

Memorandum

To: Board of Education

From: Board of Education Attorney

Date: 2/20/25

Subject: Political Expression Versus Maintaining Order

I. BACKGROUND

Students Michael, an openly gay Puerto Rican, and Victoriya, a proud Ukrainian, were inspired by ABC High School's current events curriculum and represented their identities with flags on their clothing, personal textbooks and, with permission, the classroom walls of their teacher Mr. Teta. While the student's national flags were initially supported by the student body, controversy arose when Michael requested to display a pride flag. As requests for increasingly divisive flags such as Black Lives Matter grew, Mr. Teta followed administration advice and removed all flags with national and political affiliations within his classroom.

Angered by this censorship, students began to wear clothing, draw in textbooks and write in school newspapers in support of their personal ideology and identity. Subsequently, the student body split into violent factions wherein students would physically fight those of opposing ideology.

To suppress violence, the school enacted a new policy to ban all forms of political expression. Consequently, Victoriya and Michael were suspended when they continued to wear the colors of their flag, while those wearing the American flag weren't punished. Following the students' appeal of their suspensions, the school asserted their right to quell disruption, maintain safety and discipline, and uphold the rights of non-participants' education.¹

¹ Provided materials

II. ANALYSIS OF CLAIMS

Political speech remains the most highly protected form of expression within high schools. While the “imminent lawless action” test of *Brandenburg v. Ohio* has been the defining precedent for free speech in the public forum, Supreme Court Justice Fortas’ 1969 assertion that “students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” remains the most frequently cited precedent of student First Amendment rights.²

The three tests established in *Tinker v. Des Moines Independent Community School District* for determining appropriate instances to censor expression are: substantial disruption, “reasonable forecast” of disruption, and the “heckler’s veto.”³

The primary two tests relate to ABC's assertion that its policy protected against a “disrupt[on] to the learning environment.”⁴ The protests in *Tinker*, in which students wore Anti-Vietnam War armbands, parallel the controversy at ABC of wearing pro-LGBTQIA+ colors, both in medium of expression and in the resulting level of disruption. In *Tinker*, there is evidence of hostile reactions to the student protests, including physical violence and death threats that mirror, if not surpass, the level of disruption within ABC.⁵ *Tinker*’s high level of disruption does not guarantee that ABC passes the disruption test, however; Fortas’ majority opinion never mentions the violence caused by the armbands because the school’s “professional pride”

² *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)

³ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); Driver, Justin. *The Schoolhouse Gate: Public Education, the Supreme Court, and the battle for the American mind*. New York: Vintage Books, 2019: 76, 77, 125

⁴ Provided materials

⁵ Raskin, Jamin B., "No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the *Tinker* Decision" (2009). *Articles in Law Reviews & Other Academic Journals*. 1046.

prevented it from submitting these facts to the official record.⁶ Although this may indicate ABC's right to protect social order with censorship, the final *Tinker* test proves otherwise.

According to Fortas, schools cannot censor due to “disruptive reactions to speech,” but only if the speech itself is disruptive.⁷ Examples of disruptive expression include promotion of drug use, seen in *Frederick v. Morse*; and obscene speech as in *Bethel School District v. Fraser*.⁸ The nonviolent political activism in ABC clearly does not fall within the scope of disruptive speech, and therefore its only level of disruption is in its reception.

The notion of the “heckler’s veto” has had inconsistent rulings within the courts.⁹ For instance, in *Dariano v. Morgan Hills School District* upheld the prohibition of students wearing American flags on Cinco de Mayo while the Eleventh Circuit stated in *Holloman v. Harland* that school’s limiting speech “sacrifice freedom upon the alt[a]r of order, and allow our liberty to be dictated by the inclinations of the unlawful mob.”¹⁰ Therefore, if ABC’s policy were to reach the courts, it is likely that a judge would rule in opposition to the heckler’s veto.

ABC’s final assertion that students’ rights to education must be protected disregards the maturity of high school students and their contributions to the marketplace of ideas. In the Seventh Circuit case of *Nuxoll v. Indian Prairie School District*, Justice Rovner states: “youth are often the vanguard of social change... To treat them as children in need of protection from controversy... is contrary to the values of the First Amendment.”¹¹ Thus, ABC’s assertion is invalid.

⁶ Driver, Justin. *The Schoolhouse Gate: Public Education, the Supreme Court, and the battle for the American mind*. New York: Vintage Books, 2019: 86

⁷ Driver, Justin. *The Schoolhouse Gate: Public Education, the Supreme Court, and the battle for the American mind*. New York: Vintage Books, 2019: 77; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)

⁸*Morse v. Frederick*, 551 U.S. 393 (2007) ; *Bethel School District v. Fraser*, 478 U.S. 675 (1986)

⁹Driver, Justin. *The Schoolhouse Gate: Public Education, the Supreme Court, and the battle for the American mind*. New York: Vintage Books, 2019: 126

¹⁰ *Dariano v. Morgan Hill Unified Sch. Dist., et al.*, No. 11-17858 (9th Cir. 2014); *Holloman v. Harland*, 2004 WL 1178465 (11th Cir. May 28, 2004)

¹¹*Nuxoll v. Indian Prairie School District*, No. 08-1050 (7th Cir. 2008)

Although court interference with school affairs is controversial, the Fourteenth Amendment incorporation of First Amendment freedom of expression into the states requires schools to abide by most constitutional principles, making it the role of the courts to protect this right. As Justice Jackson explains in *West Virginia State Board of Education v. Barnette*, one of the first cases protecting free expression in schools, “we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹² Thus, it is the duty of schools, to quote Justice Fortas, to “take that risk” of allowing speech that deviates from “majority opinion” because that “kind of openness” is integral to “our national strength.”¹³ Ultimately, it is the legal obligation of ABC to protect the free expression of its students and foster an environment where students can peacefully interact with opinions they oppose.

III. OPINION AND RECOMMENDATIONS

One of the primary concerns of ABC is the student body’s division into factions. Rather than resorting to censorship, the school should instead follow the wisdom of Federalist No. 10, by James Madison, which provides a valuable metaphor regarding factions. Madison claims the only ways to “remov[e] the causes of factions” are by “destroying liberty” or through forced homogeny; however, “It could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”¹⁴ Therefore, according to Madison, factions cannot be entirely removed because to do so would jeopardize the ideals of the nation, and instead efforts should be made to mitigate their effects. Correspondingly, ABC

¹² *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

¹³ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)

¹⁴ Madison, James. “The Federalist No. 10.” *Daily Advertiser*, 22 Nov. 1787.

cannot authoritatively restrict peaceful student expression and it should instead strive to foster a safe space for peaceful disagreements.

I recommend that ABC High School institutes school sponsored political debates with moderators, no tolerance policies against fighting, lessons exploring acceptance towards diverse political views, additional security, and increased punishment against videotaping fights. These measures will alleviate violence, promote independent thinking, and provide a safe space to explore peaceful political expression.

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