

MEMORANDUM

TO: School District Superintendent
FROM: Attorney
DATE: February 16, 2021
SUBJECT: First Amendment Protections of Confederate Iconography in Schools

I. Purpose

In this memorandum, I will respond to your inquiry regarding a piece of artwork featuring Confederate symbols created by a student for a school-sponsored art project. Having studied precedent regarding the usage of the Confederate flag in schools and the extent to which schools may limit their students' First Amendment rights, I will provide my recommendations for your actions.

II. Background

The inquiry centers around a project posted in an art classroom, with the instruction to, "Create a piece of art that reflects your life experience."¹ The project was created, sponsored, and managed by the school. The submissions of two students are in question. One was by a student who identifies as a Black man, which included, among other features, a closed black fist, a rainbow-colored background in reference to the LGBTQ+ community, and teardrops falling. The other was by a female student who grew up in the South. Her artwork, as the inquiry states, had the same design as the former students, with a few notable changes. The closed fist was now of pale skin color, holding the Confederate battle flag. The rainbow colors were switched to match this flag. The teardrops were swapped with raw cotton bolls.

In addition to these facts, there are other reasonable assumptions that can be drawn:

- The artwork in question was done in direct response to the Black student's artwork, as it wasn't seen in the art room prior to that day and was placed directly adjacent to his.

¹ "Imitation or Intimidation." Connecticut Bar Foundation.
https://www.ctbarfdn.org/file_download/inline/b041bf8e-b7f4-47cf-ad86-e9c837da8c67.

- The Black student’s educational experience was impacted, as he and his mother opted into virtual learning for the remainder of the school year.
- The student from the South was known to cause disruptions in the classroom regarding her Southern pride, and likely believes she is entitled to Free Speech protections.
- The school environment is one where administration may reasonably fear this iconography could be disruptive, as evidenced by an anecdote. A student who wore a Confederate flag T-Shirt knocked into the Black student, and other students gave the shirt-wearer “an air fist bump.”

III. Review Summary

Among the general public, the most popular Supreme Court decision regarding free speech in schools is *Tinker v. Des Moines ICSD*, 393 U.S. 503 (1969). This ruling popularized the phrase that students do not, “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² However, this slogan hides the full opinion of the court:

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

The notable words are that the school environment has “special characteristics.” The court was careful to note that “there is here no evidence whatever of petitioners’ interference... with the rights of other students to be secure and to be let alone.” Only when other students are not harmed can this be applied.

The court’s later ruling in *Bethel School District v. Fraser*, 478 U.S. 675 (1986) reasserted that, “The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³ This rationale led the court to support this school district in suspending a student who used a graphic sexual metaphor in an assembly speech.

² *John F. Tinker and Mary Beth Tinker; minors, etc. et. al., v. Des Moines Independent Community School District et. al.*, 393 U.S. 503 (1969)

³ *Bethel School District No. 403 v. Matthew N. Fraser; a minor; et al.*, 478 U.S. 675 (1986)

A similar ruling in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) found that schools can further restrict student free speech if it is for a school-sponsored activity. In this case, students were restricted from publishing content in a school-sponsored and school-funded newspaper. The principal deemed an article about birth control inappropriate for the target audience. Comparing this ruling to the court's previous decision in *Tinker v. Des Moines*, they reasoned,

“The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities ... Educators are entitled to exercise greater control over this second form of student expression”⁴

One lower court decision that explicitly mentions the Confederate flag in a school setting is that of *West v. Derby USD (1998)*. This particular situation featured a school district experiencing heated racial tensions, including Confederate apparel and pamphlets made by the Aryan Nation and the Ku Klux Klan. In response, the school created a policy “designed to prohibit racial harassment and to minimize disruption of the educational environment.”⁵ A middle school student violated this rule by drawing “a Confederate flag on a piece of paper during math class,” and was suspended after the administration ensured that he did so knowingly. The US District Court for the District of Kansas sided with the school, recognizing that they had a pedagogical interest in punishing student usage of this flag to prevent a disruption of the educational environment:

“Given the Confederate flag's history, as well as the history of racial incidents in the Derby School District, it was reasonable for the district to consider this flag as a symbol whose display at school would likely lead to a disruption”⁶

⁴ *Hazelwood School District, et al. v. Kuhlmeier, et al.*, 484 U.S. 260 (1988)

⁵ Zeigler, Sara L. “Confederate Flag.” *The First Amendment Encyclopedia*, Middle Tennessee State University, May 2017. <https://www.mtsu.edu/first-amendment/article/994/confederate-flag>.

⁶ *West v. Derby Unified School District* 260, 23 F. Supp. 2d 1220 (1998)

IV. Analysis and Recommendations

The inquiry states that you seek to potentially punish the student who submitted the artwork with Confederate iconography for this school project under your school board's policy, but implies that you are afraid of retaliation by the student with an argument centered around the First Amendment. It is my firm belief that such a case would not have standing.

Tinker v. Des Moines applies only when no other students are impacted by the speech. As the Black student is said to have "tears in his eyes" and switches to virtual learning, he was certainly impacted. Even if the creator of the artwork claims that the usage of the Confederate flag is merely to proclaim their Southern pride, the matching layout, the placement adjacent to the Black student's artwork, and the use of cotton bolls—an unambiguous reference to slave plantations in this context—highlights that this artwork was designed specifically to target this Black student. *Hazelwood v. Kuhlmeier* demonstrates that students do not have a blanket free speech case, especially when the activity is school-sponsored, like your art project. Finally, *West v. Derby* affirms that in a school environment where the Confederate flag may be deemed divisive, like it has based on the description in your inquiry, the school can punish its usage by students under a policy very similar to the one written in your handbook.

To answer your final questions:

- Yes, this usage of the Confederate Flag had a direct impact on another student on the basis of race, that disrupted the school's mission to educate, and can be punished under your policy.
- No, this artwork submission for your school's art project does not receive blanket protection under the First Amendment, as a piece of art outside of school could.

Therefore, I recommend that you move ahead with executing your punishment under the school board's policy. If you face challenges, my firm would be interested in defending your decision, as we believe this is concurrent with the precedents set by the various courts of the judicial system of the United States of America.

Works Cited

- “BETHEL SCHOOL DISTRICT NO. 403, et al., Petitioners v. Matthew N. FRASER, a Minor and E.L. Fraser, Guardian Ad Litem.” *Legal Information Institute*, Cornell Law School.
<https://www.law.cornell.edu/supremecourt/text/478/675>.
- “HAZELWOOD SCHOOL DISTRICT, et al., Petitioners v. Cathy KUHLMEIER et al.” *Legal Information Institute*, Cornell Law School.
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- “John F. TINKER and Mary Beth Tinker, Minors, etc., et al., Petitioners, v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT et al.” *Legal Information Institute*, Cornell Law School. <https://www.law.cornell.edu/supremecourt/text/393/503>.
- “West v. DERBY UNIFIED SCHOOL DIST. 260, 23 F. Supp. 2d 1220 (D. Kan. 1998).” *US Law*, Justia.
<https://law.justia.com/cases/federal/district-courts/FSupp2/23/1220/2297835/>.
- Zeigler, Sara L. “Confederate Flag.” *The First Amendment Encyclopedia*, Middle Tennessee State University, May 2017. <https://www.mtsu.edu/first-amendment/article/994/confederate-flag>.