



December 30, 2011

Rick Messer, Principal
Mesa Verde High School
7501 Carriage Drive
Citrus Heights, CA 95621

Re: Suspension of Donny Tobolski

Dear Mr. Messer,

The American Civil Liberties Union of Northern California writes on behalf of Donny Tobolski and his mother Kristina Dunlap regarding Donny's suspension for posting a comment about his teacher on Facebook. Donny's speech was protected under the state and federal constitutions, as well as the Education Code. That being so, Mesa Verde High School's suspension of Donny for his protected speech violates state and federal law. We take this matter seriously because of the special role of freedom of speech in our democracy. Schools, tasked with the important role of teaching our youth about civic engagement, send the wrong message when they fail to live up our country's founding principles.

The facts of this case are simple. Donny posted on his Facebook page, from a computer at his home and during non-school hours, a message about one of his teacher's, Mr. Cimino. The posting described Mr. Cimino as a "fat ass who should stop eating fast food, and is a douche bag." On December 2, 2010, Mesa Verde suspended Donny for one day, asserting that this posting constituted "cyberbullying."

The suspension violates the Constitution and the Education Code. State and federal law grant students strong protections for their speech. As the Supreme Court long ago acknowledged, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969) That being so, the First Amendment bars schools from disciplining students for speech, unless the speech creates a "material and substantial" disruption of the school environment. *Id.* at 511.

California similarly protects students' free speech rights: "Pupils of the public schools shall have the right to exercise freedom of speech and of the press." Educ. Code §48907(a). The Education Code prohibits schools from disciplining students for speech that, "when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." Educ. Code §48950(a).

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ALLEN HOPPER, NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL

Donny's comment about Mr. Cimino was protected speech because there is no plausible argument that it risked materially or substantially disrupting the school environment. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. As one court explained in a case overturning the suspension of a high school student for posting on the internet disparaging comments about another student, "ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure" do not constitute a substantial disruption. *J.C. v. Beverly Hills Unified School Dist.*, 711 F.Supp.2d 1094, 1119 (C.D. Cal. 2010).

In *Killion v. Franklin Regional School Dist.*, 136 F.Supp.2d 446 (W.D. Pa. 2001), a case involving facts virtually identical to those here, the court found unconstitutional the suspension of a student for writing a "Top Ten" list that contained negative comments about the appearance of the school athletic director. While Mr. Cimino may understandably have found Donny's Facebook posting offensive, "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech." *Id.* at 455 (internal quotation marks, citation omitted); *see also Smith v. Novato Unified School Dist.*, 150 Cal.App.4th 1439, 1456 (2007) (student's comments in newspaper about illegal immigration and which offended many students were protected: "the fact that protected speech may be offensive to some does not justify its suppression").

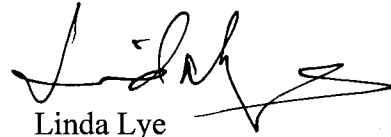
Because Donny's Facebook posting posed no actual or threat of substantial and material disruption, it was protected speech for which Donny may not be disciplined. Indeed, Mesa Verde's suspension of Donny for his protected speech exposes the school to potential suit and liability for attorney's fees. *See* Educ. Code §48950(b).

In addition to violating Donny's statutory and constitutional free speech rights, Mesa Verde lacked statutory authority as a threshold matter to impose the discipline. First, schools may only suspend a student for statutorily enumerated types of conduct. While "cyberbullying" is among the types of conduct subject to discipline, the posting here simply did not constitute "cyberbullying," which is defined as electronic communications that involve sexual harassment, a hate crime, or creation of an intimidating or hostile educational environment. *See* Educ. Code §48900(r), §32261(f), §48900.2, §48900.3, §48900.4. Donny's comments about Mr. Cimino involved nothing of the sort. Second, schools are only authorized to suspend or expel students for conduct that "is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district." Educ. Code §48900(s). Donny posted the comment to his Facebook page from his home computer during non-school hours. The underlying activity was therefore entirely beyond the school's jurisdiction.

Mr. Messer
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Mesa Verde violated Donny's state and federal rights by suspending him for his Facebook posting. His suspension should therefore be expunged from his record immediately. We look forward to your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Linda Lye', with a long horizontal flourish extending to the right.

Linda Lye
Staff Attorney

cc: Kristina Dunlap