

Introduction—Summary of Facts

This case involves a student's right to free speech and expression outside of school. June Carter was a senior at City High School, a cheerleader with a \$5,000 college athletic scholarship. She and the other members of her cheerleading squad had pages on FaceSpace, a social networking site, as did the cheerleaders at City's biggest rival, Central High School. The cheerleaders at both schools posted pictures of themselves in their cheerleading uniforms, each arguing that their school had the better looking squad. Both schools responded to these arguments by blocking FaceSpace access on school computers; however they could not regulate computer use outside school, and the debate continued. In response to attacks on her looks, June posted a suggestive picture of herself in her uniform. Although she restricted access to this picture, it was nevertheless brought to the school administration's attention. The school suspended June for the rest of the academic year, banned her from cheerleading, and she was told she would not be permitted to graduate.

Question 1

The image June posted on FaceSpace does constitute speech. The Supreme Court has held that speech must intend to convey a specific message, as well as a likelihood that the message would be understood by those who viewed it. Spence v. Washington, 418 U.S. 405 (1974). The court has made clear that symbolic speech, which is defined as "non-verbal activity that is treated as if the activity were speech,"¹ can be protected under the First Amendment. June's photo conveyed an intentional and understandable message: that she was more attractive than Central

¹ Nowak, John E. and Ronald D. Rotunda. *Constitutional Law*. 7th ed. St. Paul, MN: Thomson/West, 2000. Print.

High's cheerleaders, and therefore her squad and her school were better than Central. In Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), the wearing of black armbands in order to protest the Vietnam War was considered "closely akin to 'pure speech.'" Just as an armband can be considered nonverbal speech, a photo, intentionally posted to convey a message is also speech. Therefore, under *Tinker* and *Spence*, the photo is protected nonverbal speech. Since June's photo clearly conveyed a message, it is therefore speech.

Question 2

June's speech is protected under the First Amendment. In *Tinker*, the Supreme Court held that student speech is unprotected if it causes a substantial disruption in the schools, disturbs a class, thus hindering the learning process, or invades the rights of other students. Uploaded at home using her personal computer, June's photo did none of these, especially since students were unable to view the photo in school (since FaceSpace was blocked on school computers), and as such the picture could not have a tangible effect on the school educational environment. Although some would claim that the school has the right to censor her speech under the law established in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), which states that the school was "entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." Yet June's photo does not begin to approach the pervasive and offensive nature of Matthew Fraser's speech nominating fellow student Jeff Kuhlmen for student office:

“I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most...of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A. S. B. vice-president—he’ll never come between you and the best our high school can be.”

While this speech is obviously profane, June’s picture was merely suggestive. Since June’s photo did not disrupt learning, cause a disturbance in school, or invade the rights of others, and since it was not aggressively lewd or offensive, her speech is protected under the First Amendment, and the school has no right to prohibit her from or to punish her for posting such a photo.

Question 3a

It is proper for the Metro School District to block FaceSpace on school computers. As the Metro School District Policy on Acceptable Computer Use states, “Access is a privilege, not a right.” Since the school chooses to provide its students with computers, it is entirely within its rights to restrict their use. In addition, the school requires students to abide by the School Computer Use Rules and Responsibilities. By choosing to use school computers, students agree to follow these rules. The first rule students must agree to states that “I will use computers only for approved educational purposes.” FaceSpace cannot possibly constitute an educational site, and indeed is a distraction from learning. Schools need to be

constructive environments where students are prepared to become productive members of society, and therefore distractions need to be avoided. The Metro School District, in blocking a non-educational site, is entirely within the authority that students are required to grant it before they use school computers.

Question 3b

It was not proper for the Metro School District to suspend June and prevent her from graduating or participating in the final game. Since June's speech is protected under the Constitution of the United States, the school cannot punish her. NMAC 6.11.2.9 (1997). Even if her speech were unprotected, the school still would not have the right to discipline her. The New Mexico Administrative Code establishes that students may be disciplined for "out-of-school conduct having a direct and immediate effect on school discipline or the general safety and welfare of the school." NMAC 6.11.2.9 (1997). June's actions did not in any way affect the school's discipline, safety, or welfare. Her actions, therefore, are not considered ones for which the school can punish her. The school's choice of punishment was also extremely excessive. Suspending her until the end of the year and not allowing her to graduate go beyond the scope of normal punishment, and is not suitable for the offense. By suspending her and allowing her grades to plummet, the school ensures that she will lose her scholarship. In addition, by not permitting her to graduate², the school is effectively preventing her from going to a good college or university. In essence, the school is choosing to punish June for posting a suggestive photo of herself on the internet by ruining her future. The school did not have the right to

² The school did not state that she would be able to graduate the following year, but indeed that she would not be allowed to graduate.

punish this out-of-school as it did not interfere with the functioning of the school, and the excessive nature of the punishment makes it completely inappropriate.

Conclusion

In this case, June Carter was unconstitutionally punished for an act that did not affect her school. She should not be punished for this action, and especially should not be punished in the excessive way the school proposes. If this case were to go to court, it is likely that June Carter would win due to these facts; however, there is also a substantial chance that the court would rule in favor of the school as the most decisive fact in this case—how suggestive her photo was—is unknown. If the photo merely showed her in a slightly suggestive position, it is most likely June would win the case; however, if she had been nude in the photo, the speech would be unprotected under *Fraser*.