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Re: Banning of Vista Peak Student's "Bad Religion" T-Shirt Unconstitutional

I am writing to alert you to a serious violation of the First Amendment. We have been contacted by Matthew Halbig, a student at Vista Peak high school, seeking legal assistance. Matthew reported to us that in the last school quarter Craig Lyle, Vista Peak's Director of Operations and Management, ordered him to remove his t-shirt and threatened to suspend and arrest him if he did not comply. The shirt bore the name of a band, "Bad Religion." The band's symbol is a Latin cross with a red circle-and-slash over it. Their punk rock songs frequently promote a liberal vision of social responsibility and independent thought, including an independence from the religious and political powers-that-be.[1] The shirt did not contain any obscene words or images, nor any references to drugs, sex or violence.

Matthew's wearing of the shirt did not cause any disruption. Nonetheless, he was told that his shirt violated the school policy against "disrupting the learning environment."[2] In contrast, Matthew has told us that many students wear religious shirts and Christian cross necklaces to school. Given this disparate treatment, it is clear that the school targeted Matthew because it did not like his expression of a secular viewpoint. This violated his First Amendment rights to freedom of speech and, given the preference shown to student religious speech, the separation of church and state.

The American Humanist Association is a national nonprofit organization with over 10,000 members and 20,000 supporters across the country, including in Colorado. Our purpose is to protect the constitutional mandate requiring separation of church and state embodied in the Establishment Clause of the First Amendment and to protect the rights of humanists, atheists and other freethinkers.

The First Amendment clearly is squarely at issue in this instance. As you must know, the Supreme Court has made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). In Tinker, several public school students wore black armbands to protest the

[1] See http://en.wikipedia.org/wiki/Bad_Religion for more background on the band.
[2] The school's handbook simply provides in relevant part: "No clothing . . . determined to be distractive to the learning environment will be permitted."

Vietnam War, despite the fact that such armbands were prohibited. As a result, they were all suspended. Finding this to be a clear violation of their First Amendment rights, the Court held that schools must tolerate student expression that does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id*. at 509. The Court found that the schools' actions appeared to have been motivated by a "wish to avoid controversy which might result from the expression." *Id.* at 510. The court, however, ruled that an "undifferentiated fear or apprehension" of a disturbance is not enough to overcome a student's right to freedom of expression and that schools are prohibited from banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id*. at 508.

Like the armbands at issue in Tinker, t-shirts displaying messages worn by students in school are "unquestionably protected by the First Amendment." Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 428 n. 21 (9th Cir. 2008).[3] In particular, numerous courts have found school officials in violation of the First Amendment for suppressing a student's message about religion, even when thought by school officials to be controversial, when no substantial disruption was shown to have occurred.[4]

For instance, 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 even very 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 noted that there was "no evidence that [the] T-shirt caused any disruption at the school" and that it was insufficient that the shirt had merely the "potential to cause a disruption." *Id.* at 968,

[3] *See also* 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."); Cohen v. California, 403 U.S. 15 (1971) (wearing a jacket with a political message is protected speech); 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).

[4] *See* 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); 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 restriction" that was unconstitutional); 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 because it did not 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) (student free speech rights were violated when school did not allow them to display posters containing religious speech because there was no showing that substantial disruption would result from such display); 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 was constitutionally insufficient to justify curbing such speech under the Tinker standard); 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"); 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); 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'").

973.[5] 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.*

Applying this law to Vista Peak's decision regarding Matthew's shirt, it is quite apparent that the action taken by the school was unconstitutional. Under Tinker, the school must be able to show 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) (emphasis added).[6] There was no disruption caused by Matthew's shirt. A generalized and abstract fear of some potential disruption is not enough. In the absence of a history or presence of actual serious tension related to the viewpoint expressed, such a prohibition is unconstitutional.

Because there is no indication that it has targeted pro-religious speech, Vista Peak also engaged in impermissible viewpoint discrimination, which 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, the court recognized that forbidding a "Be Happy, Not Gay" shirt, even if it would have 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." 636 F.3d at 876. Vista Peak freely allows students to wear crosses and shirts containing religious messages. By punishing a student for wearing a shirt whose message promotes skepticism of religious ideas, the school favored pro-Christian student speech over pro-secular speech in violation of the First Amendment.

In view of the foregoing, we request that you permit Matthew to wear his "Bad Religion" shirt. Students have fundamental First Amendment rights to express their opinions on matters such as religion and politics. Those rights are trampled on when school officials act as arbitrarily as they did in Matthew's case. We ask that you respond to us in writing within ten days of receiving this letter to notify us of the steps you will be taking to rectify this serious constitutional violation so that we may avoid any potential litigation.

Sincerely,

William J. Burgess
Appignani Humanist Legal Center
American Humanist Association

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[5] *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 there was no disruptive history connected with the term at issue); Gillman, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (holding that even "'hostile remarks' that may have occurred" in response to student displays of messages a ban on shirts displaying that message); Bragg, 371 F. Supp. 2d at 826-28 (school policy prohibiting student from wearing T-shirt displaying the Confederate flag was unconstitutional in school environment where "people of both races mix freely together and form good relationships" and where there is little history of racial tension or disruption).

[6] *See also* Brown v. Cabell County Bd. of Educ., 714 F. Supp. 2d 587, 592 (S.D. W. Va. 2010) (finding that past "incidents of disruption form the most well-founded expectation of future disturbance.")