

Arkansas School's Restriction on Student Speech Found "Unreasonable" by Eighth Circuit



Devin Bates

dbates@mwlaw.com

(501) 688.8864

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An Arkansas school had an unwritten policy of restricting tabling to registered student organizations and school departments. At least generally, there was no problem with this policy. However, as applied to one particular group, the Eighth Circuit recently held that the policy's distinction between registered and unregistered student organizations was not reasonable. This blog post highlights some lessons that can be learned by Arkansas schools from this recent legal battle over First Amendment rights on campus.

Location. Location. Location. In First Amendment law, one of the magic words is "forum"—referring to the location in which a speaker speaks. The protections offered by the First Amendment vary depending on the speaker's chosen forum. There is a vast and nuanced body of Constitutional law called the "public forum doctrine" which informs where school officials can and cannot restrict speech. It all hinges on the location. In areas that are traditionally open for free expression, the law looks skeptically upon restrictions. On the other end of the spectrum, some areas of a school campus are considered nonpublic forums and tighter restrictions are expected. In this case, the school sought to stop an unregistered student group from speaking in an area that was a "limited designated public forum" which is somewhere between the two extremes just mentioned. The importance of a speaker's targeted "forum" is paramount. When a school intervenes to stop students from speaking, they must be ever mindful of the location where the student seeks to speak. Administrators must have a working familiarity with this spectrum. Here, the school officials appeared to act in a manner consistent with their policies, practices, and an appropriate understanding of speech forums.

The Reasonableness of a Restriction. For the type of forum at issue here, speech restrictions must be "reasonable" and "viewpoint neutral." Requiring that a group be registered to speak was found to be a "viewpoint neutral" restriction, as the court recognized some level of regulation is expected on that front. However, the court went on to explain that the "touchstone" of the inquiry is whether the restriction was "reasonable in light of the purpose which the forum at issue serves." Here, the sole justification for the policy was keeping the forum a "comfortable" social space for students. The Eighth Circuit concluded that this justification provided no meaningful reason for differentiating between registered and unregistered student organizations. In other words, a registered student organization could just as easily disrupt this "comfortable" environment as could an unregistered one. Two takeaways can be seen from this outcome. First, having a written policy—rather than as here, an unwritten one—can build consensus among administrators, foster consistency, and ensure Constitutional compliance. Second, when developing such a written policy, an education attorney should be consulted. Drawing on their experience and supplementing with strategic Constitutional law research where needed, an attorney can ensure that a policy's stated reason is one that will withstand challenge.

The Importance of Training to Stay on Top of First Amendment Law. Even though the court was critical of the school's justification for its actions, ultimately the school prevailed because it was not "sufficiently clear that every reasonable official would have understood" that by taking this action he or she was violating the First Amendment. The law determines what is "sufficiently clear" to "reasonable officials" based on what the Eighth Circuit and U.S. Supreme Court have decided in the past. In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." As illustrated here, a case's outcome can turn on whether the school officials should have known about other case law in their jurisdiction.

While educational leaders are not expected to be Constitutional experts, it is recommended that training on the First Amendment be woven into a school's training rotation to enable them to spot issues and know when to pick up the phone to ask for help.

Case reference: *Turning Point USA at Ark. State Univ. v. Ron Rhodes, et al.*, No. 19-3016 (8th Cir. Aug 31, 2020).