



May 10, 2010

**Via U.S. Mail and Fax**

Dr. Wesley Smith, Superintendent  
Morgan Hill Unified School District  
15600 Concord Circle  
Morgan Hill, CA 95037

Re: Live Oak High School censorship on May 5, 2010

Dear Dr. Smith:

We are writing regarding Live Oak High School's censorship of the speech of five students who wore clothing depicting the American flag on May 5, 2010. As you may know, the ACLU consistently and strongly supports the rights of students to engage in expression on campus—through their speech, written materials, organized activities, and their *clothing*—as protected by the First Amendment to the United States Constitution, Article I, section 2 of the California Constitution, and very broad speech protections codified in California Education Code §§ 48907 and 48950. The students' displays of American flags on their t-shirts on Cinco de Mayo was core political speech, entitled to the highest protection, and therefore could not be censored unless the school reasonably believed that the students wearing the flag were "inciting" a substantial disruption. *Smith v. Novato Unified School District*, 150 Cal.App.4th 1439 (2007). Moreover, the fact that Live Oak High School's vice principal thought that that the wearing of an American flag could be considered "incitement" or "incendiary," either shows a surprising lack of judgment or points to serious underlying problems of racial and/or tensions at the school that must be addressed.

In *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969), the Supreme Court held that three teenage students had a constitutional right to protest U.S. involvement in the Vietnam War by wearing black armbands to school, despite the school's fear that the armbands would be "disruptive."

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the

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campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

*Tinker*, 393 U.S. at 508-509. It is an unusual circumstance that a display of a symbol of the majority—the American flag—has become a statement that provokes fear of disruption, but the First Amendment applies just as forcefully to protect this display.

In California, the students' rights are even more robust than those guaranteed by the U.S. Constitution:

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to . . . the wearing of *buttons, badges, and other insignia* . . . except that no expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites the students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

California Education Code § 48907 (emphasis added). The main exception to the rule of free student speech—material which “incites” unlawful acts or violation of lawful regulations—has been read narrowly by the California Court of Appeal. In *Smith v. Novato Unified School Dist.*, 150 Cal.App.4th 1439 (2007), the California Court of Appeal considered whether a student’s editorial column on illegal immigration was entitled to protection under § 48907. The facts that the column “negatively presented immigrants in general and Hispanics in particular,” and was followed by threats and altercations between Latino students and the author of the column did not strip the writing of its protection. 150 Cal.App. 4th at 1448. The court explained that even when speech actually causes substantial disruption, “Schools may only prohibit speech that *incites* disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance.” 150 Cal.App.4th at 1457. In so holding, the court also noted the reason for this rule:

The focus on *inciting* speech, rather than speech that may result in disruption or other harm, reflects what has come to be known as the “heckler's veto” rule: speech that seeks to communicate ideas, even in a provocative manner, may not be prohibited merely because of the disruption it may cause due to reactions by the speech's audience.

*Dr. Wesley Smith, Superintendent*

*May 10, 2010*

*Page 3*

150 Cal.App.4th at 1456. This concept is particularly important in this case because the students' wearing of the American flag would not have been controversial but for the interest of *other* students in celebrating their Mexican heritage on Cinco de Mayo. The students' patriotic display was particularly meaningful because of the context, and their right to express their patriotism in light of that context must be honored. The right to wear an American flag every day *but* Cinco de Mayo would do little to advance the important work of the First Amendment, whose protections must be enforced every day. The right of one student to wear the American flag on Cinco de Mayo stands or falls with the right of other students to display other countries' colors, or to wear peace symbols, military insignia, religious messages or t-shirts from the NRA, the ACLU, or any other organization.

And, while the vice principal's action may have been motivated by a desire to prevent serious disruption, the very fact that the display of an American flag would cause such concern is a sign that the District should address underlying racial and/or cultural tensions at Live Oak High School. There is a need to foster sensitivity and tolerance among all students. This is important both to provide a safe school environment for all students as required by California law and also to prevent the heckler's veto from interfering with core free speech rights.

Here, the District took swift action to correct the vice principal's mistake in censoring the students' patriotic speech, and we commend you for that. But, we condemn the censorship itself as well as the loss of educational opportunity suffered by the students. We urge the District to take additional steps to inform students that their rights to free speech will be respected in the future and to meaningfully address the underlying dynamics that led to the school's improper censorship of students' patriotic speech on May 5.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions or would like to discuss this matter further.

Sincerely,



Julia Harumi Mass  
Staff Attorney

cc: Nick Boden, Principal, Live Oak High School