

MEMORANDUM

130

TO: The School Board of Education
FROM: Attorney for the Board of Education
RE: School Discipline and the First Amendment Right to Free Speech

During the Kennedy High School v. Lincoln High School football game Anthony, the Kennedy football quarterback, chose to kneel in protest during the National Anthem for what he perceived as unequal treatment of African Americans by the police. This movement has been modeled after NFL 49er Colin Kaepernick and is one that has spread among professional, college, and high school athletes across the country.¹ Anthony's behavior created a disturbance among the crowd in attendance as was obvious from the ensuing boos. Neither the coach nor school administrators disciplined Anthony for his actions.

The following week Anthony was chosen to speak during a school assembly. During this assembly a student at Kennedy High, Beth, turned her back to Anthony in protest of Anthony's refusal to stand and recite the Pledge of Allegiance at the football game. Beth was called to the principal's office and told her actions violated the school's handbook, which states that students must treat each other with respect. Beth defended her actions by pointing out that Anthony was not disciplined for refusing to stand during the National Anthem at a public football game and that his actions deeply offended her because her brother was killed while serving in the military conflict during the Middle East.

The Principal ordered Beth to write a letter of apology to Anthony, which she refused to write.

¹ Abrams, Eliana; Rothman, Lily; Steinmetz, Katy: "The Perilous Fight." Time 3 October, 2016: 36-41 Print.

Beth was referred to the Student Disciplinary Board which recommended a two day suspension. Beth's complaint is that she is being treated unfairly and that her First Amendment rights are being violated while Anthony's First Amendment Rights are being protected.²

It is imperative to remember that the First Amendment right to freedom of speech is not inclusive to words. It also includes non-verbal and symbolic forms of expressive speech. In 1969 the U.S. Supreme Court case of *Tinker V. Des Moines Independent Community School District*, 393 U.S. 503 dealt with symbolic speech when several students who wore black arm bands to school to protest the Vietnam War were ordered to remove them. This case established precedent that public school students do not shed their constitutional rights upon entering school doors and that free expression of ideas in the school is protected by both the First and Fourteenth Amendments unless school administrators can prove that a given act of expression causes "substantial interference with school discipline or the rights of others."³

There are other key court cases that address the matter of free speech in public schools. *In Russo v. Central School District No. 1*, 469 F. 2d 623 (1972) The U.S. Supreme Court upheld that a public school teacher can refuse to salute the American flag and keep their hands by their side.⁴ *In Bethel School District no. 403 v. Frasier*, 478 U.S. 675 (1986) the U.S. Supreme Court found in favor of school administrators in disciplining a student for sexually inappropriate speech because the speech was determined to be lewd in nature.⁵

² Summarization of Incident Before the Kennedy Disciplinary Board

³ Center for Public Education.
www.centerforpubliceducation.org

⁴ *Russo v. Central School District No. 1*.
www.legal.com

⁵ Key Supreme Court Cases.
www.americanbar.org

Together the court cases of *Pickering v. Board of Education*, 391 U.S. 563(1968) and *Connick v. Myers*, 461 U.S. 138 (1983) require courts to first determine if the speech in question is a matter of public concern, and if so, protected by the First Amendment. Secondly, it must be determined if the speech outweighs the school's interest in maintaining an efficient workplace.⁶

Although speech is not as free in educational settings as outside, and a challenge to school policy often provokes strong reactions by school administrators, the U.S. Supreme Court has repeatedly made clear to schools that they need to take care with the First Amendment and that school officials cannot arbitrarily choose which speech they will allow. Students are free to reveal their views unless there is a compelling reason to prevent it. This includes policies on dress codes, social media, school newspapers, The Pledge of Allegiance, and religious instruction in public schools.⁷ Disciplining a student or teacher in violation of a school policy requires school districts to take into consideration some important points on whether it encroaches on the First Amendment:

- the need for a safe, orderly, school environment conducive to learning
- the guaranteed American entitlement to speak or engage in expressive activity
- evidence the speech caused a substantial disruption of school activities
- whether the language is obscene or vulgar
- if the speech is in the form of a clear and convincing threat that leads others to fear for their safety.

⁶ Key Cases: *Pickering v. Board of Education* & *Connick v. Myers*
www.centerforpubliceducation.org

⁷ Ibid.

The Kennedy coach and administration acted correctly in not disciplining Anthony for kneeling during the National Anthem. Although his actions offended people as derived from the boos by those in attendance; the disruption was not substantial and boos were replaced by cheers as soon as the lights came back on and the game began. Furthermore, the U.S. Supreme Court has made it clear in the case of *Russo v. Central School District No. 1* that it is a violation of the First Amendment to force students or teachers to recite the Pledge of Allegiance, or even to stand while others are reciting it.

In the matter of Beth's discipline, it is my legal opinion that the Kennedy School Principal erred in ordering Beth to write a letter of apology to Anthony and that the School Disciplinary Board also erred in recommending a two day suspension for her refusal to write this letter. Although Beth's actions may have been personally directed at Anthony, the key question is whether or not her behavior created a material or substantial disruption of the assembly. Her "quiet but conspicuous" protest was not substantially disruptive, did not infringe on Anthony's right to speak or on the other student's right to listen to his speech. Her protest was neither obscene nor vulgar, nor threatened the safety of anyone at the assembly. It appears that Anthony's actions caused more disruption at the football game than Beth's did at the school assembly.

The First Amendment was meant to protect less popular views. School officials cannot arbitrarily pick and choose the speech it will allow. Students and teachers are free to reveal their views with a guaranteed American entitlement to speak or engage in expressive activity under the First and Fourteenth Amendments of the U.S. Constitution unless there is a compelling reason to stop it.⁸

⁸ Freedom of Expression in Schools:
education-law.lawyers.com/school-law/freedom-of-expression-i...

Works Cited

Abrams, Eliana, et al. "The Perilous Fight." *Time*.

"The First Amendment in Schools- Resource Guide." *NCAC*, By ncac.org/resource/first-amendment-in-schools.

"Freedom of Expression in Schools." *Education Law*, education-law.lawyers.com/school-law/freedom-of-expression-i...

"Free Speech and Public Schools." *Center for Public Education*, www.centerforpubliceducation.org/Main-Menu/Public-education/.

"Free Speech in Public Schools- Find Law." *FindLaw*, education.findlaw.com/student-rights/student-rights-and-free...

"K-12 Public School Student Expression Overview-First Amendment." *First Amendment Center*, www.firstamendmentcenter.org/k-12-public-school-student-expr.

"Key Cases: Pickering V. Board of Education & Connick V. Myers." *Center for Public Education*, www.centerforpubliceducation.org.

"Key Supreme Court Cases: Bethel School District V. Frasier." *American Bar*, www.americanbar.org.

"Russo V. Central School District No. 1." *Legal*, www.legal.com.