PACIFIC LEGAL FOUNDATION

June 6, 2017

VIA EMAIL: Mark.rendell@indianriverschools.org
AND FIRST CLASS MAIL
Dr. Mark J. Rendell, Superintendent
School District of Indian River County
6500 57th Street
Vero Beach, FL 32967

Re: J.P. Krause

Dear Superintendent Rendell:

Pacific Legal Foundation represents John "J.P." Krause, a student at Vero Beach High School. On April 25, 2017, J.P—a candidate for senior class President—gave a short, teacher-invited campaign speech in his Advanced Placement U.S. History class. The next day, while J.P. attended a national academic competition on behalf of VBHS, the school held the election. J.P. won. He won the school presidency. A moment any parent would celebrate, and a moment any school administration would normally honor. But not this time.

Although J.P. won according to VBHS rules, the school administration refused to honor the results of the election. Instead, it punished him for his short, humorous, in-class campaign speech. School rules do not forbid the use of humor in campaign speeches, and his teacher did not object to the content of J.P.'s speech. Yet remarkably, in response to the First-Amendment protected speech he gave in class, the school's administration punished J.P. with detention and disqualified him from the presidency. The administration falsely claimed that he *harassed* his fellow student candidate.

In a country that holds its voting rights sacrosanct, not to mention its First Amendment rights, it is surprising that the school decided to disqualify an election winner because of pure political speech. It's likewise surprising that the school would disregard the voting rights exercised by the students of the school, who voted for J.P. only to find their intentions entirely disregarded by VBHS school administration.

What lesson does the school's response teach J.P. and his classmates about free and fair elections? What lesson did it teach them about the First Amendment?

In recognition of J.P.'s First Amendment rights, and in respect to the student voters at VBHS, PLF respectfully requests that the School Board reinstate J.P. as Vero Beach High School's Student Body Senior Class President and eliminate from J.P.'s record any mention of a disciplinary action involving "harassment." We make this request because the laws demand nothing less. The Constitution is on our side.

HEADQUARTERS: 930 G Street | Sacramento, CA 95814 | (916) 419-7111 | FAX (916) 419-7747
ATLANTIC: 8645 N. Military Trail, Suite 511 | Palm Beach Gardens, FL 33410 | (561) 691-5000 | FAX (561) 691-5006
DC: 3033 Wilson Boulevard, Suite 700 | Arlington, VA 22201 | (202) 888-6881 | FAX (202) 888-6855
HAWAII: P.O. Box 235856 | Honolulu, HI 96823-3514 | (808) 733-3373 | FAX (808) 733-3374
NORTHWEST: 10940 NE 33rd Place, Suite 210 | Bellevue, WA 98004 | (425) 576-0484 | FAX (425) 576-9565
ALASKA: (907) 278-1731 | **OREGON:** (503) 241-8179

E-MAIL: plf@pacificlegal.org
WEB SITE: www.pacificlegal.org

I. Punishing J.P. for His Speech Violates the First Amendment

The First Amendment protects speech that might offend others. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 512 (1969), the United States Supreme Court recognized "*neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.*" The Court held that a school may not censor a student's speech unless it caused a substantial disruption of, or a material interference with, school activities. J.P.'s speech caused no substantial disruption of, or material interference with school activities or the rights of other students. His speech simply asked his fellow students for their support in the upcoming student election.

To be sure, if a student gives a speech that is lewd, vulgar, or profane, then the school can sanction him. *See, e.g., Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986). But that is not remotely the case here.

J.P.'s speech did no more than involve light-hearted humor by associating his opponent in satirical manner with current political and cultural events. His speech directly referenced national political campaign topics, such as Communism, raising taxes, and President Trump's stated intention to build a wall on our country's southern border. Nobody could have taken his comments seriously; that is, no reasonable person believes his fellow candidate for the Presidency is a Communist, wants to raise the students' taxes, or favors Sebastian River High School rather than her own high school. Yet VBHS Principal Shawn O'Keefe claims in an email to J.P.'s mother that J.P.'s speech violated the harassment policy because he "publicly humiliated" his opponent. Accepting that preposterous claim for the sake of argument, the Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. *See Tinker*, 393 U.S. at 509. As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance. Here, we have no fear of disruption, let alone a specific or significant fear.

II. The VBHS Code of Student Conduct Handbook Violates the First Amendment as Overbroad

J.P.'s speech in no way singled out his fellow student candidate for her appearance, abilities, gender, race, creed, religious beliefs, or sexual orientation. Nor was it "deeply offensive." It did not interfere with her educational performance, educational opportunities, or educational benefits. Yet the school claims that his speech amounted to harassment. The school's definition, and its application of that definition here, violates the First Amendment.

The Student Handbook broadly defines harassment as "any threatening, insulting, or dehumanizing gesture, use of data or computer software, or written, verbal or physical conduct directed against a student or school employee that: 1) Places a student or school employee in

reasonable fear of harm to person or damage to property, 2) Has the effect of substantially interfering with a student's education performance, opportunities, or benefits, 3) has the effect of substantially disrupting the orderly operation of a school." Handbook at 30-31.[1]

The relevant language here is "verbal conduct....directed against a student." Of the three possible outcomes listed by the definition, the first and third plainly do not apply here. Thus the only conceivable outcome that the school could be alleging here is the second—that the alleged "harassing" speech "has the effect of substantially interfering with a student's educational performance, opportunities, or benefits." This forbidden effect is the broadest of the three, the only one that could even conceivably be read to bar "publicly humiliat[ing]" another student.

The policy's broad ban on "verbal conduct" is unconstitutional, both on its face and as applied here. We know it is unconstitutional, because a U.S. Supreme Court justice has said the same about a similar school policy. In *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), the U.S. Third Circuit Court of Appeals, in an opinion written by then Judge, now Justice Samuel Alito, struck down a school district's harassment policy as overbroad, holding that even speech that is defined as "harassing" may enjoy First Amendment protection.

In *Saxe*, Judge Alito wrote that the school's harassment policy improperly swept in those "simple acts of teasing and name-calling" that had previously been held to be protected by the First Amendment. The policy's language in that case barred speech that has the "purpose or effect of" interfering with educational performance or creating a hostile environment. It ignored the constitutional requirement that a school must reasonably believe that speech will cause actual material disruption before prohibiting it. Judge Alito explained that even if the speech created a "hostile environment" that "intrudes upon . . . the rights of other students," it is not enough that the speech is merely offensive to some listener, because "there is no categorical 'harassment exception' to the First Amendment's Free Speech Clause.

The school's harrassment policy—like the one at issue here—had no threshold requirement of pervasiveness or severity, and therefore it could cover any speech about someone the content of which could offend someone. This could bar "core" political and religious speech (like J.P.'s political speech here). Provided such speech does not pose a realistic threat of substantial disruption, the Third Circuit held, *it is within a student's First Amendment rights.*

Likewise here, J.P.'s speech has been targeted by the school district's harassment policy, a policy that is similarly overbroad and unconstitutional. J.P. did not create a substantial disruption—to the contrary, the video of the incident reflects that the 'speech' allowed for 90 seconds of lighthearted fun, and clever political satire, in a high-level academic class.

---

[1] The other examples of harassment in the Code of Conduct are not relevant to this discussion.

Indeed, in *Saxe*, Judge Alito noted that the First Amendment protects speech that is far more offensive or humiliating than what is at issue here. Judge Alito said: "There is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." J.P.'s speech didn't come within a country mile of this kind of offensive speech—speech that the Third Circuit ruled was protected—yet VBHS decided J.P.'s speech was not protected, and instead punished him for it pursuant to its unconstitutional harassment policy.

Supreme Court precedent also demonstrates that the VBHS school policy here fails to pass constitutional muster. A regulation is unconstitutional on its face as overbroad where there is "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). Here, students at VBHS will never know what they can say that will trip the wires of the school's harassment policy, since administration has held (so far) that J.P.'s harmless speech violated the harassment code. If this innocuous 90 seconds violates the harassment code, then what speech won't?

At bottom, as Justice Alito said in *Saxe*, there is no categorical 'harassment exception' to the First Amendment's Free Speech Clause. Although there is "a compelling interest in promoting an educational environment that is safe and conducive to learning, there are no facts here sufficient to justify the VBHS position that J.P. created a substantial disruption. To the contrary, the video of the incident demonstrates that the classroom remained an environment safe and conducive to learning at all times.

What's particularly striking about this misuse of a speech code is the fact that the student handbook promises to deliver a much more robust institution for its public school students. In the handbook, VBHS and the Indian River County School District claim that the school must "prepar[e] all students to thrive in college, career, and community endeavors." In the 21st Century, we should expect to hear opinions we may not personally agree with and stand ready to engage those opinions in the marketplace of ideas. Vero Beach High School does its students no service to punish a student for innocent humor conducted as part of a school election, with an A.P. U.S. History teacher's permission. To the contrary, the school's misuse of its Code of Conduct unjustly steals the election and brands his record with a "harassment" charge, unconstitutionally interferes with J.P.'s educational opportunities, and jeopardizes his college admission possibilities.

Conclusion

The actions taken by the school here—both in the way it treated J.P. and in the way it applied its harassment policy—created a "chilling" effect that stifles student speech for all students, not just J.P. Those actions violated J.P.'s First Amendment rights.

The classroom has been recognized by the Supreme Court of the United States as the "marketplace of ideas," and the High Court has emphasized the "nation's future depends on leaders trained through wide exposure to that robust exchange of ideas." High school students, particularly those campaigning in a school election, cannot be punished for innocuous humor and political satire of the sort J.P. engaged in. The Constitution forbids it. I hope this letter is well-taken at the School District and causes the District to reverse its position, reinstate J.P. Krause as Class President, and remove any reference to a finding of harassment against J.P.

I look forward to hearing from you.

Sincerely,

MARK MILLER
Senior & Managing Attorney
Pacific Legal Foundation

cc: Shawn R. Frost (Shawn.Frost@indianriverschools.org)
Dale Simchick (Dale.Simchick@indianriverschools.org)
Laura Zorc (Laura.Zorc@indianriverschools.org)
Charles G. Searcy (Charles.Searcy@indianriverschools.org
Tiffany M. Justice (Tiffany.Justice@indianriverschools.org)
Principal Shawn O'Keefe (Shawn.Okeefe@indianriverschools.org)