Memorandum

From: Lawyer for the Board of Education
To: Board of Education
Subject: Acceptable forms of student protest

At the next meeting, the School Board must carefully consider the district's policy on acceptable student protests. Two students from Kennedy High School have recently initiated protests during school sponsored events. At the last football game, Anthony took a knee while the national anthem played to protest injustice against African Americans. A week later, Beth, angry at Anthony's disregard for the flag and country, turned her back on him while he was speaking at an assembly. The School Disciplinary Board has recommended Beth receive a two day suspension for disrespecting another student and refusing to issue an apology at the request of the principal. Anthony has not received any formal action. In order to address this issue thoroughly, Anthony's behavior at the football game will be examined along with Beth's behavior at the assembly. Upon review of legal precedent, the school does not have a strong legal standing to discipline either student without violating their First Amendment rights.

Under *Tinker v. Des Moines Independent Community School District,* the Supreme Court determined that students retain First Amendment rights in public schools. The majority opinion stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate".[1]

However, this right is not without limits. Known as the "material and substantial disruption" test, *Tinker v. Des Moines Independent Community School District* notes that schools may prohibit expression if it interferes with the classroom learning environment or infringes on

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[1] Tinker Et Al v. Des Moines Independent Community School District Et Al, 393 U.S. 503, (Feb. 24, 1969). Accessed February 24, 2017. https://scholar.google.com/scholar_case?case=15235797139493194004&hl=en&as_sdt=8006&as_vis=1.

the rights of others.[2] Subsequent cases have strengthened the degree of control schools have over student expression. *Hazelwood School District v. Kuhlmeier* permitted a school to censor student newspaper articles on sensitive topics noting that "First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment".[3] Ultimately, the *Tinker* case serves as the fundamental guideline for considering the student protests at Kennedy High School.

Applying the "material and substantial disruption" test, Anthony's protest is protected speech because it was silent and did not interfere with the football game. Furthermore, there is a clear legal precedent that confirms his actions are protected under the First Amendment. The Supreme Court case *West Virginia v. Barnette* ruled that schools cannot force students to recite the Pledge of Allegiance or to salute the flag because "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[4] In other words, students cannot be coerced to honor the flag or country if it is contrary to their beliefs. Similar decisions in lower federal courts have considered standing for civic ceremonies an extension of this right. In *Goetz v. Ansell,* the 2nd US Circuit Court of Appeals determined that "The alternative offered plaintiff of standing in silence is an act that cannot be compelled over his deeply held convictions. It can no more be required than the Pledge itself".[5] Similarly in *Lipp v. Morris* the 3rd US Circuit Court of

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[2] Ibid.
[3] Hazelwood School District v. Kuhlmeier, 86 U.S. 836, (Jan. 13, 1988). Accessed February 24, 2017. http://caselaw.findlaw.com/us-supreme-court/484/260.html.
[4] West Virginia State Board of Education Et Al v. Barnette Et Al, 319 U.S. 624, (June 14, 1943). Accessed February 24, 2017. https://scholar.google.com/scholar_case?case=8030119134463419441&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[5] Goetz v. Ansell, 477 F.2d 636, (2d Cir. Apr. 19, 1973). Accessed February 24, 2017. https://scholar.google.com/scholar_case?case=7214020129234354461&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Appeals deemed demanding students to stand at attention was "an unconstitutional requirement that the student engage in a form of speech and may not be enforced".[6] Anthony undoubtedly has the Constitutional right to kneel during the national anthem.

When evaluating Beth's protest under the "material and substantial disruption" test a similar conclusion is reached. Her actions caused no disruption at the school assembly thus it qualifies as protected speech. Courts have previously ruled that symbolic behavior carried out in a non-obtrusive manner is legal. In *Brown v. Louisiana* the Supreme Court decided that a stand-in at a segregated public library was protected under the First Amendment. The Court explained, "[R]ights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be"[7] Beth had a right to be at the assembly and to silently turn away. She cannot be suspended merely on the grounds of her protest or refusing to issue an apology.

In *Texas v. Johnson,* the Supreme Court mentioned two criteria for an action when considering symbolic expression. There should be "[a]n intent to convey a particularized message" and a great likelihood "that the message would be understood by those who viewed it".[8] Both students can be asked by the school to clarify their motivations so that their behavior is understood as an expression of a political view and not disrespect in violation of the student handbook.

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[6] Lipp v. Morris, 579 F.2d 834, (3d Cir. July 18, 1978). Accessed February 24, 2017. https://scholar.google.com/scholar_case?case=8827308107684536245&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
[7] Brown v. Louisiana, 383 U.S. 131, (Feb. 23, 1966). Accessed February 24, 2017. https://supreme.justia.com/cases/federal/us/383/131/case.html.
[8] Texas v. Johnson, 491 U.S. 397, (June 21, 1989). Accessed February 24, 2017. https://www.law.cornell.edu/supremecourt/text/491/397.

The school administration can only take action if student protests escalate to personal attacks. Schools are understood to have *in loco parentis,* which means they have some legal authority to act as parents.[9] In *State v. Pendergrass,* the North Carolina Supreme Court asserted that "the teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power".[10] Additionally, *Bethel School District No. 403 v. Fraser* affirmed a school's responsibility of teaching students "habits and manners of civility as values" and "the boundaries of socially appropriate behavior". [11] As such, the school has a legitimate responsibility to discipline students if the situation is beyond an expression of political views. For example in *Lander v. Seaver,* the Vermont Supreme Court upheld punishment for a student who called his teacher "Old Jack Seaver" in front of other students.[12]

To summarize, the school does not have standing to discipline either Anthony or Beth for their peaceful protests. Unless a protest becomes an impairment to learning, schools must maintain an environment in which students can express their opinions openly.

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[9] Todd A. DeMitchell, "In Loco Parentis," USEduLaw, accessed February 24, 2017, http://usedulaw.com/345-in-loco-parentis.html.
[10] State v. Pendergrass, 19 N.C. 365, (North Carolina Supreme Court June 1837). Accessed February 24, 2017. https://la.utexas.edu/users/jmciver/357L/19NC365.html.
[11] . Bethel School District No. 403 v. Fraser, 478 U.S. 675, (July 7, 1986). Accessed February 24, 2017. https://www.law.cornell.edu/supremecourt/text/478/675.
[12] Morse v. Frederick, 439 F.3d 1114, (June 25, 2007). Accessed February 24, 2017. https://www.law.cornell.edu/supct/html/06-278.ZC.html.

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