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	:	Civil Action No. 3:17-cv-1734
Plaintiffs,	:	(The Hon. A. Richard Caputo)
v.	:	
MAHANOY AREA SCHOOL DISTRICT,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Michael I. Levin (PA 21232)
David W. Brown (PA 201553)
LEVIN LEGAL GROUP, P.C.
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006
Phone: (215) 938-6378
Fax: (215) 938-6375
mlevin@levinlegalgroup.com
dbrown@levinlegalgroup.com

Attorneys for Defendant

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I. INTRODUCTION

From the start of this litigation, there has been little dispute over the facts of the case. Plaintiffs and the Defendant, Mahanoy Area School District (the "School District") agree that on or about May 27, 2017, a freshman at Mahanoy Area High School ("MAHS"), B.L., was angry that she had failed to make the school's varsity cheerleading team for the next school year, resigning her to a second year on the junior varsity team. That day, B.L. posted a photograph of herself and a friend standing in a local convenience store and giving the middle finger via the social media platform Snapchat. B.L. superimposed text over the photo, saying, "fuck school fuck softball fuck cheer fuck everything." The message – or "Snap" – was shared with about 250 of B.L.'s friends, along a second Snap complaining about the varsity selection process.

Since many of those receiving the Snaps were MAHS students, the Snaps quickly and inevitably found their way into the possession of the team's two cheerleading coaches. After determining that the first Snap violated MAHS cheerleading team rules (the "Cheerleading Rules") prohibiting disrespectful behavior and the posting of negative information about cheerleading on the Internet, the coaches suspended B.L. from cheerleading for one year. School District administrators and board members voiced support for the suspension but took no formal action to ratify it.

Although the parties largely agree on the facts, they differ widely on the applicable law. Plaintiffs claim that the suspension violated B.L.'s First Amendment right to free speech, and that the Cheerleading Rules violate the First Amendment as well as the due process clause of the Fourteenth Amendment.

Meanwhile, as will be shown, the School District disputes the Plaintiffs' claims and now seeks judgment in its favor on the grounds that: 1) the Cheerleading Rules have an educational purpose, and therefore the suspension was permitted under the classic analysis set out in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); 2) the suspension was permitted under the alternate analysis in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (find no protection in a school setting for lewd or obscene language); and 3) the Cheerleading Rules do not violate either the First Amendment or the Due Process Clause. Accordingly, the School District respectfully requests that the Court enter judgment in its favor.

II. FACTS AND PROCEDURAL HISTORY

The Defendant relies on the facts as detailed in the accompanying Statement of Undisputed Material Facts (the "Facts"). The procedural history of this case is as follows:

Plaintiffs filed a Complaint on September 25, 2017, alleging that the School District's removal of B.L. from the cheerleading team constituted a violation of the

First Amendment as well as 42 U.S.C. § 1983, and that the team's cheerleading rules violate the First Amendment, Section 1983, and the Due Process Clause of the Fourteenth Amendment. [Doc. 1]. At the same time, Plaintiffs also filed a Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction. [Doc. 2]. On September 26, 2017, this Court entered a TRO. [Doc. 5]. After an evidentiary hearing on October 2, 2017, the Court granted a preliminary injunction, returning B.L. to the cheerleading team pending the outcome of this litigation. [Doc. 13].

Defendant timely filed an Answer to the Complaint on November 17, 2017. [Doc. 16]. The Parties then engaged in discovery, exchanging documents and conducting depositions of key witnesses. Discovery in this matter closed on November 16, 2018. [*see* Doc. 28]. The Defendant now submits the accompanying Motion for Summary Judgment.

III. STATEMENT OF QUESTIONS INVOLVED

1. Is a school district permitted to suspend a student from a voluntary extracurricular activity for conduct that admittedly violates agreed-upon rules and that is contrary to the educational mission of the extracurricular activity under the First Amendment analysis in *Tinker*? Suggested answer: Yes.

2. Does a school district violate the First Amendment by removing a student from an extracurricular team for using profanity about the extracurricular activity? Suggested answer: No.

3. Do the Mahanoy Area High School Cheerleading Rules violate the First Amendment? Suggested answer: No.

4. Do the Mahanoy Area High School Cheerleading Rules violate the Due Process Clause of the Fourteenth Amendment? Suggested answer: No.

IV. ARGUMENT

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004).

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other

facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "The standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Rule 56(e) permits a summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves.

B. The Suspension Did Not Violate the First Amendment

The Complaint alleges that the School District suspension of B.L. from the cheerleading team violates the First Amendment. Compl., ¶ 66. However, the Plaintiffs are mistaken for the following reasons, as will be described in detail below. First, B.L. was not excluded from school, but merely suspended from a voluntary, extracurricular activity after she violated team rules. Second, B.L.'s comments were profane, garnering less First Amendment protection than regular

speech or political speech. Third, B.L.'s actions admittedly violated team rules to which she and her mother voluntarily agreed.

The Supreme Court's school speech jurisprudence echoes a common theme: although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The Court has decided four lead student speech cases: *Tinker*; *Fraser*; *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and *Morse v. Frederick*, 551 U.S. 393 (2007). Each governs a different area of student speech: "(1) vulgar, lewd, obscene, and plainly offensive speech" is governed by *Fraser*; "(2) school-sponsored speech" is governed by *Hazelwood*, and "(3) speech that falls into neither of these categories" is governed by *Tinker*. In *Morse*, the Court dealt with a fourth, and somewhat unique, category – speech promoting illegal drug use. 551 U.S. at 403. All four cases involved speech that took place at school or at a school-sanctioned event. Beyond those contexts, the Court has noted only that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents." *Morse*, 551 U.S. at 401.

1. Schools Can Punish Students for Out-Of-School Speech

As an initial matter, it is beyond doubt that schools have the authority to discipline students for out-of-school speech under certain conditions. *See, e.g.*, *D.J.M. ex rel. D.M. v. Hannibal Public School Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (upholding suspension where student threatened classmates on social media); *Bell v. Itawamba County School Bd.*, 799 F.3d 379 (5th Cir. 2015) (upholding suspension for student posting rap song on Internet with threatening language); *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011) (upholding suspension for creating and posting to a MySpace webpage that was largely dedicated to ridiculing a fellow student); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (student disqualified from running for class secretary after posting a vulgar and misleading message about the supposed cancellation of an upcoming school event on a web log from home); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012) (students suspended for creating website with racist comments mocking black students, as well as sexually explicit comments about particular female classmates).

In *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926, 930 (3d Cir. 2011) (en banc), the Third Circuit "assume[d], without deciding, that Tinker applie[d]" to a student's creation of a parody MySpace profile mocking the school principal, but held that it was not reasonably foreseeable that the speech

would create a substantial disruption. In another Third Circuit *en banc* case decided the same day as *Blue Mountain*, and also involving a principal parody profile, the Court acknowledged that "schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances." *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011). So the issue is not whether schools can discipline students for off-campus actions, but rather when.

Not only do the foregoing cases recognize that out-of-school conduct can be regulated, but the School Code permits such regulation. Although Section 510 of the School Code (24 P.S. § 5-510) permits suspensions and expulsions from school for only school-related conduct, when it comes to extracurricular activities, Section 511 (24 P.S. § 5-511) does not contain the limiting language found in section 510.[1]

[1] Section 510 of the School Code provides, in pertinent part: "The board of school directors . . . may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper . . . regarding the conduct and deportment of all pupils . . . *during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school*." 24 P.S. § 5-510 (italics added). However, in stark contrast, when it comes to the regulation of extracurricular activities, the statutory authorization is not limited in that manner. Section 511 provides, in relevant part: "The board of school directors . . . shall prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper, regarding (1) the management, supervision, control, or prohibition of exercises, athletics, or games of any kind, school publications, debating, forensic, dramatic, musical, and other

2. Tinker Allows Discipline Resulting from Rules Instituted as Part of School's Educational Mission

In *Tinker*, the Supreme Court sought to balance students' free speech rights with the educational mission of schools. As such, the court held that "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513. In this case, the Plaintiffs have admitted that rules such as the Cheerleading Rules serve a legitimate educational interest, and that B.L.'s actions violated those rules. Facts, ¶ 25-27, 61.

The Supreme Court has held that student free speech rights should not substantially interfere with a school's educational mission. *Fraser*, 478 U.S. at 685. Both *Tinker* and this state law discuss material and substantial interference with the educational process. *R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 642 (M.D. Pa. 2016).

The Supreme Court stated the following about a public school's authority over the conduct of students:

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activities related to the school program . . . and may provide for the suspension, dismissal, or other reasonable penalty in the case of any . . . pupil who violates any of such rules or regulations." 24 P.S. § 5-511.

> [A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." 469 U.S., at 339, 105 S.Ct., at 741. While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," *see DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200, 109 S.Ct. 998, 1005-1006, 103 L.Ed.2d 249 (1989), we have acknowledged that for many purposes "school authorities ac[t] in loco parentis," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 3165, 92 L.Ed.2d 549 (1986), with the power and indeed the duty to "inculcate the habits and manners of civility," id., at 681, 106 S.Ct., at 3163 (internal quotation marks omitted). Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969), the nature of those rights is what is appropriate for children in school. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 581–582, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975) (due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred"); *Fraser, supra*, 478 U.S., at 683, 106 S.Ct., at 3164 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 571, 98 L.Ed.2d 592 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); *Ingraham, supra*, 430 U.S., at 682, 97 S.Ct., at 1418 ("Imposing additional administrative safeguards [upon corporal punishment] . . . would . . . entail a significant intrusion into an area of primary educational responsibility").

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995).

The School District's expert witness, Dr. Lawrence J. Mussoline, has been an educator for nearly 40 years and has been a school superintendent at four

districts over the past 20 years, as well as having experience as a varsity and junior varsity coach and an assistant athletic director. *See* Exh. D-24 [expert report]. In his expert report, he described the educational purpose of school rules.

> Imparting a variety of life lessons to cheerleading participants and keeping respect and decorum at the forefront of cheerleading rules is a perfect example of teaching life skills that sometimes can't be taught in the regular classroom and school environment. The community expects rules to be honored. The community expects the rules are to be spelled out clearly ahead of time so the participants know the expectations going into the endeavor. The community expects that students and citizens like to follow the rules of the sport, the workplace, the school, and the community. Therefore, the expectations of the cheer coach and the rules she clearly articulated are not only typical throughout the interscholastic sports but expected in communities like Mahanoy City all over the Commonwealth.

Exh. D-24, p. 6. Coach Nicole Luchetta-Rump stated the purpose for addressing behavior violating the Cheerleading rules more succinctly, stating, "[W]e do usually do need to address it to some extent so that we don't have chaos within our squad." Facts, ¶ 54.

Because rules for extracurricular activities serve a valid educational mission, the School District's inability to enforce such rules creates a likelihood of a substantial disruption of the district's educational mission. And therefore, because permitting actions such as B.L.'s to go undisciplined would lead to a substantial disruption of the School District's educational mission, enforcement of the Cheerleading Rules are permitted under *Tinker*.

3. Students Have No Right to Participate in Extracurricular Activities

In granting the Plaintiffs' motion for a preliminary injunction in this case, the Court noted that the Third Circuit has "not offered a separate standard to analyze student speech in cases where the punishment was removal from an extracurricular," as opposed to removal from school. Memorandum [Doc. 12], p. 8 (Oct. 5, 2017). The Court then rejected the School District's argument that there was no First Amendment violation because B.L. was only removed from an extracurricular activity but was not deprived of any classes or activities relating to her regular education. The School District respectfully renews its argument here.

B.L. acknowledges that her participation in cheerleading is voluntary and not a part of the school curriculum. Statement of Undisputed Facts [hereinafter "Facts"], ¶ 32. To participate in cheerleading, B.L. and her mother voluntarily agreed that B.L. would abide by the Cheerleading Rules and the MAHS rule of conduct for extracurricular activities. Facts, ¶ 17. To achieve effective and efficient activities such as team sports, school officials may condition participation with a greater limitation of constitutional rights than might otherwise be permissible. *See Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291 (2007) (restriction on speech in recruiting athletes);

Vernonia Sch. Dist. 47J, *supra*, (voluntary participants in school athletics have reason to expect intrusions upon normal rights and privileges).

Many courts – including this one – have held that a public school student does not have a protected property interest in extracurricular activities. *See Dominic J. v. Wyoming Valley West High School*, 362 F. Supp. 2d 560, 571-72 (M.D. Pa. 2005) (Caputo, J.); *Angstadt v. Midd–West Sch. Dist.*, 377 F.3d 338, 344 (3d Cir. 2004) (affirming district court ruling that public school student did not have a protected property interest in extracurricular activities); *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir.2007) ("It is well-established that students do not have a general constitutional right to participate in extracurricular athletics."); *Davenport v. Randolph Cnty. Bd. of Educ.*, 730 F.2d 1395 (11th Cir. 1984); *Hebert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981); *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980); *Dallam v. Cumberland Valley Sch. Dist.*, 391 F.Supp. 358 (M.D. Pa. 1975).

The Third Circuit has held that "[t]he narrower goals of an athletic team differ from those of academic pursuits and are not always consistent with the freewheeling exchange of views that might be appropriate in a classroom debate." *Blasi v. Pen Argyl Area Sch. Dist.*, 512 Fed. App'x 173, 175 (3d Cir. 2013); *see also Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir.2001) ("School officials have a legitimate interest in affording student athletes an

educational environment conducive to learning team unity and sportsmanship and free from disruptions that could hurt or stray the cohesiveness of the team.").

In Dr. Mussoline's expert report, he notes that his school districts have always imposed more stringent rules on extracurricular participation, including banning such participation for poor grades, poor attendance, breach of school rules, or breach of team rules. Exh. D-24, p. 3-4. "As an example, the violation of evening pre-game curfew rules could easily result in a game suspension and repeated violations of pre-game curfew rules could easily result in suspension from the team for the duration of the season." *Id.*

> Inappropriate conduct could range from disrespect toward the coaches, disrespect toward teammates, disrespect toward the opposing team, disrespect toward officials, disrespect towards school employees, and even disrespect toward the school. Disrespect could include: profanity, aggressive behavior, nonverbal unacceptable behavior, threatening someone physically or verbally, the use of social media to threaten someone, talking back to a coach, cutting practice, discrediting the program after some event to the disdain of the student, cutting practice, fighting, gossip, and in the 21st century the use of social media as a medium of disrespect usually tied to the lack of self-control.

Exh. D-24, p. 4.

In *Blasi*, two brothers made school basketball teams in the Pen Argyl School District. The School District's Athletic Policies included the "Parental/Spectator Guidelines," which advised parents of team members to refrain from "[r]idiculing or berating players, coaches, officials or other spectators." The brothers and their

father each signed a statement acknowledging receiving and reading the policies and agreeing to uphold "the standards therein." The father later sent 17 e-mails to coaches criticizing their coaching and some of his sons' teammates. The district banned the father from attending the next basketball game. The Third Circuit upheld the ban. *Blasi*, 512 Fed. App'x at 176. In the Memorandum, this Court noted that the *Blasi* e-mails differed from the Snap in this case because the e-mails were "threatening," and therefore potentially posed a substantial disruption invoking *Tinker*. Memorandum, n.9. However, the Third Circuit made no such connection. Rather, the Third Circuit noted the nature of team sports, as well as the father's agreement to abide by the guidelines.

> In this instance, plaintiff's charges are made in the context of an athletic program in which his sons' participation, and by extension his own, is voluntary. Plaintiff was aware of and agreed to the standards required of students, and their parents, in order to participate in the School District's basketball program, including restrictions on the manner and tone of speech used with respect to coaches and other players. . . . The Guidelines and the challenged subsequent amendments are reasonably designed to enhance the educational and athletic experience of plaintiff's sons as well as that of other students participating in the program.
> . . .
> "Athletic programs may ... produce long-term benefits by distilling positive character traits in the players. However, the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal. . . . The plays and strategies are seldom up for debate. Execution of the coach's will is paramount." *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir.2007).

> The sanction upon plaintiff was imposed because, contrary to the Guidelines, he used incendiary language denigrating coaches and young players alike. In so doing, plaintiff not only violated his own agreement to refrain from using abusive language, he also jeopardized the interests of other participants in the athletic program.

Blasi, 512 Fed. App'x at 176.

In this case, B.L. and her mother agreed to abide by the Student Handbook "by conducting themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." B.L.'s Snaps served to tarnish that image and specifically conflicted with the Cheerleading Rules as set out by the cheerleading coaches, creating conflict within the ranks of the cheerleading team. Facts, ¶¶ 58-59. Accordingly, the situation is parallel to that in *Blasi*. Therefore, the coaches were well within their rights to suspend B.L. after she violated those rules.

Meanwhile, a case with facts nearly identical to those here recently came before a federal district court in Utah. In that case, a cheerleader recorded herself and some friends singing along to the lyrics of Big Sean's song "I.D.F.W.U." She then posted an eight-second video to Snapchat of the girls singing the following lyrics from the song: "I don't fuck with you, you little stupid ass bitch, I ain't fucking with you." *Johnson v. Cache County School Dist.*, 323 F. Supp. 3d 1301 (D. Utah 2018). The cheerleader was then removed from the team. In rejecting

the plaintiff's motion for a preliminary injunction, the court noted this Court's preliminary injunction ruling:

> [T]his court disagrees with the B.L. court's failure to consider the difference between a school suspension and participation in an extracurricular activity. "By choosing to 'go out for the team,' [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally, [and] have reason to expect intrusions upon normal rights and privileges." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *Doninger*, 527 F.3d at 53. ***The court finds the cases recognizing the distinction between school suspension and participation in an extracurricular activity to be more persuasive given that there is no constitutional right to participate in an extracurricular activity.***

Johnson, *supra*, at 1301 (emphasis added).

4. *Fraser* Analysis Permits Discipline for B.L.'s Posts

In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), the U.S. Supreme Court held that obscene speech and profanity is not protected in the school setting. *Id.* at 685-86. (The *Fraser* decision represented an exception to the general rule set out in *Tinker* that out-of-school speech can be regulated by school officials only when it might reasonably cause substantial disruption or material interference with school activities.) The court noted that its rulings have "recognized an interest in protecting minors from exposure to vulgar and offensive spoken language." *Id.* (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("[S]uch utterances are no essential part of any exposition of ideas, and are

of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.")) In this case, B.L. was literally giving the middle finger to the school and her cheerleading teammates.

As recognized in the Court's preliminary injunction Memorandum, the Third Circuit has held that *Fraser* does not apply to off-campus speech where there is a suspension or expulsion from school. *See, e.g.*, *Layshock*, 650 F.3d at 219; *J.S. v. Blue Mountain School Dist.*, 650 F.3d 915, 932 (3d Cir. 2011). However, in a concurring opinion in *Layshock*, Circuit Judge Jordan recognized the difficulty such a bright line creates.

> For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.
> . . .
> I worry that the combination of our decisions today in this case and in J.S. may send an "anything goes" signal to students, faculties, and administrators of public schools. To the extent it appears we have undercut the reasoned discretion of administrators to exercise control over the school environment, we will not have served well those affected by the quality of public education, which is to say everyone.

Layshock, 650 F.3d at 220-222.

However, we are not dealing in this case with a suspension or expulsion from school, as was the Third Circuit in *Layshock* and *Blue Mountain*. The School

District posits that in the context of suspension from participation in a voluntary extracurricular activity, the view taken by several courts when addressing profane language is a reasonable view in determining whether off-campus speech deserves *Fraser* analysis.

In *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 807 A.2d 847 (Pa. 2002) *abrogated on other grounds as recognized in Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018), a middle school student created a web site titled "Teacher Sux," that included crude and derogatory comments about teachers and the school's principal. The school district eventually expelled the student, whose parents then appealed. The Supreme Court began its analysis by recognizing other cases where "off-campus speech has been imported onto school grounds.[2] *Id.* at 865. The court

[2] *See Baker v. Downey City Board of Educ.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969) (distribution of underground paper outside gate of campus did not militate against fact that student knew other students would distribute paper on campus); *Boucher v. School District of Greenfield*, 134 F.3d 821, 828-29 (7th Cir. 1998) (student expression case law applies to underground newspaper distributed on campus); *Bystrom v. Fridley High School*, 686 F. Supp. 1387 (D. Minn. 1987) (student expression case law applies where unofficial newspaper distributed in lunch room); *Pangle v. Bend–Lapine School Dist.*, 10 P.3d 275 (Ore. 2000) (same, where on campus distribution of underground newspaper); *cf.*, *Fenton v. Stear*, 423 F.Supp. 767, 772 (W.D. Pa. 1976) (calling a teacher a lewd name in a public place subjected student to discipline by school authorities); *but see Thomas v. Bd. of Educ., Granville Central School District*, 607 F.2d 1043, 1050 (2d Cir.1979) (school activity *de minimis* where publication printed outside school and not sold

then held that although the web site was created off school property, the speech constituted on-campus speech because it was directed toward the school community and was accessible on school property. "The statements made in the 'Teacher Sux' web site are no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly and held subject to discipline in *Fraser*." *Id.* at 868 (applying both *Tinker* and *Fraser* analysis). In this case, B.L.'s Snaps were clearly directed at a specific audience of MAHS students and were capable of being accessed by students on their cell phones while on school property and were admittedly profane. Further, they found their way into the school and into the hands of the coaches.

In *Kowalski*, a high school cheerleader created a MySpace group web page making derisive comments about a classmate, and she invited 100 friends to join the group. 652 F.3d at 567-68. The next day, the parents of the offended classmate complained to the school. Administrators concluded that Kowalski had created a "hate website" in violation of school policy. They suspended her from school for five days and issued a 90-day "social suspension," preventing her from attending school events. Kowalski was also removed from the cheerleading squad. Kowalski challenged the discipline on the grounds that the speech occurred off

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on school grounds, but few articles transcribed on school typewriters and finished product stored in teacher's closet).

campus. The Fourth Circuit held that there was enough of a nexus to the school community to discipline her:

> Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment. She also knew that the dialogue would and did take place among Musselman High School students whom she invited to join the "S.A.S.H." group and that the fallout from her conduct and the speech within the group would be felt in the school itself. . . . There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.

Id. at 573. The court held that a court could likely decide the case on Fraser grounds, but that such a decision was unnecessary since the school's discipline of Kowalski was permitted under *Tinker*. *Id.* at 573.

The *Kowalski* case bears a striking resemblance to the facts in the instant case. Although B.L. did not direct her Snap at a specific classmate, she gave the middle finger and made comments hurtful to the cheerleading team in general. As in *Kowalski*, B.L. knew that her posts could reasonably be expected to impact the school environment. B.L. also knew, or should have known, that her post would generate dialogue among her MAHS classmates who viewed the posts, and that the posts would echo in the school itself, as they certainly did.

The *J.L. ex rel H.S.* and *Kowalski* cases demonstrate that Fraser analysis can and should be applied when off-campus speech can be deemed to constitute on-campus speech, as in this case. Thus, while recognizing the Third Circuit precedent to the contrary, the School District believes that the discipline of B.L. was permitted under *Fraser*.

C. The Cheerleading Rules Do Not Violate Section 1983

The Plaintiffs allege that the Cheerleading Rules violate their rights under Section 1983 in two ways. They claim that the rules are unconstitutional on their face because they are unduly vague in violation of the Due Process Clause of the Fourteenth Amendment. Compl., ¶ 68. They also argue that the Cheerleading Rules are overbroad and constitute viewpoint discrimination, in violation of the First Amendment. Compl., ¶ 67. As will be shown, Plaintiffs are incorrect on both claims.

1. The Cheerleading Rules Do Not Violate Due Process

To state a claim under § 1983, Plaintiffs must have been deprived of a federally protected right by someone acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). The absence of a state actor or a constitutional harm will result in the failure of the § 1983 claim. *See id.*

To establish a cause of action for a procedural due process violation, a plaintiff must prove that a person acting under color of state law deprived him of a protected property interest without due process. *See Midnight Sessions, Ltd. v. City of Phila.*, 945 F.2d 667, 680 (3d Cir. 1991). Therefore, the Court must first determine whether B.L. suffered a deprivation of a protected property interest.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that a state must "recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." *Id.* at 574. However, as this Court has noted, the Supreme Court has not had occasion to determine whether a public school student also has a protected property interest in participating in extracurricular activities. *Dominic J. v. Wyoming Valley West High School*, 362 F. Supp. 2d 560, 571-72 (M.D. Pa. 2005) (Caputo, J.). Yet, as this Court also noted:

> However, of the myriad district and appellate courts that have considered this issue, a vast number of them have held that a public school student does not have a protected property interest in participating in extracurricular activities. (collecting cases) Of particular note is *Dallam* [*v. Cumberland Valley Sch. Dist.*, 391 F. Supp. 358 (M.D.Pa.1975)]. There the Court, in holding that a public school student does not have a protected property interest in playing interscholastic sports, noted:
>
> > The property interest in education created by the State is participation in the entire process. The myriad activities which combine to form that education process cannot be dissected to create hundreds of separate property rights, each

> cognizable under the Constitution. Otherwise, removal from a particular class, dismissal from an athletic team, a club or any extracurricular activity, would each require ultimate satisfaction of procedural due process.
> 391 F. Supp. at 361.

Dominic J., *supra*, at 571-72. In *Dominic J.*, a student was removed from his high school swimming and water polo teams because a coach believed he had a drug problem. When drug tests came back negative, the student and his parents brought several claims including one for a violation of due process. However, based on the cases cited above, this Court held that because the student did not have a protected property interest in participating in extracurricular activities, the plaintiffs had failed to present evidence of a constitutional violation. *Id.* at 572 (granting summary judgment in favor of defendants); see also *Angstadt v. Midd–West Sch. Dist.*, 377 F.3d 338, 344 (3d Cir. 2004) (affirming district court ruling that public school student did not have protected property interest in participating in extracurricular activities). Accordingly, because the Plaintiffs have failed to show any protected property interest in B.L.'s participation in cheerleading, the Court must grant summary judgment is favor of Defendant on Plaintiffs' due process claim.

2. Cheerleading Rules Are Not Overbroad or Discriminatory

As noted above, Plaintiffs also claim that the Cheerleading Rules are overbroad and constitute viewpoint discrimination. In a facial challenge to the

overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

As the Third Circuit has held, because invalidation for facial overbreadth is "strong medicine," there are limits to its application. *Aiello v. City of Wilmington, Del.*, 623 F.2d 845, 852 (1980). The standards for the use of the facial overbreadth doctrine were set forth by the Supreme Court in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). There, three employees of the State of Oklahoma were charged with violations of a state law that restricted the political activities of state employees. Although conceding that the statute was constitutional as applied to their own conduct, the employees nevertheless argued that the statute reached protected as well as unprotected conduct and therefore must be struck down as unconstitutionally overbroad. The Court, however, rejected the overbreadth argument. The Court reasoned that the function of facial overbreadth adjudication attenuates as the otherwise unprotected behavior it forbids the State to sanction moves from "pure speech" toward conduct, and that conduct even if expressive falls within the scope of otherwise valid laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. *Broadrick*, *supra*, 413 U.S. at 615. Thus, the Court concluded that

"where conduct and not merely speech is involved," the overbreadth of a statute must not only be real but also substantial, viewed in light of the statute's plainly legitimate sweep. *Id.*

Applying the substantial overbreadth test to the statute at issue in *Broadrick*, the Court concluded that the challenged section of the Oklahoma statute need not be discarded *in toto* "because some persons' arguably protected conduct may or may not be caught or chilled by the statute." *Id.* at 618. In reaching this conclusion the Court noted that the statute sought "to regulate political activity in an even-handed neutral manner." Id. at 616-18. Accordingly, where *Broadrick* is applicable, a statute or rule must be substantially overbroad before it may be invalidated.

In this case, the Cheerleading Rules specifically prohibit several types of conduct, including failure to regularly attends practices and games, violations of standards for cheerleaders' dress and appearance, and displays of poor sportsmanship. Exh. D-3. Therefore, the rules under which B.L. was disciplined are not directed solely at "pure speech" but are aimed at a range of conduct and speech. Accordingly the Court must proceed under the *Broadrick* rule to determine if the overbreadth, if any, of the Cheerleading Rules is substantial.

In *Broadrick*, the Court concluded that the state statute at issue had been interpreted to restrict the wearing of political buttons or the use of bumper stickers,

which would seem to be clearly within the protected scope of the first amendment. Nonetheless, the Court found the challenged statute not to be substantially overbroad. The Court's opinion was based upon its belief that the intrusions upon protected conduct sanctioned by the statute were marginal compared with its primary thrust aimed at clearly regulable conduct. *See* The Supreme Court, 1972 Term, 87 HARV. L. REV. 1, 151 (1973). In this case, while the provision of the Cheerleading Rules prohibiting the posting negative information about cheerleading, cheerleaders or coaches on the Internet may seem to be protected speech, any intrusion upon that conduct is marginal compared to the overall goal of the rules to maintain proper behavior and sportsmanship among the members of the cheerleading team.

The Third Circuit has further held that the expected frequency of potential impermissible applications of a statute should be considered in determining possible overbreadth.

> [T]he historic or likely frequency of a statute's conceivably impermissible applications is also relevant. If that frequency is relatively low, it may be more appropriate to guard against the statute's conceivably impermissible applications through case-by-case adjudication rather than through facial invalidation.

Aiello, 623 F.2d at 854. In this case, there is no reason to believe that members of the cheerleading team will be posting negative information about cheerleading, cheerleaders, or coaches on the Internet. As Coach Luchetta-Rump noted at her

deposition, only one student has been disciplined for violating the sportsmanship rules in the Cheerleading Rules in the four years that she has been a coach. Facts, ¶ 52. Accordingly, this weighs in favor of finding the rules permissible.

The Court must also consider the School District's interest in underlying the statute or regulation.

> Facial invalidation necessarily encroaches upon legislative prerogatives. Those sections of a statute covering conduct which is permissibly regulable are swept aside for fear of the chilling effect emanating from its impermissibly broad language. This may not be an undesirable result, for the first amendment is nonmajoritarian in nature and must in the last resort depend upon the courts for enforcement. Yet facial invalidation is not a finely honed scalpel in the hands of a judicial surgeon but a broad-blade instrument, which must be applied with restraint.

Aiello, 623 F.2d at 854-55. In this case, the School District has a strong interest in encouraging students' good sportsmanship. By supporting rules regarding cheerleaders' conduct, the School District can maintain order, develop camaraderie among team members, reinforce basic disciplinary rules, and teach teenagers about proper behavior while engaging in healthy competition.

The Third Circuit noted in *Aiello* that although public employees, like all citizens, have first amendment rights, "(t)he area of unregulable speech available to public employees is . . . narrower than that available to the public at large." *Gasparinetti v. Kerr*, 568 F.2d 311 (3d Cir. 1977). Courts have held that public school students' free speech rights are also limited. As with public employees,

schools have particular concerns of efficiency, discipline, and public trust when dealing with student disciplinary issues. Accordingly, the School District's interest in the challenged Cheerleading Rules is substantial.

Based on these factors, the facial overbreadth of the Cheerleading Rules, if any, fades significantly when compared with their otherwise legitimate purposes. Because the Cheerleading Rules are not overbroad, the Plaintiffs' overbreadth argument is invalid. Accordingly, summary judgment should be granted in favor of the School District on that claim.

V. CONCLUSION

For the reasons stated above, Defendant respectfully requests that this Court grant the Motion and enter judgment in favor of the Defendant and against all Plaintiffs.

Respectfully submitted,

Date: December 20, 2018

/s/ David W. Brown

Michael I. Levin (PA 21232)
David W. Brown (PA 201553)
LEVIN LEGAL GROUP, P.C.
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006
Phone: (215) 938-6378
Fax: (215) 938-6375
mlevin@levinlegalgroup.com
dbrown@levinlegalgroup.com

Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(3), I hereby certify that the Defendants previously sought, and were granted, leave to exceed the 5,000-word limit of Local Rule 7.8(b)(2).

Date: December 20, 2018

/s/ David W. Brown
David W. Brown

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2018, I electronically re-transmitted the foregoing Memorandum of Law in support of its Motion for Summary Judgment to be filed to the Clerk's Office using the Court's Electronic Case Filing system ("ECF") for filing and transmittal of a Notice of Electronic Case Filing to all counsel via the ECF, in accordance with Fed. R. Civ. P. 5(b) and M.D. Pa. L.R. 5.7.

/s/ David W. Brown
David W. Brown