Cherry Creek student expelled for anti-Semitic Snapchat appeals lost free speech ruling

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A student expelled from Cherry Creek High School for posting an anti-Semitic comment on Snapchat is appealing a district court dismissal of his case against the district for violating his First-Amendment rights.

Legal experts believe the appeal could be successful, given a Supreme Court ruling over the summer that limited schools' ability to regulate student speech that takes place off campus.

According to court documents, on a Friday evening in September of 2019 a Cherry Creek High School student referred to only as C.G. posted a picture to Snapchat of several friends in a thrift store wearing vintage hats. The hats resembled WWII-era military garb, and the post was captioned "Me and the boys bout to exterminate the Jews."

C.G. deleted the post and offered an apology within several hours, the lawsuit said. A fellow student saw the post and told her father about it, who contacted the police and circulated it among members of the community.

The police arrived to C.G.'s house and determined there was no threat, the lawsuit said. Another parent contacted the school about the post, expressing concern about antisemitism in the district and asking the school to use the incident to address hate speech in the community.

School officials initially suspended C.G. and ultimately expelled him for one year on the grounds that he violated school conduct and that the district could regulate "behavior on or off school

property which is detrimental to the welfare, safety or morals of other students or school personnel," according to the lawsuit.

C.G. and his parents sued the district in U.S. District Court in Colorado, alleging that his First Amendment rights had been violated. Last August the court dismissed the case, stating that the school had the legal grounds to discipline C.G. even though the post was not made during school or on school property, and did not explicitly mention any district students or staff. It also rejected the claim that C.G.'s due process rights were violated.

In September, C.G. and his parents submitted his case to the 10th Circuit Court of Appeals. The Colorado ACLU, the national ACLU, the Foundation for Individual Fights in Education and the Cato Institute all filed "friend of the court" briefs in his support.

"The ACLU brief concedes that the speech in question is undeniably offensive, but maintains that the detestable nature of the speech here cannot justify diminishing the First Amendment's protections for young people," the national ACLU said in a statement. "Outside of school-supervised settings, young people have the right to express themselves without being punished for their ideas, and other young people and adults have the right to hear what they have to say."

In an email, Cherry Creek spokesperson Abbe Smith said, "The District prevailed in this matter involving First Amendment issues at the trial court level and we hope that the 10th Circuit will uphold that decision."

Scott Levin, the director of the the Mountain States Anti-Defamation League, told the *Sentinel* that the ADL is "very much a pro-First Amendment organization" but that the post in question was demeaning to victims of the Holocaust and caused a lot of pain to the local Jewish community.

"Holocaust jokes are never appropriate, and unfortunately they are all too prevalent at this time," Levin said. "We were hoping that when this came forward and was made public it could be a teachable moment for students and for others about the inappropriateness of Holocaust analogies."

This is the first case regarding schools' ability to regulate online speech that takes place off campus to reach federal appellate court since a Supreme Court ruling over the summer addressed the issue.

Mahoney v. B.L. involved a cheerleader at a Pennsylvania school who was suspended from the cheer squad for making a profane Snapchat post after she failed to make the varsity squad. The Supreme Court ruled that her First Amendment rights were violated, and that schools can only regulate off-campus student speech when there is a significant reason to do so.

Alan Chen, a Denver University law professor who specializes in First Amendment cases, told the *Sentinel* that the Supreme Court ruling was “definitely in favor” of the Cherry Creek student, which has a lot of similarities to *Mahoney*.

C.G.’s post was an offensive joke that under the First Amendment pretty clearly qualifies as protected speech, Chen said. The Supreme Court ruling said that the less a student’s off-campus speech is connected to school, the more their First Amendment rights are equivalent to that of an adult.

“Here, there’s absolutely no connection to the school whatsoever,” he said.