MEMORANDUM

TO: Members of the School Board

FROM: Lawyer

RE: Acceptable Forms of Protest

In the fall, the quarterback (Anthony) of Kennedy High School's football team kneeled during the national anthem to protest the unfair treatment of African Americans in America. The school took no disciplinary action, which was appropriate in light of the fact that the student's action was political symbolic speech protected by the First and Fourteenth Amendments. At an assembly a week after the game, another student (Beth) turned her back on the quarterback as he was speaking to protest his actions at the game. The school's Student Disciplinary Board recommended a two-day suspension after Beth refused to write an apology.[1] Enforcing that suspension would violate the Beth's free speech rights, since her actions, like Anthony's, constituted protected symbolic speech and amounts to unconstitutional viewpoint discrimination.

The school acted appropriately in not punishing Anthony for his silent protest at the football game, since his protest amounts to constitutionally protected speech. Anthony, the team's captain and starting quarterback, kneeled to call attention to police racial profiling and violence perpetrated against African Americans, a protest he planned to continue later in the season. There were murmurs and boos from the crowd, but neither the school nor the coaching staff took any disciplinary action against Anthony.[2] While Anthony's silent protest is not technically speech, the Supreme Court has routinely viewed this kind of protest as symbolic

[1] "Taking a Knee or Taking a Stand" (Attachment A)
[2] Id.

speech. In Tinker v. Des Moines, the Supreme Court reviewed a similar scenario, where a school forbade students from wearing black armbands to protest the Vietnam War.[3] The Tinker Court and held that this protest was a "symbolic act" and therefore "akin to pure speech."[4] Like the armbands in Tinker, Anthony's silent kneeling is a form of symbolic, political speech, entitled to the highest level of First Amendment protection.[5] As the Court has long maintained, "the protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," and attempts to restrict that kind of speech must survive strict scrutiny.[6]

The fact that Anthony's protest happened in a school setting does not change the fact that his speech is entitled to First Amendment protection. In Tinker, the Court stated that students do not "shed their constitutional rights to freedom of speech and expression at the schoolhouse gate."[7] The Court also clarified that students' speech rights apply "[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours."[8] The Tinker Court did, however, acknowledge, that in a school context, students' free speech rights are not unlimited. Schools have "comprehensive authority . . . to prescribe and control conduct in schools" and can constitutionally limit speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[9] The only indication of any disorder in the record is that

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[3] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 504 (1969).
[4] Id. at 505.
[5] The Court has found that certain types of speech in schools do *not* merit this level of protection. For example, in Bethel School District v. Fraser, the Court clarified that "vulgar" speech is not protected in the same way as political speech. 478 U.S. 675, 685 (1986). The Court reached the same conclusion about speech promoting drug use in Morse v. Frederick. 551 U.S. 393 (2007). There is no evidence that the speech in this case is vulgar or promotes illegal activity.
[6] Roth v. United States, 354 U.S. 484 (1957).
[7] Tinker at 513.
[8] Id. at 512-13.
[9] Id. at 513.

"many in the crowd [did] not like it and the murmurs turn[ed] to boos" and that one student, Beth, stood in protest during an assembly a week later.[10] Those negative reactions do not rise to the level of "material disruption" sufficient to allow a restriction on Anthony's right to speech; in Tinker, for example, "a few students made hostile remarks to the children wearing the armbands," but the Court did not find that to be substantial disruption. Instead these are examples of what the Court in Tinker called "the discomfort and unpleasantness that always accompany an unpopular viewpoint."[11] Therefore, the school acted appropriately by not disciplining Anthony, since his protest constitutes protected speech and the school had no reasonable basis on which to punish of restrict that speech .

Like Anthony's protest, Beth's actions also constitute symbolic, political speech, and therefore, enforcing the Student Disciplinary Board's suspension recommendation would violate her First Amendment rights. Beth, a member of a Gold Star family, turned her back to Anthony during assembly to convey her disagreement with his protest. The school found that Beth's actions violated the school's written policy of treating others with respect, and therefore ordered her to write an apology and suggested disciplinary consequence when she refused.[12] Beth's silent protest, much like Anthony's, is political, symbolic speech, qualifying for the highest level of protection.[13] The fact that there is a school policy that she has arguably violated does not automatically change this conclusion; a policy cannot be enforced if doing so would violate a constitutional right.

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[10] "Taking a Knee or Taking a Stand" (Attachment A)
[11] Tinker at 509.
[12] "Taking a Knee or Taking a Stand" (Attachment A)
[13] Like Anthony's speech, Beth's speech was neither vulgar, nor did it advocate illicit behavior, making this fact pattern significantly different than those in Bethel and Morse.

There is no evidence that Beth's actions "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school," which would strip her of First Amendment protection.[14] According to the record, Beth turned her back on Anthony "quietly but conspicuously."[15] There is no evident of a reaction, positive or negative, among the student body to her protest or to her refusal to write a letter of apology. As the Court wrote in Tinker, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[16]

It appears that the school and Student Disciplinary Board's actions in this case amount to viewpoint discrimination. As the Tinker court wrote, "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[17] By punishing Beth's protest, while implicitly condoning Anthony's symbolic act, the school is unconstitutionally favoring one side of a political debate over another.

It is crucial for schools to be safe places where students treat each other with respect. School administrators bear a significant responsibility in ensuring such a conducive learning environment. At the same time, school authority here is not unlimited; students have rights to speech in school, and protecting those rights is critical to educating an informed citizenry. Schools need to be places of free and open interchange of ideas that challenge students' beliefs, in turn establishing respect for opposing viewpoints and learning the valuable lesson of agreeing to disagree. In this case, both student protests were protected symbolic speech that did not

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[14] Tinker at 509, citing Burnside v. Byars, 363 F.2d 744, 749 (1966).
[15] "Taking a Knee or Taking a Stand" (Attachment A)
[16] Tinker at 508.
[17] Id.

substantially disrupt the school environment. Therefore, the school acted appropriately with regard to Anthony's action, but it would be unconstitutional for the school to follow through on its plan to suspend Beth.

Works Cited

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Burnside v. Byars, 363 F.2d 744 (1966)

Morse v. Frederick. 551 U.S. 393 (2007)

Roth v. United States, 354 U.S. 484 (1957)

"Taking a Knee or Taking a Stand" (Attachment A)

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)