

Children's Law Center of Indiana



Delinquency

04/09/2007

NOTE: Transfer Granted, Opinion Vacated 878 N.E. 2d 212 (Ind. Sept. 25, 2007)

In **A.B. v. State**, 863 N.E.2d 1212 (Ind. Ct. App. 2007), the Court reversed and remanded with instruction to vacate the juvenile court's adjudication of the juvenile as a delinquent based on six counts of harassment, offenses that would be Class B misdemeanors if committed by an adult. A Middle School principal was the subject of a February 15, 2006 posting by the juvenile on myspace.com. The posting said:

Hey you piece of greencastle shit. What the fuck do you think of me [now] that you can[t] control me? Huh? Ha ha ha guess what I'll wear my fucking piercings all day long and to school and you can[t] do shit about it! Ha ha fucking ha! Stupid bastard! Oh and kudos to whomever made this ([I'm] pretty sure I know who). Get a background.

Although the juvenile made other such postings, this is the only one referred to by the juvenile court in its order supporting the delinquency adjudication. The juvenile court placed the juvenile on nine months of probation combined with various conditions. The juvenile appealed contending that the juvenile court erred by not protecting the content of the February 15 posting as political speech pursuant to the First Amendment of the U.S. Constitution and Article 1, Section 9 of the Indiana Constitution.

The juvenile's conviction for harassment contravened her right to speak, as guaranteed by the Indiana Constitution. *Id.* at 1218. The Court noted that having found Article 1, Section 9 of the Indiana Constitution dispositive in this case, it did not need to review the juvenile's claim under the First Amendment of the U.S. Constitution. *Id.* at 1218 n.3. The Court quoted the harassment statute, I.C. 35-45-2-2(a)(4) as well as Article 1, Section 9 of the Indiana Constitution which states: "No law shall be passed, restraining the free interchange of thought and opinion or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible." *Id.* at 1216. The Court observed that because the juvenile wrote a message on a website, the legality of her prosecution must stand or fall on the dictates of "our constitution's free expression provision." *Id.* Citing *Whittington v. State*, 669 N.E.2d 1363, 1367 (Ind. 1996), the Court used a two-step inquiry to review the constitutionality of the application of the harassment statute: (1) the reviewing court determines whether state action has restricted a claimant's expressive activity; and (2) if it has, the court must decide whether the restricted activity constituted an abuse of the right to speak. *A.B.* at 1216-17. As to the first step, according to the Court, at a minimum the clause is implicated when the State imposes a direct and significant burden on a person's opportunity to speak his or her mind, in whatever manner the speaker deems most appropriate. Here, the Court concluded that this condition was satisfied by the juvenile's adjudication for harassing the principal by posting a message on an internet website. *Id.* at 1217. According to the Court, in

addressing the second step, when reviewing the State's determination that a claimant's expression was an abuse of the right of free speech under the Indiana Constitution, the court is required to find only that the State's determination was rational. However, if the claimant's speech giving rise to the harassment conviction is political, the State must demonstrate that it has not materially burdened the claimant's opportunity to engage in political expression. Madden v. State, 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003). Such expression is not materially burdened if the State produces evidence that the speech inflicted particularized harm analogous to tortuous injury on readily identifiable private interests. To demonstrate the requisite level of harm, there must be evidence that the speech caused actual discomfort to persons of ordinary sensibilities or that it interfered with an individual's comfortable enjoyment of his privacy. Evidence of mere annoyance is insufficient. Shoultz v. State, 735 N.E.2d 818, 825-26 (Ind. Ct. App. 2000). For purposes of Section 9, a claimant's expressive activity is political if its point is to comment on government action, rather than to focus on the conduct of a private party, including the speaker. The nature of expression will be judged by an objective standard, and the burden is on the claimant to demonstrate that the expression would have been understood as political. Whittington at 1370. A.B. at 1217.

The Court noted that, here, it is clear that school authorities are state actors for purposes of freedom of expression and, as such, are subject to the commands of the First Amendment and by extension, Section 9 of the Indiana Constitution. Id. at 1218. The Court stated that viewing the juvenile's posted comments objectively, the juvenile openly criticized the principal's imposed school policy on decorative body piercings and forcefully indicated her displeasure with it. The Court held that, while it had little regard for the juvenile's use of vulgar epithets, her overall message constituted political speech in that the thrust of her expression focused on explicitly opposing the action of the principal, a state actor, in enforcing a certain school policy. Id. The Court observed, however, that political expression is not shielded from all criminal liability, but noted that, here, the State had failed to produce any evidence that the juvenile's expression inflicted particularized harm analogous to tortuous injury on readily identifiable private interests as required to rebut the juvenile's claim of political speech. Id.