

## CASES IN POINT CASES IN POINT CASES IN POINT

# Reasonable Forecasts

*Courts recognize that principals are the best judges of what will disrupt their schools, but they still must provide evidence that their decisions are based on facts.*

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**T**he U.S. Court of Appeals for the 5th Circuit has upheld a lower court ruling that a Texas school's dress code policy prohibiting visible displays of the Confederate flag on school grounds did not violate the U.S. Constitution (*A. M. v. Cash*, 2009). The case is another in a growing line of similar rulings supporting school officials' "reasonable forecasts" of substantial disruption in the school environment.

### **Inappropriate Symbolism**

In 2006, two students from a Texas high school came to school carrying purses decorated with images of the Confederate flag. The school district has a zero-tolerance policy for clothing or accessories that contained "inappropriate symbolism, especially which discriminates against other students based on race, religion, or sex." In addition, the particular school at issue had a specific policy, adopted in response to previous incidents, that prohibited the visible display of the Confederate flag on school grounds.

Accordingly, school officials told the purse-carrying students that they could either give the purses to school officials until the end of the school day or have someone come and get them. Instead, according to court papers, the students voluntarily chose to go home for the day, but were not suspended and did not face any other disciplinary action from the school.

The students, however, later appealed the school policy regarding the display of the Confederate flag. During the first-level appeal in the process, the principal defended the policy, noting past incidences of racial tension and violence on campus, which "would be higher but for the restriction on visible displays of the Confed-

erate flag." In a later appeal, the school district superintendent affirmed the principal's determination and denied further appeals by the students.

The student's parents later filed suit against the school claiming, among other rights, violations of their children's right to free speech and expression under the U.S. Constitution. In doing so, one plaintiff argued that the Confederate flag for her represented a "symbol of patriotism, faith, and family." That student reportedly also contended that the school's policy was not evenly enforced and that the Mexican flag and other symbols or images including those of Malcolm X were allowed. Nevertheless, the district court granted summary judgment in favor of the school district finding the school's ban permissible under the Supreme Court's landmark ruling in *Tinker v. Des Moines Independent Community School District* (1969).

Looking at the case in light of *Tinker*, the district court found that school officials "reasonably concluded that the prohibited speech (i.e., visible displays of the Confederate battle flag) was imposed to prevent an anticipated substantial and material disruption of the educational process at the school." The court further determined that school officials could, without running afoul of the Constitution or of the standard set forth in *Tinker*, "reach this decision based on the historical atmosphere of racial hostility at [the school] as well as the problems caused by displaying the Confederate battle flag in the past."

### **A History of Tension**

Affidavits from the school's current and previous principals and documented uncontroverted evidence revealed a history of racial tension at

the high school. The school—which reportedly had a student body of 2,300—enrolled fewer than 60 Black students. Before the enactment of the policy, there were “35 reported incidences of race-related problems” during a single year. The following year brought additional disciplinary referrals for racial incidents involving racist slurs accompanied by the Confederate flag, drawings of nooses, and derogatory comments about hanging minorities. The principal also noted the existence of “racially hostile graffiti in the restrooms” and physical altercations including a fight in the lobby of the school gym between the student body and student supporters from a predominately Black visiting school, for which the police were called to “assist in restoring order.”

Additional incidents included a student shoving a Confederate flag in the face of several members of another school’s all-Black volleyball team, which reportedly led to students at the high school at issue in this case attempting to display the Confederate flag at numerous athletic events. The school eventually instituted the anti-Confederate flag policy after some White students from the school waved the flag “in the direction of a group of fellow African American students as they waited for the bus.” According to court papers, the principal and staff members viewed this as an attempt to intimidate Black students at the school.

The plaintiffs in this case argued that their “harmless” purses were not related to the racial incidents at the school and had nothing to do with racial intimidation. The plaintiffs argued further that school officials had not shown that the Confederate flag in and of itself caused a substantial and

material disruption of the school environment sufficient to meet the *Tinker* standard. The district court disagreed, finding instead that the documented history of racial-related incidents combined with the dual meaning surrounding the Confederate flag were “sufficient to meet the *Tinker* standard.” The plaintiffs appealed, and after reviewing the case anew, the U.S. Court of Appeals for the 5th Circuit affirmed the lower court’s ruling.

### Some Authority

In ruling in favor of the school district, the 5th Circuit also looked first to *Tinker* and its well-established principle that students do not shed their rights at the schoolhouse gate. The court noted that *Tinker* also stands for the important proposition that school officials “nevertheless retain some authority consistent with fundamental safeguards, to prescribe and control conduct in schools.” As a result, school officials may restrict student speech or expression “upon showing facts which might reasonably have led school authorities to forecast [that the proscribed speech would cause] substantial disruption of or material interference with school activities.”

To meet this “forecasting” standard, the 5th Circuit has clarified that school officials cannot rely on a mere expectation that the speech at issue will be disruptive. Such decisions also cannot be based on intuition. Instead, reasonable forecasts that certain proscribed speech will result in a substantial disruption of the school environment must be based on established, substantial fact that has been gleaned from some reasonable level of inquiry.

Applying the amplified *Tinker* standard to the present case, the 5th Circuit determined that the school



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officials' forecasts that the students' purses would cause disruption was reasonable given racial incidents at the school involving the Confederate flag. The court also looked to the 3rd, 6th, and 11th Circuits, which have similarly held that school officials "may prohibit the display of the Confederate flag in light of racial hostility and tension at their schools."

The particular cases cited by the court involved similar histories of racial tension (e.g., graffiti, general and specific threats against students, and physical altercations).

In a footnote, the 5th Circuit further pointed out that both the 8th and 10th Circuits have similarly "concluded that prohibitions on the Confederate flag did not infringe on students' rights of free speech and expression."

### **A Rock and a Hard Place**

In the present case, the crux of the plaintiffs' argument regarding the First Amendment was the contention that school officials had to show a direct connection between the prohibited speech and anticipated disruption. That is, that the Confederate flag in fact caused past disruptions. The court deemed this to be too narrow an interpretation of *Tinker*. Following the plaintiffs' reasoning, the court opined, would effectively require school officials to wait for speech to cause disruptions before taking action. This the court found to be in direct con-

tradiction to the portion of the *Tinker* holding that allows school officials to "forecast substantial disruption."

According to the court, both the 6th and 10th Circuits have rejected the interpretation of *Tinker* advanced by the plaintiffs in the present case. "The Sixth Circuit noted that the plaintiff's interpretation would place 'school officials...between the proverbial rock and a hard place: either they allow the disruption to occur, or they are guilty of a constitutional violation'" (*Lowery v. Everhard*, 2001).

In further rejection of the plaintiffs' contentions in the present case, the 5th Circuit noted that even in the absence of a showing of a past disruption (which is not required under *Tinker*), school officials can also meet the *Tinker* burden by "establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in a disruption." Apparently, in a notable number of cases involving prohibited displays of the Confederate flag in schools, school officials' reasonable forecasts and expectations thankfully seem to suffice. **PL**

### **REFERENCES**

- A. M. v. Cash, No.08-10477 (5th Cir. Oct. 9, 2009).
- *Lowery v. Everhard*, 497 F.3d 584, 596 (6th Cir. 2001)
- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)