



October 31, 2013

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**Re: Violation of Student's First Amendment Rights**

To Birdville High School officials:

This letter is written on behalf of a senior student, Isaiah Smith, who was recently suspended from Birdville High School for carrying a ripped Bible to class. Isaiah brought the book in response to ongoing bullying towards him for being gay. He was told by a school official that he could bring a Bible to school but not a ripped Bible. The school's actions amount to egregious viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. This letter demands the school to expunge Isaiah's record of the suspension immediately and to permit him to carry his torn Bible with him while in school in the future or, in the alternative, to prohibit all students from carrying any Bible at school, lest it face litigation.

The American Humanist Association (the "AHA") is a national nonprofit organization with over 20,000 members and 125,000 supporters across the country including in Texas. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state.

On Monday, October 28, Isaiah brought his Bible to school in response to the anti-gay bullying he frequently endures from his classmates. The bullies repeatedly told Isaiah, a fellow Christian, that being gay is a sin, that gays go to hell, and that he too would go to hell. Isaiah brought his Bible to school to show the bullies why he did not believe it condemns gay persons. Isaiah believes that the Bible is a tool that Christians are suppose to use, so that they can be guided spiritually, physically,

mentally and psychologically. As soon as Isaiah began getting bullied by classmates in his first period class on Monday, he reached for his Bible and tore out the pages containing the book of Leviticus among other scriptures. Moments later, the assistant principal, Glenn Serviente, told Isaiah to follow him to his office. Isaiah told the assistant principal about the bullying. Serviente, citing Tinker v. Des Moines School District, told Isaiah that tearing the Bible, but oddly not the bullying he had to endure, creates a disruption. Isaiah responded, stating he would not tear the Bible at school in the future but asked if he could carry it. Serviente said that he could carry the Bible, so long as he did not tear it. He made Isaiah stay in his office until the school bell rang.

Isaiah carried the torn Bible in his hand the remainder of the day without any disruption. He continued to carry the same Bible on Tuesday without any resulting disruption. However, when Isaiah brought the same book to school on Wednesday, also without any resulting disruption, the assistant principal called Isaiah into his office and immediately began to reprimand him. He asked Isaiah, “how would Muslims feel if a student was tearing up the Qur-an?” and then told him he was suspended. He then demanded Isaiah to give him the book. Isaiah said no, informing Serviente that he did not tear the Bible since being told on Monday that he could not do so. The assistant principal clarified that Isaiah was suspended for merely *carrying* a ripped Bible at school. He then reached for Isaiah’s Bible without his permission and slammed it on his desk. First he said Isaiah was suspended from school for the remainder of the day, but then changed his mind and told Isaiah he was suspended for three days. He also confiscated Isaiah’s Bible.

These actions amount to a clear violation of Isaiah’s First Amendment rights. In Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-07 (1969), the Supreme Court famously declared: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Yet the school oddly cited this case for the opposite proposition. In Tinker, several public school students wore black armbands to their schools to publicize their objections to the Vietnam War, despite the schools’ policies prohibiting such armbands. As a result, they were suspended. Finding this to be a clear violation of their First Amendment rights, the Court held that schools must tolerate student expression unless it would “*materially and substantially* interfere with the requirements of appropriate discipline in the operation of the school.” *Id.* at 509 (emphasis added). The Court found no such evidence. To the contrary, the Court concluded that the schools’ actions appeared to have been motivated only by a “wish to avoid controversy.” *Id.* at 510.

Reprimanding Isaiah for ripping his Bible on Monday violated the First Amendment. Isaiah’s Bible was not the source of disruption, the bullying was. Instead of reprimanding the bullies, the school punished Isaiah for offering an alternative viewpoint on the Bible. Like the armbands in Tinker, Isaiah’s torn Bible is “unquestionably protected by the First Amendment.” Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 428 n. 21 (9th Cir. 2008).<sup>1</sup> Numerous courts, including the Fifth Circuit Court of Appeals, have found school officials in violation of the First Amendment for suppressing a student’s religious (or anti-religious) message, including messages on the topic of homosexuality in particular, even when thought by school officials to be controversial.<sup>2</sup> For instance,

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<sup>1</sup> Cf. Cohen v. California, 403 U.S. 15 (1971) (wearing a jacket with a political message is protected speech); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001) (“A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues. Words printed on clothing qualify as pure speech and are protected under the First Amendment.”) (citations omitted); Castorina v. Madison County Sch. Bd., 246 F.3d 536, 541 (6th Cir. 2001) (wearing a T-shirt with a Confederate flag constitutes protected speech).

<sup>2</sup> See e.g., Morgan v. Swanson, 659 F.3d 359, 388, 395 (5th Cir. 2011) (principal violated First Amendment rights of elementary school student who was denied right to distribute pencils with a religious message); Heinkel v. Sch. Bd., 194 Fed. Appx. 604, 608-09 (11th Cir. 2006) (school’s prohibition “of all religious and political symbols is a content-based

in Nixon v. Northern Local School Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005), a school's request that a student remove a t-shirt expressing divisive religious opinions was found to have violated his First Amendment rights. The front of the shirt said: "INTOLERANT Jesus said . . . I am the way, the truth and the life. John 14:6." The back stated: "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" *Id.* The court made clear that "[t]he mere fact that [certain] groups . . . could find the shirt's message offensive, falls well short of the Tinker standard for reasonably anticipating a disruption of school activities." *Id.* at 973.

Under Tinker, the school must be able to produce *facts* that clearly prove that the torn book "would *substantially interfere*" with the work of the school. This requires a showing of a "concrete threat of substantial disruption that is linked to a history of past events." Flaherty v. Keystone Oaks School Dist., 247 F. Supp. 2d 698, 702, 705 (W.D. Pa. 2003) (citing Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243, 262 (3rd Cir. 2002)). In the absence of such facts, the school's prohibition on carrying torn Bibles is unconstitutional.<sup>3</sup> In Tinker, "even though several students made hostile remarks to the Plaintiffs because of their armbands, the Court found that there was no

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restriction unsupported by a reasonable belief of the School Board that all such expression would create substantial disruption in the Lee County schools."); Wright ex rel. A.W. v. Pulaski County Special Sch. Dist., 2011 WL 1134965, at \*3 (E.D. Ark. 2011) (granting plaintiffs' motion for a preliminary injunction because the school officials did not present any "evidence that disseminating flyers regarding church sponsored activities will substantially interfere with the work of the school"); Gold v. Wilson County Sch. Bd. of Educ., 632 F. Supp. 2d 771, 789-790 (M.D. Tenn. 2009) (granting motion for preliminary injunction of parents and students on claim their free speech rights were violated when school did not allow them to display posters containing religious speech); Gillman v. School Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (varied methods of conveying messages of support for homosexual rights in a "gay pride movement" did not justify ban on speech that was "political" in nature where any forecast of disruption was "'speculative,' 'theoretical,' and 'de minimis'"); Bowler v. Town of Hudson, 514 F. Supp. 2d 168, 178 (D. Mass. 2007) (denying summary judgment to school because removal of student "Conservative Club" posters containing URL of a website that questioned Islam and had link to graphic and disturbing images of hostage executions was not a valid forecast of material and substantial disruption under Tinker); M.B. ex rel. Martin v. Liverpool Central Sch. Dist., 487 F. Supp. 2d 117 (N.D. N.Y. 2007) (school officials had only an undifferentiated fear that student's distribution of religious flyers with a personal religious message during non-instructional school time would result in a disruption of the educational process, which constitutionally insufficient to justify curbing such speech under the Tinker standard); Nixon v. Northern Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005) (school's request that student remove T-shirt expressing controversial opinions regarding religion violated his First Amendment rights); Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001) (granting preliminary injunction to student who was told by school he could not wear sweatshirt emblazoned with message, "Straight Pride" because such clothing would be protected by the First Amendment and principal's action in banning the sweatshirt was likely unreasonable); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997) (prohibition on wearing rosaries violated the students' First Amendment rights since the regulation did not bear a reasonable relation to regulating gang activity and placed an undue burden on the students).

<sup>3</sup> See e.g., Zamecnik v. Indian Prairie School Dist. # 204, 636 F.3d 874, 876 (7th Cir. 2011) (school was unable to provide facts sufficient to indicate it reasonably expected a disruption from a shirt stating "Be Happy, Not Gay" and students were entitled to damages because they were injured by the school's violation of their constitutional rights); DeJohn v. Temple University, 537 F.3d 301, 317 (3rd Cir. 2008) (university's policy against sexual harassment that focused on "motives of the speaker" was "contrary to Tinker's requirement that speech cannot be prohibited in the absence of a tenable threat of disruption"); Gillman, 567 F. Supp. 2d 1359 (holding that even "'hostile remarks' that may have occurred" in response to student displays of messages "advocat[ing] the acceptance of and fair treatment for persons who are homosexual" did not justify the school board's policy prohibiting students from "wearing or displaying t-shirts, armbands, stickers, or buttons containing slogans and symbols" with this message). See also Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243, 253 (3rd Cir. 2002) (granting preliminary injunction against school's enforcement of racial harassment policy to prohibit students from wearing t-shirt containing the word "redneck" because while there was substantial evidence of prior disruption related to Confederate flag, there was no similarly disruptive history connected with the term at issue); Bragg, 371 F. Supp. 2d at 826-28 (school policy prohibiting student from wearing T-shirt displaying the Confederate flag was unconstitutional); C.H. v. Bridgeton Bd. of Educ., 2010 WL 1644612, at \*6 (D.N.J. 2010) (school did not meet burden under Tinker when it argued that there would be disruption if school could not enforce code against student wearing a Pro-Life armband because there was only a general fear of disruption).

disruption sufficient to uphold the school's prohibition.” Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 667 (S.D. Tex. 1997). Here too, there is no evidence that Isaiah’s torn book interferes with school safety. The bullies alone are responsible for creating such disruption. Accordingly, there is insufficient evidence to justify the infringement on Isaiah’s “religiously-motivated speech.” *Id.*

Yet even if the school was justified in bringing Isaiah to the office on Monday to ask him not to rip the Bible in class, which it was not for the reasons set forth above, it was in no way justified for reprimanding him, let alone suspending him for three days, for merely *carrying* a torn version of the Bible to school. This amounts to plain viewpoint discrimination, prohibited by the First Amendment. The assistant principal expressly said that the school allows students to carry un-torn versions of the Bible but not torn versions. Indeed, Isaiah has seen other students carry un-torn copies of the Bible at school. The only reason Isaiah was suspended was because he carried a torn version to communicate a message of tolerance towards homosexuals.

Such viewpoint discrimination is *per se* unconstitutional. See Rosenberger v. Rector, 515 U.S. 819, 828-29 (1995). When “the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Id.* at 829. As such, schools “may not favor one speaker over another.” *Id.* at 828. In Zamecnik v. Indian Prairie School Dist. # 204, 636 F.3d 874, 874-875 (7th Cir. 2011), for example, the Seventh Circuit recognized that forbidding a “Be Happy, Not Gay” shirt, even if it had a tendency to provoke disruption, would run afoul to the rule against viewpoint discrimination, explaining: “a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality.” *Id.* at 876. Certainly the reverse is true as well. Birdville High School freely allows students to carry Bibles, ostensibly containing anti-homosexual messages. By harshly penalizing a student for conveying a contrary message, one that seeks *tolerance* towards homosexuals, the school has favored one viewpoint over another in clear violation of the First Amendment.

Because the suspension of Isaiah violates the First Amendment, the school must expunge it from Isaiah’s school record, allow him to return to school immediately, and take any other action necessary to restore Isaiah’s position at the school. The school must also return the book to Isaiah and allow students to carry torn versions of the Bible or else prohibit everyone from carrying the Bible or any other religious text, such as the Quran to school. If not, the school may be sued in federal court for injunctive and declaratory relief. In addition, because the law in this area is well established, the school officials responsible for violating Isaiah’s rights may be sued in their *individual* capacities and may be personally liable for damages along with reimbursement of plaintiff’s attorneys’ fees. In order to avoid such litigation, please send me a letter (preferably by email at [mmiller@americanhumanist.org](mailto:mmiller@americanhumanist.org)) immediately, indicating that you will take the appropriate steps to remedy this clear constitutional violation. Thank you in advance for taking the time to address this very important matter.

Sincerely,

Monica Miller, Esq.  
Bill Burgess, Esq.  
American Humanist Association