

MEMORANDUM

TO: School District Superintendent
FROM: School District Attorney
SUBJECT: Display of the Confederate Flag in Public Schools

I. BACKGROUND

This memorandum responds to your inquiry about whether a drawing of the Confederate flag for a school art project violates the school board’s policy. At issue in this incident are students’ right to free speech and schools’ responsibility to provide a safe, inclusive, and respectful learning environment for all students.

While the Supreme Court has long established that artistic expression across all forms is akin to “pure speech” and entitled to First Amendment protection, it has allowed restriction and censorship of the free expression rights of public school students in various circumstances.¹ It should also be noted that despite being a significant part of Southern heritage, the meaning of the Confederate flag has shifted over time. It has become a racially divisive symbol and has been used in several incidents throughout the nation to promote violence and racism. Courts across the country have repeatedly upheld public schools’ authority to restrict the Confederate flag.

Pertinent precedent provides important guidance on how school districts should respond to the specific situations encountered in school.

¹ U.S. Const. Amend. I

II. ANALYSIS AND SUMMARY

The U.S. Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District* (1969) established that public school students' right to free speech at school is protected by the First Amendment.² However, the Court recognized these rights under the condition that the speech did not "materially and substantially disrupt the work and discipline of the school."³ The Court later expanded *Tinker* standard and ruled in *Bethel School District v. Fraser* (1986) that schools could regulate student expression that would "undermine the school's basic educational mission", even if it was not disruptive of the school environment.⁴ Two years later, it further reinforced in *Hazelwood School District v. Kuhlmeier* (1988) that schools have the discretion to prohibit any form of expression if censorship is "reasonably related to legitimate pedagogical concerns."⁵

Applying First Amendment framework and the standards established by the Supreme Court, lower federal courts have addressed the issue of Confederate flags at public schools and upheld the school's ban of the flag in almost all cases. In *West v. Derby Unified School District No. 260* (1998), for instance, the U.S. Court of Appeals for the Tenth Circuit ruled in favor of the school district's disciplinary actions against a student for knowingly violating a policy prohibiting imagery of the Confederate flag "at school, on school property, or at school activities", and concluded that the district policy did not violate the First Amendment as the school officials "had a reasonable basis for forecasting disruption from display of such items at school, and its

² *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)

³ *Ibid.*, 503, 513.

⁴ *Fraser v. Bethel School Dist. No. 403*, 478 U.S. 675, 685 (1986).

⁵ *Kuhlmeier v. Hazelwood School District*, 484 U.S. 260, 261 (1988).

prohibition was therefore permissible under the *Tinker* standard.”⁶

While evidence of historic, race-based tension is present in most of these cases, it is worth noting that the U.S. Court of Appeals for the Eleventh Circuit has ruled in favor of a school district with no more evidence than prior fights between students of different races because “one only needs to consult the evening news to understand the concern school administrators [have] regarding the disruption, hurt feelings, emotional trauma, and outright violence which the display of the [Confederate flag] could provoke.”⁷

Moreover, civil rights laws are relevant. The display of the Confederate flag at school may cause some students to feel intimidated due to the flag’s tense history. Both federal (Title VI of the Civil Rights Act, Equal Educational Opportunities Act of 1974) and state laws (Conn. Gen. Stat. § Section 10-15c.) hold schools accountable for ensuring a safe learning environment for all students.⁸ While student safety is the responsibility of the entire community, schools are particularly responsible to take measures to prevent and intervene in student misconduct that may result in discriminatory harassment based on protective traits, such as race, color, religion, gender, or sexual orientation.

Following the principles established by courts and applicable laws, school leaders need to carefully assess all aspects of the specific situation they face and determine its potential impact. Should an expression be expected to create a substantial disruption or be inconsistent with the fundamental values of the school, school officials have a solid legal ground for banning it.

⁶ *West v. Derby Unified School Dist. # 260*, 23 F. Supp. 2d 1220, 1221 (D. Kan. 1998); *West v. Derby Unified School District # 260*, 23 F. Supp. 2d 1223, 1233 (10th Cir. 2000).

⁷ *Scott v. School Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir. 2003).

⁸ Title VI of the Civil Rights Act of 1964; Equal Educational Opportunities Act of 1974; Conn. Gen. Stat. § Section 10-15c.

III. OPTIONS AND RECOMMENDATIONS

There are two potential courses of action:

1. Inform the student and her parents of the violation and take disciplinary action to enforce the school board's policy. This option deals directly with the issue at surface-level; however, it does not address the root cause of the incident and may create increased confrontations among students of different races. Therefore, it is deemed less optimal.
2. Arrange a meeting with the student and her parents immediately to discuss the incident. Though it appears that the act of drawing the Confederate flag violates the school's written policy, it is possible that the student never intended to harass or intimidate anyone. Should that be the case, it is recommended that school officials initiate a broad discussion among all students to address the insensitivity to this weighty topic, the root cause of the incident. The Confederate flag is an important aspect of American history: rather than censoring or erasing it, educators are encouraged to take this opportunity to teach its history in context and to educate students about the importance of understanding the situation from others' perspectives.

In addition, it is strongly recommended that the school district organize a task force of students, parents, teachers, and other community members to develop an action plan to address the emerging issues of racial harassment and intimidation and update the district policy accordingly.

I would be glad to offer legal advice and assistance in this matter.

Last but not least, the school district should decide on a case-by-case basis whether it is appropriate to prohibit the display of the Confederate flag at school, factoring in the current local environment of the district as well as events occurring on the state and national level.

Works Cited

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