IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

WILLIAM M. SCHINGLER, JR., by and through his father, WILLIAM M. SHINGLER, SR.; MICHELLE TUCKER, by and through her mother, ANITA TUCKER; MASON MOSELEY, by and through his parents, EDWARD AND KAY MOSELEY; LOGAN TOOLE, by and through his father, JAMES TOOLE; SKYLER KING, by and through his mother, DELIA KING; SETH ATKINSON, by and through his father, CALVIN ATKINSON; J. MACK WILLIAMSON, by and through his mother, SHANNON WILLIAMSON; CHRISTOPHER HAYES, by and through his mother, ANGIE PIERCE; CALEB HICKS, by and through his mother, MARGARET HICKS; Plaintiffs vs. SEMINOLE COUNTY SCHOOL DISTRICT, and LARRY R. BRYANT, in his official capacity as Superintendent of the Seminole County School District, Defendants.	)	CIVIL ACTION FILE NO.:

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs file this brief in support of a preliminary injunction against further enforcement of the Seminole County Board of Education dress codes for middle and high schools which -- as interpreted and affirmed by the Board -- prohibit the wearing by any students of t-shirts anywhere bearing the "confederate flag" even though (1) the plaintiffs

here have engaged in "silent, passive expression of opinion" through their confederate flag t-shirts for *many years;* (2) the Board has conceded that there has been no disruptive behavior in all those years associated with the shirts; and (3) the Board fails to advance specific evidence to prove that the t-shirts "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508 (1969).

FACTUAL BACKGROUND

Plaintiffs (Students) are eight teens attending Seminole County High School and Seminole County Middle School. With their own parents' approval, and for well over a year, Students have occasionally worn t-shirts to school that include confederate flag in the background and various other images of cars or deer in the foreground. Students wear these shirts as their way of expressing their interest in hunting and cars and their opinions about their Southern Heritage. Complaint, ¶¶ 9-10, 13. Until recently, these shirts were allowed at Seminole County middle and high schools. Students wearing of these shirts in school from 1999-2001 has not caused a single disruption. Id. ¶ 11; see also Letter Harben to Weber, 04/03/01 ("It is true that there are no incidents of student unrest due to the wearing of these t-shirts.").

Despite the lack of any disruption from these shirts over a prolonged period, Superintendent Larry Bryant, in January 2001, ordered that any shirt bearing the confederate flag be targeted for censorship and the student wearing the shirt could be

subjected to disciplinary action.[1] Each of the eight student-plaintiffs were then victims of this new censorship policy -- even though their silent, passive expression of opinion had always proved to be innocuous and non-disruptive. Id. ¶ 13-14. After considering a request from counsel for the students to change the policy, the Seminole County Board of Education nevertheless ratified the Superintendent's censorship policy for all shirts anywhere bearing the confederate flag. Id. ¶ 20.

Since 1956, the former and now current official Georgia flags have contained the image of the confederate flag. O.C.G.A. § 50-3-1 (1956); O.C.G.A. § 50-3-1 (2001). Georgia law requires that the Georgia flag be displayed in schools, and the Secretary of State procures flags for Georgia schools. O.C.G.A. § 50-3-3, O.C.G.A. § 50-3-4; O.C.G.A. § 50-3-4.1; O.C.G.A. § 50-3-10. Since 1956, the Seminole County schools have displayed the former and current Georgia flag -- emblazoned with the confederate flag -- in front of both middle and high schools as well as in lunchrooms and classrooms and the former Georgia flag is

[1] The Seminole County High School Dress Code, inter alia, bars shirts that are "inappropriate" or "that contain references to race or illegal or immoral behavior," while the Seminole County Middle School Dress Code bars shirts that might be considered "offensive to others." Complaint, ¶¶ 5-7. Non-conformity with the dress code is a Class 1 offense that initially results in in-school suspension but also results in a parental conference and may also lead to corporal punishment, detention, suspension, or transfer to an alternative school. Id. ¶ 7-8.

still displayed in some classrooms. Complaint, ¶ 15. Like the Students' flag shirts, the defendants' own display of the very same confederate flag symbol has resulted in no disruption in the Seminole County schools.

Students seek to wear their shirts and express their views silently and in a non-disruptive way. Id. ¶¶ 15-16.

ARGUMENT

A preliminary injunction is appropriate when the movant establishes: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury; (3) that Plaintiffs' injury outweighs any harm an injunction may cause Defendants; and (4) that granting the injunction would not disserve the public interest. See Teper v. Miller, 82 F.3d 989, 992-93 n.3 (11th Cir. 1996). Students satisfy each of these requirements.

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL

A. The Blanket Ban on Confederate Flag T-Shirts Violates Students' Free Speech and Expression Rights.

This case is governed by the Supreme Court's standard for non-school sponsored speech. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508 (1969). Tinker is the one case in which the Supreme Court squarely addressed the question of whether and when a public school student can wear an article of clothing intended to convey a message, political or otherwise. The Court bore witness to the importance of free speech in schools:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess the absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect the obligations of the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. Id. at 511.

In Tinker, five students were suspended for wearing black armbands to school in protest of, and in the midst of, the highly charged National debate over the Vietnam War. Violent and "vehement" protests were occurring throughout the Nation about the "major controversy" that was the "conflagration in Vietnam." The Tinker students sought to join their speech in this heated National debate. Id. at 510 n.4. When the Tinker students came to school, they were accosted by other students who "made hostile remarks to the children wearing armbands" outside classrooms. Id. at 508. The school also had documented reports that:

(1) "A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and felt that if any kind of demonstration existed, *it might evolve into something which would be difficult to control.*"

(2) "Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed." Id. at 509 n. 3 (emphasis added).

Although the lower courts upheld the school's authority to punish the students in order to address the school's fear of disruption, the Supreme Court said that the school and lower courts had insufficient evidence of disruption to justify that fear and sacrifice the students' First Amendment rights.

The Court began by recognizing the "unmistakable holding of this Court for almost 50 years" that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. Balancing that right against the need to "control conduct in schools," the Court held that the school could silence students' speech only if authorities show that such speech "**would** materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Id. at 509 (emphasis added). Elaborating on the standard, the Court said:

[U]ndifferentiated 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 campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk. Id. at 508.

The Supreme Court conducted an "independent examination of the record" including:

- The armbands were tied to the "major" "vehement" Vietnam War controversy throughout the Nation;
- Students wearing armbands were accosted by others who made hostile remarks;
- Documented reports of likely counter-demonstrations; and
- A report of a potentially uncontrollable situation directly relating to the armbands marshaled by the friends of a person killed in the war.

After reviewing all this evidence in detail the Supreme Court reversed and held that the record, while grounded in some evidence of potential disruption, nevertheless "fails to yield evidence that the wearing of the armbands would substantially interfere with the work of the school or impinge on the rights of other students."

Id. at 509.[2]

The evidence of potential disruption in this case pales by comparison to the evidence found *insufficient* in Tinker to silence students' speech that is a "silent, passive expression of opinion." First, unlike Tinker, where other students made hostile comments about the armbands, here the Board concedes unequivocally that in all the years that students have worn flag shirts there were "no incidents of student unrest due to the wearing of these t-shirts." Harben Letter to Weber (April 3, 2001). Second, in Tinker, the school had specific reports of potential counter-demonstrations and a potentially uncontrollable situation marshaled by the friends of a student who was tragically killed in the line of duty. There are no similar reports of any kind in this case. Id. Third, the "conflagration" of often violent war protests, rejected in Tinker as insufficient to silence student's opinions about the war, was certainly more likely to ignite a spark than the debate about role of the confederate flag in the lives of Southerners and all

[2] As a second and additional basis for its ruling, the Court focused on the fact that the school district failed to bar other symbols of "political or controversial significance including "buttons relating to national political campaigns, ... [and] the Iron Cross, traditionally a symbol of Nazism." The Court found that the school only silenced the "expression of a particular opinion." Id. at 510-11.

Americans. Fourth, unlike Tinker, the students in this case have worn their confederate flag t-shirts, often for years, at school, without *any* disruption. Complaint, ¶ 11. If the Tinker evidence was insufficient to silence students' speech, then the far thinner evidence here certainly cannot justify censorship.

Indeed, the State of Georgia prescribes that the very flag displayed on these students' t-shirts be displayed in front of the school, in classrooms, and on posters as provided by Georgia law. O.C.G.A. §§ 50-3-1, 50-3-3; 50-3-4.1 (public schools' display of Georgia Flag). Even the new Georgia Flag contains the "stars and bars."[3] Thus, since 1956, the Seminole County schools have displayed the former and current Georgia flag -- emblazoned with the confederate flag -- in front of both schools as well as in lunchrooms and classrooms and the former Georgia flag is still displayed in some classrooms. Defendants would be hard-pressed to justify silencing the very message they display for all students to see.

[3] Since 1956, the former and now current official Georgia flags have contained the image of the confederate flag. O.C.G.A. § 50-3-1 (1956); O.C.G.A. § 50-3-1 (2001). Georgia law requires that the Georgia flag be displayed in schools, and the Secretary of State procures flags for Georgia schools. O.C.G.A. §§ 50-3-3, 50-3-4; 50-3-4.1; 50-3-10.

The most recent decision grappling with the constitutionality of confederate flag t-shirts in school focuses on the specific and narrow circumstances in which such shirts may be barred. Castorina v. Madison Cty. Sch. Bd., 2001 WESTLAW 223622 (6th Cir. 2001) (attached). In that case, the plaintiffs were twice suspended for wearing shirts that displayed the confederate flag and the words "Southern Thunder" under a dress code that prevented the wearing of shirts with, *inter alia*, "illegal, immoral, or racist implications." Id. at 1. The case turned on disputed evidence that "a fight broke out involving students wearing confederate flag T-Shirts the day before [the principal] prohibited plaintiffs from wearing their shirts." The principal stated that the flags were "the cause of the fight." Id. at 8 (Kennedy, concurring). The district court granted summary judgment to the school in the face of this factual dispute, but the Sixth Circuit reversed and remanded.

In analyzing the confederate flag cases, the Sixth Circuit made clear that there are very limited circumstances where such shirts may be banned. See, e.g. Melton v. Young, 465 F.2d 1332 (6th Cir. 1972) (confederate flag shirts banned where recently desegregated school had "significant racial tension much of which sprung from" the confederate flag symbol); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) (confederate flag shirts banned where "actual fights involving racial symbols (the

Confederate flag in particular)"). Yet, viewing the Castorina evidence "in the light most favorable to the plaintiffs," the shirts were unrelated to any fights and "did not disrupt school activity or cause unrest during the school day." Therefore, other confederate flag cases involving actual flag-related disturbances are "distinguish[able]," and the plaintiffs would prevail under Tinker and its progeny. Castorina, at 2-3.

This Circuit has not addressed the constitutionality of a ban on confederate flag shirts, except to say that the law is not clearly established for qualified immunity damages purposes. Denno v. School Bd. of Volusia Cty., Fla., 218 F.3d 1267 (11th Cir. 2000). The Denno decision is not particularly helpful because the Eleventh Circuit simply assumed a constitutional violation. Id. at 1275 n.5.[4] Judge Forrester, concurring in part and dissenting in

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[4] The Denno panel recognized "strong arguments" for the use of the Tinker standard rather than the *school sponsored speech* standard of Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) and Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). Indeed, this Circuit and those Supreme Court decisions repeatedly draw a line between the Tinker standard for independent student speech, such as t-shirts, and the Fraser/Hazelwood for speech the "public might reasonably perceive to bear the imprimatur of the school." Virgil v. School Bd. of Columbia Cty., 862 F.2d 1517, 1520-23 (11th Cir. 1989) (drawing distinction between school-sponsored curricular decisions and "student expressive activity"); Alabama Student Party v. Student Govt. Ass'n of the Univ. of Ala., 867 F.2d 1344, 1347 (11th Cir. 1989) ("[T]here is a difference between speech the school must *tolerate* and speech the school must affirmatively approve.... In Tinker, the issue was distinct. There, the regulation selected out a particular message, which just happened to occur on school premises, for punishment."); Bishop v. Arnov, 926 F.2d 1066, 1073 (11th Cir. 1991) (noting "key difference" in Tinker was that "a student's expression can be more readily identified as a thing independent of the school"). A more extended discussion of the distinction between the Tinker line and

part, drew on precedent from this Circuit and it predecessor, tackled the underlying constitutional question and found that where a school has failed to show more than "undifferentiated fear" that confederate flag shirts will create a disruptive atmosphere, censorship is prohibited under the First Amendment. He concluded:

> The Confederate battle flag is a catalyst for the discussion of varying viewpoints on history, politics, and societal issues. Discourse on such issues ... is exactly what the First Amendment was designed to protect. Repressing this kind of discussion would be as unreasonable, and hopefully unthinkable, as a rule that forbids students to discuss the Constitution of the United States on the basis that it recognized slavery or forbids the display of the American Flag because it has been carried by hate groups. 218 F.3d at 1285.

Tinker carries the day. This case falls comfortably within the Tinker line of decisions where a school system has simply

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Fraser/Hazelwood line of cases is presented in both Judge Forrester's opinion in Denno and Castorina. Even if Fraser were improperly applied to independent student speech, "a clear underpinning of the Court's holding in Fraser was the disruptive nature of the plaintiff's nominating speech." Thus, even under Fraser, a showing of likely disruption would be required. There is absolutely no such evidence here.

failed to show a sufficient likelihood of disruption. Indeed, the "undifferentiated fear" of disruption here pales in comparison to the far more specific evidence of potential disruption found insufficient in Tinker. While confederate flag t-shirts may be banned in narrow and specific circumstances where evidence shows they "*would* materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," there is no *per se* rule, and the vague institutional fears of Defendants are far too feeble a basis to sacrifice these students' rights to express themselves by simply wearing their shirts that include a confederate flag.

B. The Dress Codes Are Unconstitutionally Vague and Overbroad.

In all events, Defendants' dress codes violate Students' rights to due process because they are unduly vague and overbroad. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Due process "requires that an individual be informed as to what actions a governmental authority prohibits with such clarity that he is not forced to speculate at the meaning of the law." Armstrong v. Mayor & Aldermen of Savannah, 250 Ga. 121, 123 (1982).[5] Vague laws and policies "offend several important values" by failing to provide fair

[5] The Georgia Constitution "provides even broader protection of speech than the first amendment" and the "least restrictive means" of regulating speech must be employed. Statesboro Publ'g Co. v. City of Sylvania, 271 Ga. 92, 95 (1999).

warning to law-abiding citizens, encouraging arbitrary and discriminatory enforcement of the law, and chilling free speech. Grayned, at 108-09; see also Forsyth County v. Nationalist Movement, 505 U.S. 123, 132-33 (1992).

In effectuating the ban on confederate flag t-shirts, the Board relies upon dress codes, which (1) for high school prohibits, inter alia, clothing that is not "appropriate" as well as "decals, slogans or 'saying' on clothes that . . . contain references to race or illegal or immoral behavior" and (2) for middle school prohibits shirts "offensive to others." Seminole County High School Handbook at 10; Seminole County Middle School Handbook at 10. But the dress codes fail to specify which kinds of references to race are prohibited, and completely fail to define the terms "immoral" or "appropriate" or "offensive to others." Although school disciplinary rules need not be as detailed as a criminal code, where, as here, a policy "reaches First Amendment free speech and free exercise rights, 'the doctrine demands a greater degree of specificity than in other contexts.'" Smith v. Goguen, 415 U.S. 566, 573 (1974); see Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997) (holding that school ban on "gang-related apparel" was void for vagueness); Melton v. Young, 328 F. Supp. 88, 97 (E.D. Tenn. 1971) (striking down school policy banning "provocative symbols"), aff'd on other grounds, 465 F.2d 1332 (6th Cir. 1972).

The policy also is unconstitutionally overbroad because it curtails substantial protected speech. See Nationalist Movement, 505 U.S. at 130; see also Sabel v. State, 248 Ga. 10, 13 (1981) (A "statute will be struck as overbroad when it proscribes or can proscribe constitutionally protected conduct."). The ban is so sweeping that "any reference"

to race, whatever its context, is subject to censorship and possible discipline. Hence, clothing commemorating Dr. Martin Luther King, Jr.'s birthday and achievements, celebrating the civil rights movement, and taking a public position on affirmative action or racial discrimination (pro or con) are prohibited by the policy. Indeed, the fact that the Board views confederate flag t-shirts (which contain no explicit references to "race") to fall within its content-based ban on student expression shows that the policy is so broad as to restrict substantial protected speech. The middle school's dress code prohibiting shirts "offensive to others" is also broad and malleable. Because the dress codes fail to specify the kinds of references to the topic of "race" are prohibited and what topics "offensive to others" are barred, both dress codes prohibit substantial protected speech violate the First and Fourteenth Amendments.[6]

II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM

An injunction is further warranted because Students have demonstrated irreparable harm flowing from the violation of their First Amendment rights. "The loss of First

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[6] If the dress codes were viewed as only targeting clothing espousing certain views, they might also present constitutional problems for lack of viewpoint neutrality. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547-48 (1992) (hate crimes law unconstitutional where speech "would seemingly be usable ad libitum in the placards of those arguing in favor of . . . tolerance and equality, but could not be used by that speaker's opponents").

Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm." Elrod v. Burns, 427 U.S. 347, 373 (1976); Northeastern Fla. Chapter of Asso'n of Gen. Contractors of America v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990)). The record, in fact, shows that the dress code and the Board's action "has already induced self-censorship." ACLU v. Miller, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997).

III. THE BALANCE OF HARDSHIPS WEIGHS IN PLAINTIFFS' FAVOR

The equities tip decisively in Students' favor. Preliminary relief is essential to safeguard Students' constitutional rights during the pendency of these proceedings. See McCormack v. Township of Clinton, 872 F. Supp. 1320, 1327 (D.N.J. 1994) ("equities weigh exclusively in plaintiff's favor" in speech case). At the same time, an injunction will not be overly burdensome -- it would only prevent enforcement of the recently enacted confederate flag ban until the merits are resolved. Since many students have been wearing these flag shirts for years without disruption prior to the new policy, the scales of hardship tip well in their favor.

IV. GRANTING PRELIMINARY RELIEF SERVES THE PUBLIC INTEREST

Finally, a preliminary injunction serves the public interest by delineating and enforcing the rights of students and their parents to free speech. "No long string of citations is necessary to find that the public interest in favor of having access to a free flow of constitutionally protected speech." ACLU v. Reno, 929 F. Supp. 824, 851 (E.D. Pa. 1996); see also Miller, 977 F. Supp. at 1235.

CONCLUSION

For the foregoing reasons, a preliminary injunction should be entered against further enforcement the Defendant's dress codes to bar confederate flag shirts.

This the ____ day of May, 2001.

Respectfully submitted,

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