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Distinguishing Between Bullying and Protected First Amendment Speech: Lessons Learned from One School's Constitutional Blunder Over Anonymous Sticky Notes

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Schools sometimes find themselves needing to walk a fine but complicated line, whereby they curtail bullying but also balance the right to free speech. One recent case illustrates this point. A high school sophomore anonymously posted a sticky note on a bathroom mirror referencing her school's investigation into sexual assault. The note did not identify anyone by name. School officials treated the note and others like it as a Title IX complaint and they investigated in light of other events and rumors. The entire situation turned out to be false, but was not debunked until after some concern and disruption unfolded in the school. School officials concluded that the note constituted bullying of the alleged male perpetrator, and so they imposed a three day suspension on the note's author. The student's parent filed a lawsuit which paused the suspension and ultimately resulted in an appeal. Recently, a court ruled that the school likely had not acted in compliance with the student's First Amendment rights. This blog post will explain why, and highlight lessons that can be learned by schools trying to distinguish between bullying and protected First Amendment activity.

Political or Non-Political Speech?

As a general rule, a school may not impose restrictions on speech that can *plausibly be interpreted as* commenting on any political or social issue. By contrast, speech must not rise to the level of being *reasonably interpreted as political* speech to obtain protection. Without ultimately deciding whether the speech was core political speech, in this case the court determined that it was due protection under the First Amendment. The court noted that the issue of how public schools handle sexual assault likely "expresses political advocacy on a question of significant public consequence." Drawing from this set of facts, school officials should carefully consider all plausible interpretations of student speech, not just what the student says about it or what an administrator believes. If this sounds like a difficult determination to make, that is because it often can be! It should go without saying but for clarity will be stated here: when hot button issues come up in student speech, school officials must carefully consider whether the speech could plausibly be interpreted as political speech. Up this year for likely areas to watch are issues of race, police brutality, systemic racism, and the election.

The Student's Stated Reason Does Not Necessarily Control.

In this case, the note's author explained that she "posted the note to address the problem of sexual assault in [the] school." Notably she did not name anyone. The student's reasoning was not necessarily determinative, and instead the inquiry was seeking to understand the "objectively reasonable interpretation of the speech, not the speaker's motive." With that being said, the student's stated reason was impliedly determined reasonable, and the school's stated reason shifted over time as explained below, which certainly was not a good look for the school.

The School's Shifting Justification for a Suspension.

The oft cited U.S. Supreme Court case *Tinker* provides the framework for justifying a restriction of student speech that is otherwise protected. This touches on a vast body of complex Constitutional law that must be carefully studied and applied by a school's legal counsel. In this case, although the school officials concluded that the sticky note represented bullying under the school's policy, the court rejected that this rationale alone could justify the suspension sufficient to satisfy *Tinker*. The suspension letter handed to the student provided no reason other than bullying. However, later when coming to court the school added two other justifications: (1) disruptions caused, and (2) the speech could represent defamation to the alleged perpetrator. The court rejected these two reasons, explaining that the school was stuck with the stated reason contemporaneously provided to the student, and that the school could not later change its rationale. And looking only at the stated reason of bullying, the court found that the school did not closely link the sticky note containing protected speech to the actual harm that the alleged but innocent male perpetrator suffered. As illustrated here, to uphold a student's suspension it is important that the reason stated at the time of suspension is both fully developed, and one that will pass muster not only under the school's policies, but also under the First Amendment and the case law interpreting it. Consulting an attorney equipped to handle complex Constitutional litigation can often help to shape the path and avoid many issues like this upfront.

Click [here](#) to subscribe to the Mitchell Williams education law blog. In the coming days, we will discuss the Arkansas specific laws that touch on the tension between the First Amendment and cyberbullying.

Case reference: *Norris v. Cape Elizabeth Sch. Dist.*, No. 19-2167 (1st Cir. Aug. 6, 2020).