

'There is No Constitutional Right to be a Bully'

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"There is no constitutional right to be a bully." *Sypniewski v. Warren Hills Reg. I Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

Under the First Amendment, a school may prohibit students and spectators at school-sponsored events (such as a basketball game) from engaging in conduct or speech intended to insult, intimidate or otherwise harass others. Court decisions make it clear that schools may adopt and enforce reasonable rules and regulations governing spectators' conduct at extracurricular activities.

Sportsmanship Rules and the First Amendment

Impinging on the Rights of Others

There is some disagreement whether the traditional First Amendment student-speech rules apply to students who attend school-sponsored extracurricular activities as spectators. On one hand, attending the event is voluntary – students are not required to attend. School staff may or may not be present to supervise the event. Student spectators are not subject to instruction or curriculum as they are during the school day, and students and adults are largely treated the same and held to the same expectations – spectators are spectators.

On the other hand, the school is the government, and the First Amendment is implicated whenever the government regulates speech. Students are still students, and students at a school-sponsored event are subject to school rules and discipline. In any event, regardless of whether the First Amendment's student-speech rules apply, **schools can (and should) prevent students from engaging in insulting or intimidating behaviors toward others.**

The seminal United States Supreme Court case on student speech under the First Amendment is the 1969 decision in *Tinker v. Des Moines Independent Community School District* where the Supreme Court formulated the rule that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, the *Tinker* court was careful to distinguish the student's wearing of armbands from conduct that affected others, and wrote:

"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, *unaccompanied by any disorder or disturbance on the part of petitioners.* There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of *collision with the rights of other students to be secure and to be let alone.* Accordingly, this case does not

concern speech or action that intrudes upon the work of the schools or the *rights of other students.*" (Emphasis supplied).

Over the past 50 years, the Supreme Court has revisited the Tinker holding several times, and state and federal anti-discrimination and anti-bullying statutes have been enacted that apply to public school districts. While the Supreme Court has not been entirely clear or consistent in the "rule" to be applied in its post-Tinker cases, it has been consistent about two principles. One, the scope of a student's First Amendment rights is what is appropriate for the children in school or the activity involved. Two, schools may regulate or prohibit student speech at a school-sponsored event that infringes on the rights of others, as opposed to political speech that simply makes others uncomfortable.

Recent cases in the Tinker progeny held that the right to be let alone includes the right to be free from physical intrusions as well as psychological attacks. One court held that a school district properly disciplined a student after he posted racist and degrading comments about other students on his own blog. If a school may discipline a student for racist and offensive blog posts, it follows that a school may discipline students for in-person speech that is racist and/or offensive and is intended to convey an intimidating or harassing message.

In addition, if students organize a particular event that can reasonably be determined to be intended to target students on the basis of sex, race or ethnicity, the school may prohibit any speech that members of the public might "reasonably perceive to bear the imprimatur of the school.

Forecasting a Substantial Disruption

In order to prevent harm to other students, schools may prohibit speech that could reasonably be anticipated to cause a substantial disruption to the school environment. For example, a court found that a school district could permissibly require students to remove the American flag t-shirts that they wore to insult or provoke the Mexican students on Cinco de Mayo. In that case, different groups of students had fought with each other and engaged in other disruptive conduct for some time.

One group, primarily composed of Mexican-American students, planned to wear Mexican shirts on Cinco de Mayo. Another group of non-Mexican students planned to wear American shirts to "counter" the Mexican shirts. School officials heard murmurs of simmering tensions over the dueling shirts and instructed students wearing American shirts to turn them inside out or remove them. School officials were concerned that fights would break out over the shirts.

On appeal, the federal circuit court ruled in favor of the school officials, noting that they do not have to wait for a disruption to occur before they act to prohibit such speech. Instead, they may prohibit speech if there is a reasonable forecast of a substantial disruption and to allow spectators to enjoy a game with an unobstructed view.

Spectator and Sportsmanship Rules

Courts have consistently held that reasonable sportsmanship rules at school-sponsored events are constitutional. For instance, in a recent case a father was prohibited from attending a basketball game because he had violated the district's "Parental/Spectator Guidelines." The father filed suit, asserting that the "Guidelines" were unconstitutional and violated his First Amendment rights.

In dismissing his claim, the court noted the importance of the "Guidelines" as *"reflect[ing] a substantial government interest in protecting young students from witnessing heated confrontations between a parent and a coach, or from hearing parents and spectators rant about a coach's alleged incompetence. The good experience of the other student-athletes in the game should not be disrupted by parents or spectators who strongly disagree with a coach's decisions or the way he coaches the team. Behavior like [the father's] only serves to harass and disrupt the functioning of the entire basketball program to the detriment of all participants."*

The court also addressed the father's claim that the district's "Athletic Code" was unconstitutional. The court noted that the sportsmanship requirements in the "Athletic Code" were allowable and operated to *"shield student-athletes from anything that would detract from their participation in interscholastic sports."*

In another case, a school banned a frequent spectator from attending school events for a period of time because he made abusive and/or profane statements at several events. The spectator filed suit, challenging the school's actions.

In upholding the district's ban, the court commented that "school officials . . . have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property." In exercising that authority, schools must take into account the fact that *high school athletic events "are commonly attended by the families of the participants, including younger siblings, as well as by other high school students and the high school students participating in the event."* Thus, the court reasoned, the school has a responsibility to ensure that conduct at its events is appropriate in light of these circumstances.

Schools with sportsmanship rules or other similar school rules may apply those rules to ensure that a student's speech or conduct does not detract from other students' participation in the activity. The school may also take into consideration the fact that families of participants will be exposed to any purported bullying behavior. Schools have authority under their sportsmanship rules to discipline students for intimidating or harassing behaviors.

Students as a Captive Audience

The United States Supreme Court also has held that a school district has more leeway to censor speech in settings where students are a “captive audience.” The “captive audience” doctrine provides an exception under the First Amendment to allow the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech.

For example, students playing in a basketball game cannot leave the game to avoid the offensive conduct. It seems highly unlikely that a court would require a student to decide between not playing in a game and having to endure insulting comments from other students. Under the “captive audience” doctrine, a school has the authority to prohibit offensive speech directed toward students who are held in a captive audience.

Overall

All in all, there is strong authority for a school to prohibit or otherwise censor student speech that is intended to harass, intimidate, insult or otherwise bully others. From *Tinker* to other established principles of First Amendment case law, a school administrator may act in response to such conduct and may take reasonable steps intended to prohibit such conduct. In doing so, however, the administrator must take care to distinguish behavior that is directed at others for the purpose of intimidating or bullying them from speech on political or other matters of public concern that is offensive only because others might disagree with the viewpoint expressed.