q. After you removed B. from the team, did you tell the team why she had been removed?

A. No.

Q. What did you say to the team about why she wasn't there?

A. We did not say anything to them.

Q. Okay. Did you continue to get questions about the Snap?

A. Yes.

Q. And you just did not answer them?

A. We just told them that we could not talk about it.

Q. Okay. After the court ordered B. back on the team, how did her return to the team effect cheerleaders?

A. They were upset about it. They felt that it was [166] unfair that she was being returned to the team.

Q. And when you say they, who specifically are you referring to who felt that way?

A. I had several students approach me. But it seemed collectively as a team, the majority of them were upset.

Q. So who specifically approached you?

A. Must I answer that question?

Q. Yes.

A. Okay.

Q. I am sorry.

A. I just know that they did not want me to mention their name, and that's why I am hesitant on mentioning it, one of them.

MS. TACK-HOOPER: If you want to go off the record for a second, we can chat about that. Let's go off the record.

(Discussion held off the record.)

BY MS. TACK-HOOPER:

Q. Okay. So you do not have to tell me who specifically approached you in light of your lawyer's statements. You can just tell me how many people told you that they were upset and whether they were on variety or JV.

MS. TACK-HOOPER: We're back on the record. Your lawyer has represented to me that the district is not going to rely on the testimony of any students in this matter so —

[167] MR. BROWN: Other than the plaintiff.

BY MS. TACK-HOOPER:

Q. Other than the plaintiff. So in light of that, of that representation, you do not have to name the

specific students who spoke with you. If you could tell me just how many students spoke with you and whether they were on varsity or JV cheerleading, that's fine.

A. Okay. At least four that I can think of, four specific cheerleaders that approached me about being upset about her return to the squad on JV.

Q. Okay. And you also testified that it was your impression that the whole squad was upset. Was that because of what these students told you about how other people felt?

A. It was just their reaction in general.

Q. To what, to B's presence?

A. Yes.

Q. Okay. And what is your understanding of why they were upset that she was back?

A. My understanding was that they were upset that she violated the rule. They understood, although we did not tell them, they knew what she posted. And they were upset that she was able to post such a thing, but not be punished for it.

Q. Okay.

A. In addition, do you want me to tell you about the varsity members as well?

[168] Q. Oh, yes. Please. I am sorry. I thought that you said they were only on JV?

A. Yes. There was four on JV. I believe that year we had eight girls including B. on the squad. So that would have been four out of the eight that approached me. And then on varsity, there was at least four girls who approached me.

Q. Okay. Out of how many people on varsity?

A. Varsity I believe was eleven or twelve that year.

Q. Okay. Now, B's on varsity now?

A. Yes.

Q. Correct?

Does there still seem to be any lingering resentment toward B.?

A. There is still anger, yes.

* * * * *

[172] Q. This has previously been marked as D2. Is this — what is this? Do you know what this is?

A. I believe this was a Snapchat that April received.

Q. All right.

A. Because you can take a Snap, like a picture of the floor or something, and then write text on it. I believe that's also a Snap.

Q. It says love how me and, redacted, get told we need a year of JV before we make varsity, but that doesn't matter to anyone else. And then there is an upside down smiley face. Does that violate any rules if it's a Snap that says that?

A. No.

MS. TACK-HOOPER: Okay. All right. This will be P-9.

(Document dated 9/27/17 produced and marked Deposition Exhibit Number P9.)

BY MS. TACK-HOOPER:

Q. You have Exhibit P9, which is an email thread.

If you would like to take a moment to read it, that probably makes sense.

You can just read the portion from you on page one.

A. Okay.

Q. Okay. It says in addition to this incident, numerous students expressed that she was giving blank a hard [173] time for making varsity squad as an incoming freshman. This is also against our rules.

What does it mean to give someone a hard time?

A. From what I understand is she was being told that she didn't deserve to be on the squad because she was a freshman.

Q. Okay. And what rule did that violate?

A. Just not being respectful toward your teammates.

Q. Okay. Did you investigate whether that in fact happened?

A. I did not find any further information on that.

Q. Okay. And you have not punished B. for that incident?

A. I have not, no.

Q. Okay. This is D10.

Was this a text message — was this your text message?

A. Yes.

Q. With B.?

A. Yes.

Q. And she asks if you have to do a year of JV before you could make varsity, and you said say no. She responded that's stupid. Does saying that's stupid about that rule violate any rules?

A. No.

* * * * *

[BY MR. BROWN:]

[175] Q. You were asked a question if something were lingering, you said there is still anger. I want to clarify. You said there is still anger on the part of whom to whom?

A. The cheerleaders are still upset.

Q. They're still upset with B. and the fact that she's on the team after what she did?

A. Yes.

* * * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – DEPOSITION
OF APRIL GNALL
OCTOBER 10, 2018

* * * * *

[BY MS. TACK-HOOPER:]

[186] Q. So you were here during Ms. Luchetta-Rump's testimony. Did you agree with her testimony?

A. Yes.

Q. Was there anything that she said that you disagreed [187] with?

A. No.

Q. Is there anything that she said that you felt was incomplete?

A. No.

* * * * *

[188] Q. Okay. B. says that she created the Snap on Saturday, May 27, 2017 at the Cocoa Hut. Do you have any reason to doubt any of those details?

A. No.

Q. Okay. Was the cheerleading season over at that point?

A. I don't really think our season ever is over because we literally go from tryouts. We roll into practices for the summer. We go into football season. We go into basketball season which goes into wrestling season. We get that slight little break before we start holding practices for tryouts again. So personally I feel like our season is on going.

* * * * *

[191] Q. Okay. I am handing you Exhibit D2. Do you know what this is?

A. It was the second Snap that I received.

Q. Okay. And where did you receive it?

A. At home that night.

Q. From your daughter?

A. Yes.

Q. Okay. Do you have any information about how the screen shot or photo was taken?

A. As far as I know, it was shared with S. and S. forwarded it to me.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – DEPOSITION
OF DR. JOIE GREEN

OCTOBER 10, 2018

* * * * *

[BY MS. TACK-HOOPER:]

[219] Q. Okay. So you agree that coaches have the power to remove students from sports or extra-curriculars because of their out-of-school speech?

A. Depending on the situation.

Q. What does that mean?

A. Depending on what the issue is. If — what is their out-of-school speech? If it's related, directly related to the school district, harms the school, harms any kind of verbal written or something that is going to hurt the school [220] district, then yes; if it's not, then no.

Q. Okay. So would coaches have the power to adopt a rule that says that you can't swear outside of school because swearing reflects badly on the district?

A. That's a tough one too. I think that if they said — they were swearing against the organization and that was in their rules, then that would be an issue. But if they were just swearing, I don't think that's an issue. It's an individual case basis.

Q. Okay.

A. You know, just like the SG thing was different than B's. You know, one did something wrong on social media. We addressed it. That punishment was different. B. did something wrong on social media, that punishment was different. So like it depends on the situation itself.

Q. Okay.

A. And based on what they have in their rules.

Q. Okay. But there is nothing about B's punishment that you think went too far and went beyond what coaches should be allowed to do, is that right?

A. Do you mean — well, if — no. I think that is right.

Q. Okay. We talked a lot about — this morning about the nature of Snapchat and the fact that it is different from other social media platforms. In many ways it shares many [221] qualities with say like a large group text. In your view, your coaches have the power to say you can't say disparaging things about the school or about our sport to a large group of people, even if it is not public on line?

MR. BROWN: I object to the form. But if you understand the question, you can answer.

THE WITNESS: If it's public on line, and it is a derogatory remark towards their team and that is a rule of theirs, then yes, they have the option to discipline them.
BY MS. TACK-HOOPER:

Q. Okay. I am talking about a situation that's not public on line. It's a closed group of some sort, either a closed social media group or like a large group chat.

A. If they find out about it, they have the right to discipline the child. If they find out that it is in fact a post, because obviously it wasn't private because everybody else found out about it.

Q. Okay. So in your view, coaches have the power to punish speech that comes into the school in some way even if it wasn't like open to everyone in the public, is that your view?

A. No. I am saying if — if the speech effects the — that specific team or group, then yes. An if it's their rule, then yes.

Q. Right.

[222] A. They have the right to punish those children.

Q. Okay. So someone could say something outside of school to one other person that could effect a team. You agree with that, right?

A. Uh-huh.

Q. And that one other person they sent it to could tell fifty other people, right?

A. Uh-huh.

Q. I am trying to figure out if that is something that you think that the school could punish, or if there is some kind of line drawn that the district does —

A. I look at it, my own personal view is if you are talking — if I am talking to you by myself and I am

saying to you cheerleading sucks, it's different than posting it on a public forum for everyone to see to get all of the cheerleaders worked up and upset. It happened both times. So like you need to discipline that person because it effected the team itself. If it didn't effect the team, or if it was just a conversation between you and I and no one else knew about it and I was mad at you one day and went up to the coach and said, hey, did you know that so and so said this to me, there is really nothing that you can do about that. To me there is a difference between freedom and speech and throwing a public — out into a public forum of bashing of your group when you know that that is a rule that you're not able to do.

* * * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – DEPOSITION
OF B.L.

OCTOBER 24, 2018

* * * * *

[BY MR. LEVIN:]

[58] Q. Then the next sentence says, quote, good sportsmanship will be enforced. This includes foul language and inappropriate gestures, end of quote.

Did I read that sentence correctly?

A. Yes.

Q. Do you understand what that says?

A. Yes.

Q. Do you think that's reasonable and appropriate?

ATTORNEY HELPER: And I'll object to form. You can answer.

THE WITNESS: I guess.

BY ATTORNEY LEVIN:

Q. Now, you would agree that the word fuck is in violation of that sentence; right?

ATTORNEY HELPER: I'll object to form.

THE WITNESS: [59] I guess, when you're representing your school.

BY ATTORNEY LEVIN:

Q. And you would agree that giving the middle finger is an inappropriate gesture?

Is that correct?

ATTORNEY HELPER: And I'll object to form again, but you can answer.

THE WITNESS: Yes.

BY ATTORNEY LEVIN:

Q. Do you think it's a proper and laudable goal for schools — for public schools, to teach students to have respect for others?

A. Yes.

Q. Do you agree that it's a proper and laudable goal for school districts to hold students accountable for not following applicable rules?

ATTORNEY HELPER: I'm going to object to form. Assumes the rules are [60] valid.

BY ATTORNEY LEVIN:

Q. Would you agree with that?

A. I guess.

Q. Do you agree the cheerleaders are representing their teams like the rule states?

A. When you're at games and all, yes.

Q. Do you live in the Mahanoy Area School District?

A. Like, do I live — ?

Q. You gave an address.

A. Yes.

Q. It is within the boundaries of the Mahanoy Area School District?

A. Yes.

Q. All right.

And can we agree that the Mahanoy Area School District is a small school district?

A. Yes.

Q. Would you agree that in Mahanoy, it seems like everybody knows everybody else?

A. Yes.

Q. Is that a yes?

A. Yes.

Q. Try to keep your voice up. Okay?

And can we agree that in Mahanoy, it's one of those places where many people in the community know the kids from the different teams and squads, including the cheerleading squad?

A. I would assume.

* * * * *

[66] Q. Do you agree with me that cheerleading can be dangerous, depending upon the stunts that the team does?

A. Yes.

Q. Is it correct that cheerleaders have to depend on other cheerleaders to catch them for some of the exercises?

A. Yes.

Q. Can you explain that? Give us some examples?

A. Like if anyone was up and they fall backwards, they have to like, [67] depend on the person in the back to catch them.

Q. Are there any other stunts that your cheerleading squad does where teammates have to depend on the others to do what they're supposed to be doing?

A. All of them.

ATTORNEY HELPER: Object to form.

BY ATTORNEY LEVIN:

Q. Excuse me?

A. All of them. Like all of the stunts, you have to depend on each other.

Q. Do the stunts have names?

A. Some of them.

Q. What are some of the names that you remember?

A. Like up at an extension.

Q. I didn't hear that.
Extension?

A. Yes.

Q. And what's an extension?

A. Well, I don't know how to [68] explain it. You would like, go up and in people's hands, I guess. I don't know how to explain it.

Q. All right.
Give me another name of another stunt?

A. A lib.

Q. I didn't hear that.

A. A lib.

Q. L-I-B?

A. L-I — yeah, I think. I guess. I don't know.

Q. Okay.

And what's a lib?

A. You would basically do the same thing as an extension, but with only one foot instead of both.

Q. Are there any other names of any of the stunts?

A. I don't know.
A flip we could do.

Q. And what's a flip?

A. You just like flip — I don't know how to explain it.

Q. All right. [69]
Any other names of any other stunts?

A. I don't think so.

Q. And then there are some stunts that the team does that don't have names.

Is that correct?

A. I guess. That's — what I said was basically all we do.

Q. You only do extensions, libs and flips, as far as stunts go?

A. And preps, which is like a lower extension.

Q. All right.
Any others?

A. Not — no.

Q. All right.
And if any of the kids don't do what they're supposed to do, somebody could get injured.

Is that correct?

A. Yes.

* * * * *

[73] Q. What exactly did she tell you?

A. She just showed me the picture. And then said that it was disrespectful towards her and that I was kicked off.

Q. All right.
And how did you respond if at all?

A. I cried.

* * * * *

[85] Q. Now in the Snap — and if you want to take a look at D-1 again. You said, quote, fuck school, end of quote.

Right?

A. Yes.

Q. Were you referring to the Mahanoy High School?

A. I was just referring to school in general.

Q. Well, does it refer to any other high school other than the Mahanoy School, High School?

ATTORNEY HELPER: Objection. Asked and answered.

THE WITNESS: Not —.

BY ATTORNEY LEVIN:

Q. Excuse me?

A. Not specifically.

[86] Q. And softball, you were referring to the school's softball team because you didn't get the position you wanted.

Right?

ATTORNEY HELPER: Objection to form.

A. Not —.

ATTORNEY HELPER: Was it the school softball team?

THE WITNESS: It wasn't our softball team. It wasn't the school's softball team.

BY ATTORNEY LEVIN:

Q. Okay.
Cheer was the school's cheerleading squad.
Right?

A. I was just saying it in general. Like, I wasn't specifically saying anything —.

Q. Were you referring to any other cheerleading other than the [87] school —?

ATTORNEY HELPER: Objection. She was still answering.

BY ATTORNEY LEVIN:

Q. I'm sorry, I thought —.

A. I said it because I was mad.

Q. You were mad at —?

A. Because I didn't get —. I didn't make it onto varsity.

Q. And you didn't make it on the varsity by the school district.

Right?

A. Yes.

Q. So you were mad at not getting on the school district's varsity team, so you said fuck cheer.

Right?

A. Yes.

Q. Would you agree that it would be reasonable for a person reading your Snap to think that you were referring to the school district's cheerleading squad when you said fuck cheer?

[88] A. I guess.

Q. Do you think it would be reasonable for someone reading your Snap, and knowing where you went to school, that you were referring to the high school when you said fuck school?

A. I guess.

Q. Please take a look at paragraph 63 of your complaint.

In that complaint, in that paragraph it is alleged, quote, among other benefits, students who participate in extracurricular activities are less likely to abuse alcohol or drugs than students who do not participate in extracurricular activities.

Do you know anything about that subject?

A. No.

Q. Paragraph 61, it's alleged that, quote, being removed from the squad impairs your opportunities to gain admission to top colleges.

Do you see that?

[89] A. Yes.

Q. Do you have any knowledge as to the basis for that statement?

A. No.

Q. Please take a look at paragraph 62, where it's alleged sustained participation in extracurricular activities also has significant benefits for student well-being.

Do you have any basis for that statement?

A. No.

Q. I added page numbers on the lower-right hand corner to make it easier to identify pages. Could you go to page 12? In paragraph E, it is alleged that you're seeking damages in amount to be determined by a trial.

What damages are you seeking? Do you know?

A. I don't know.

Q. Do you think it's fair to keep someone off of extracurricular activities if they're struggling in school?

[90] ATTORNEY HELPER: Object to the form.

THE WITNESS: If they're eligible, I guess.

BY ATTORNEY LEVIN:

Q. Well, if they're struggling so that they don't meet the academic requirements, do you think it's fair to keep them off?

A. I guess.

ATTORNEY HELPER: I'm going to object to form. You're asking for an opinion not fact.

BY ATTORNEY LEVIN:

Q. And why is it that you think that's fair to keep them off if they're struggling in school?

ATTORNEY HELPER: Object to form.

THE WITNESS: They have to stay off if they're ineligible. Like, if they're failing two classes, [91] they get benched for it. So —.

BY ATTORNEY LEVIN:

Q. The uniforms, who pays for them for cheerleading? Do you know?

A. I don't know.

Q. Do the — does the school district provide it to you?

A. I guess.

Q. Do you think that teaching students that there are consequences for crude and profane communications on social media is a proper role for school districts?

ATTORNEY HELPER: I'm going to object to the form. It's calling for an opinion.

THE WITNESS: I don't know.

BY ATTORNEY LEVIN:

Q. Do you know how your conduct affected the other members of the cheerleader squad last year?

ATTORNEY HELPER: [92] Object to form.

THE WITNESS: None of them ever said anything to me about it.

BY ATTORNEY LEVIN:

Q. So is the answer you don't know what affect it had on them?

A. Yeah. I don't know.

Q. Do you know how it affected any of the other cheerleaders that you were allowed back on the cheerleading squad?

ATTORNEY HELPER: I'm going to object as asked and answered.

THE WITNESS: People were mad about it I guess.

BY ATTORNEY LEVIN:

Q. Okay.
And how do you know they were mad about it?

A. 'Cause they said stuff and other people heard it.

Q. Did they say stuff to you? Or [93] did other people tell you they said stuff?

ATTORNEY HELPER: Object to form.

THE WITNESS: They didn't say anything directly to me.

BY ATTORNEY LEVIN:

Q. All right.
So anything you know about them being mad is because somebody else told you?

A. Yes.

Q. And did the people who told you what other cheerleaders were saying or were mad, did they tell you what they were saying?

A. I got told what one of them said.

Q. And who is the person who allegedly said what you're going to tell me about?

A. P.B.

Q. Okay. And what did P.B. allegedly [94] say?

A. All she said was that — because I didn't know one of the cheers, so I stood out for it. And she said that if I'm just going to keep doing that, then I shouldn't have come back on.

Q. You mean, if you stay out of participating in a cheer that you don't know about, you shouldn't have come back on.

Is that your understanding?

A. Yes.

* * * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – DEPOSITION
OF BETTY LOU LEVY

OCTOBER 24, 2018

* * * * *

[BY MR. LEVIN:]

[11] Q. Tell me all the ways that the school district's exclusion from — of B.L from cheerleading last year, affected her?

A. Can you rephrase that?

Q. Sure.

You were told by B.L., that she was removed from the cheerleading squad.

Right?

A. Correct.

Q. Did it have any affect on her?

A. Well, absolutely. She was upset.

Q. All right.

- And how do you know she was upset?
- A. She called me crying.
- [12] Q. All right.
Any other way?
- A. I don't know. I don't know.
- Q. Other than being upset when she called you crying, are you aware of any other way that her removal from the cheerleading squad affected her?
- A. Well, she was upset about it.
- Q. Okay.
And how long was she upset about it?
- A. Quite a while.
- Q. And when you say quite a while, can you give me an estimate of the amount of time that she was upset?
- A. A few weeks.
- Q. And did she need any medical attention as a result of being upset about it?
- A. No.
- Q. Did she need any therapy as a result of getting upset about it?
- A. No.
- Q. Did her grades go down as a result of being taken out of [13] cheerleading?
- A. No.

* * * * *

[38] BY ATTORNEY LEVIN:

- Q. Did you or your husband discipline B.L. for posting the Snap?
- A. I cannot speak for my husband. Did I discipline her? No.
- Q. Well, are you aware whether he disciplined her or not?

A. You would have to ask him that.

Q. Why did you not discipline her?

A. I cannot think —. Well, because —. I didn't discipline her because obviously there was some — she doesn't speak like this on a daily basis. This isn't how she speaks.

Q. When you say this, you're [39] talking about

—

A. The F-word.

Q. — what is reflected in the Snap?

A. Correct.

She doesn't talk like that. So obviously there was a problem somewhere. So you're going to sit her down. You're going to talk to her and ask her what the problem is.

Q. Did you do that?

A. Absolutely.

Q. What did you say to her and what did she say to you?

A. I asked her what — you know, what was wrong. Why she did it.

Q. And what did she say?

A. She was upset. She was having a bad week. Said that everybody had a bad week, mom.

Q. Did she tell you what she was upset about?

A. About not making the cheerleading squad.

Q. You mean not making varsity?

[40] A. Well, not making varsity. Sorry. Correct.

Q. Did she say anything else about what she was upset about?

A. It was, I guess, final week. So she was stressed studying for all that.

Q. Anything else that she said?

A. Not that I remember.

Q. Okay.

And how did you respond to her?

A. I don't remember exactly how I responded.

Q. Well, approximately, how did you respond?

I don't need to know exact.

A. We sat her down. Well, we talked and you know, we did tell her that, you know, that's the wrong thing to do. We don't speak like that. She said she didn't mean to hurt anybody by it. She didn't mean anything by it. She was just leaving out frustration.

* * * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:17-cv-01734

B.L., A MINOR, BY AND THROUGH HER FATHER,
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,
PLAINTIFFS

v.

MAHANoy AREA SCHOOL DISTRICT, DEFENDANT

TRANSCRIPT OF PROCEEDING – DEPOSITION
OF LAWRENCE LEVY

OCTOBER 24, 2018

* * * * *

[BY MR. LEVIN:]

[12] Q. Can you tell me all the ways that the school's exclusion of B.L. from cheerleading affected her?

A. She was upset for quite a few weeks afterwards. For a week, after she was notified that she was off, she didn't leave the house. She pretty much isolated herself to her bedroom.

Q. For that week?

A. I'd say a little bit longer than a week.

Q. Any other ways that the exclusion affected her?

A. Other than emotionally.

Q. Now, the only emotional statement that I've received so far is that she was upset a couple of weeks?

A. Right.

Q. Are you talking about something else?

A. No. Just the emotional.

Q. Okay. [13]

Did she have to go to the doctor because of being kicked off the cheerleading squad?

A. No.

Q. Did she need any therapy as a result of being kicked off the cheerleading squad?

A. No.

Q. Did she need any medication as a result of being kicked off the cheerleading squad?

A. No.

Q. And when you heard your wife and B.L. say, it did not affect her educational work.

Is that correct?

A. To my knowledge, no.

* * * * *

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

<p>B.L., a minor, by and through her father, LAWRENCE LEVY, and her mother, BETTY LOU LEVY,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>MAHANoy AREA SCHOOL DISTRICT,</p> <p style="text-align: center;">Defendant.</p>

Civil Action
No. 3:17-CV-1734

(The Hon. A. Richard
Caputo)

**DEFENDANT’S STATEMENT OF UNDISPUTED
FACTS**

* * * * *

10. The cheerleading team is active throughout the year, including the summer. Exh. D-11, ¶ 14; Exh. D-20, 13:18-25; Exh. D-21, 7:17-8:5.

* * * * *

43. Coach Gnall received a call from her daughter, then a MAHS cheerleader, who had been informed by another cheerleader that B.L. had posted inappropriate Snaps. After the phone call, Gnall’s daughter sent Gnall screenshots of the Snaps. Exh. D-21, 9:18-21.

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