



Northern  
California

November 7, 2017

Lucia D. Vazquez, Board President  
Visalia Unified School District  
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Visalia, California 93277  
[lvazquez@vusd.org](mailto:lvazquez@vusd.org)

Re: **Public comments** to proposed changes to dress code banning “hate group” clothing

Dear Board President Vazquez,

We submit these public comments on behalf of Brianna Smith (a Visalia student activist), ACT for Women and Girls based in Visalia, CA, and the American Civil Liberties Union of Northern California (“ACLU”), regarding the proposed change to the dress code (AR 5132) being considered by the District at this evening’s school board meeting. It is our understanding that the proposed change will subject students to disciplinary measures if they wear “clothing, jewelry and personal items” that “promote . . . hate group activity” (hereinafter, “proposed policy”). It is also our understanding that this proposal is an attempt to help students feel safe on campus and in part in reaction to a student wearing a Confederate flag sweatshirt to school.<sup>1</sup>

As discussed in more detail below, we appreciate the stated intent behind the proposed policy. We share the view that the Confederate flag is a symbol of hate and intolerance that celebrates a war fought to keep Black people in bondage and terrorizes the descendants of the enslaved. Moreover, we applaud any efforts by the District to maintain an inclusive, safe, and nurturing environment for all students. Indeed, the Education Code makes clear that all school districts have a mandatory obligation to create a safe and inclusive environment for students. *See* Cal. Ed. Code §§ 201, 220, 32261(a). The Education Code further mandates that the District investigate reported instances of bullying by students and teachers. *See id.* at §§ 234.1(b), 32261(a), 32280.

Notwithstanding, we believe that the change in the dress code is misguided because among other reasons: i) it doesn’t address the root causes of racism and bigotry in the District; ii)

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<sup>1</sup> *See* <http://www.fresnobee.com/news/local/education/article181397876.html>.

it gives administrators and teachers even more discretion to impose discipline on students, discretion that often leads to selective enforcement against students of color—the very students that the proposed policy is intended to protect; and iii) a blanket ban on “hate group” symbols and the Confederate flag violates the Education Code and the constitutional guarantee of free speech.<sup>2</sup> Instead of banning protected speech, we urge that the District engage in meaningful efforts to combat racial and other biases on campus—including the steps we outline at the conclusion of this letter.

As an initial matter, we understand the deep concerns in the community over the display of a Confederate flag at school. For most Black people, the Confederate flag symbolizes a time when the law allowed individuals to treat Black people as less than human because of the color of their skin. For Black Southerners, this type of idolization never left the region. Black people often walk down streets and see Confederate flags waiving from backs of trucks or worn on clothes. It does not stop there. The KKK actively recruits in the South and Confederate monuments are proudly on display. These reminders of slavery, lynching, and Jim Crow are present and entrenched in daily life.

Similarly, in the Central Valley, Black students are regularly reminded that racists, bigots, and individuals who abhor their existence live among them as well. Recently, students were reminded of that reality when some of their classmates proudly displayed confederacy messages. For Black students, this was not a gentle reminder of “good old days” but a reminder of blatant racism and hatred. Seeing symbols of white supremacy reminds Black people and other people of color that racism is so embedded in the threads of this country, that it often just shifts forms while remaining ever present.

That said, we believe that the proposed change to the dress code is misguided. We appreciate that the District has a legal and moral duty to affirmatively combat racism and other forms of bigotry at school. But dress codes that purport to ban “hate group” or “offensive” or “demeaning” apparel, however well-intentioned, do not address the underlying source of racism, bigotry, and discrimination that happens at school. Certainly, racial bias in the District is not confined to displays of Confederate symbols.<sup>3</sup> As Brianna Smith, one of the authors of this letter, has previously explained to school officials, racial hostility within the District in her experience is getting increasingly worse. Black students are called the n-word, Mexican students are told to “go back to Mexico”, and white students regularly say, “white power” to students of color.<sup>4</sup> As Destiny Campos, a Visalia Unified high school student stated to us, “[banning hate speech in a

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<sup>2</sup> The District’s existing policy banning clothing that “advocate[s] racial, ethnic, religious, or sexual orientation prejudice” suffers from similar infirmities as the proposed policy.

<sup>3</sup> For example, in 2015, a fourth grader at Shannon Ranch Elementary School in Visalia refused to sing a song that had derogatory messages towards Native Americans. As a member of the Wukchumni tribe, he had to explain to administrators that a racist song should not be part of the curriculum. See <https://nativenewsonline.net/currents/ten-year-old-wukchumni-boys-refusal-to-sing-derogatory-song-leads-to-its-removal-from-school/>.

<sup>4</sup> Brianna Smith, May 31, 2017 email to Superintendent Oto and El Diamante Principal and Senior Learning Director.

dress code] is ineffective. . . . [The school district] needs to have genuine discussions about what these symbols mean. While it is important for individuals to embrace their heritage, it is far more important for a school to create a positive learning environment.”

Second, we believe the proposed policy is misguided for the additional reason that giving school officials *more power* to punish students through the dress code is likely to result in *more discipline against students of color*—the very students that the policy is intended to protect. As Morgan McKinney Sanchez, a Visalia high school student, stated to us, she already “feels targeted through the dress code.” She believes this is rooted in the biased, discretionary practices that administrators and teachers have regarding what is “acceptable” clothing. That the proposed policy vaguely refers to “hate groups”<sup>5</sup> will only exacerbate this problem. As concerned students, community members, and advocates, we strongly encourage Visalia Unified to explore the root cause for the insidious behavior that happens in the school district before potentially creating a situation that may harm students of color in unintended ways.

Finally, we believe that the District would face legal liability if it adopted the proposed policy. Under the Education Code, students have the same free speech rights on campus as adults have in any public space. Cal. Ed. Code § 48950; *see also Smith v. Novato*, 150 Cal. App. 4<sup>th</sup> 1439, 1453 (2007). The courts have been clear that adults have the right generally to display the Confederate flag and other hateful symbols. *Virginia v. Black*, 538 U.S. 343, 366-67 (2003). Moreover, a prohibition against clothing that promotes “hate groups” is unconstitutional because it is void-for-vagueness. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011). As you are aware, the term “hate group” is not a legal term and there is no common understanding of what qualifies a group as a “hate group.” Accordingly, it is our position that the proposed policy “fails to give a [student] of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Id.* The proposed policy also gives too much discretion to school officials to decide in an *ad hoc* and subjective basis what is prohibited speech and what is not. *See id.* Accordingly, the proposed policy is unconstitutionally vague.<sup>6</sup>

Instead of banning protected speech, we strongly urge the District to take affirmative steps to address the actual harm caused by the racially harmful environment that has been building over many years. This includes ensuring that classrooms directly address the foundational harm of erasing or separating people of color history, discussing the confederacy while including its root in slavery, and ensuring that students and teachers understand that protecting one students’ free speech does not mean creating a hostile environment for others. It

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<sup>5</sup> As discussed elsewhere in this letter, there is no common definition of “hate group.” For example, some politicians have called for the Black Lives Matter movement, a movement meant to uplift Black people, to be designated as a “hate group.” *See, e.g.,* <http://www.politifact.com/wisconsin/statements/2017/apr/17/sheriff-david-clarke-us-senate/pro-sheriff-david-clarke-group-says-clarke-called/>.

<sup>6</sup> To be clear, the constitutional right to display hateful symbols is not absolute. The District may properly ban such speech when it is expressed with the intent to intimidate specific individuals. *Virginia*, 538 U.S. at 363.

also means resisting calls for stricter disciplinary practices,<sup>7</sup> and instead adopting a restorative justice framework.

In sum, while we applaud any efforts by the District to combat racism and affirmatively stand against discrimination, the proposed policy is misguided as well as being unlawful. We urge the District to instead directly address racial tension on campus by, among other measures, creating a space for small group dialogue regarding racial tensions at school; ensuring proper and authentic history lessons regarding the confederacy and historical racism; and creating a safe space for student conversations in Black Student Unions and other groups core to student identities that are authentic and encouraged by supportive faculty.

Thank you for the opportunity to comment. Please do not hesitate to contact Abre' Conner at 559.554.2994 if you have any questions or concerns regarding these points.

Sincerely,



Abre' Conner  
Staff Attorney, ACLU of Northern California



Brianna Smith  
Student Activist



Gina Rodriguez  
Program Director, ACT for Women and Girls

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<sup>7</sup> Visalia teachers demand student discipline, USA Today, May 11, 2017, <https://www.usatoday.com/story/news/local/2017/05/11/visalia-teachers-demand-student-discipline/101573094/>.

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