



## ACLU Nebraska Foundation

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**BECAUSE FREEDOM CAN'T PROTECT ITSELF**

August 29, 2008

Dr. Keith Lutz  
Superintendent, Millard Schools  
Fax (402) 715-8448

Re: School suspensions at Millard South

Dear Dr. Lutz:

I have attempted to reach your office by phone without success. I would like to speak with you or your school's attorney about the suspensions that took place at Millard South High School earlier today of students wearing t-shirts with the phrase "RIP Julius."

A school may prohibit or punish a student's chosen form of speech only if it is reasonably likely to result in a material and substantial interference with the educational process or violate the rights of others. This formula, from the famous case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), contains two important limits on school's discipline. First, the likelihood of disruption must be serious--an "undifferentiated fear or apprehension of disturbance" is not enough. 393 U.S. at 508. Second, the type of disruption must be serious as well--the mere possibility that students will argue with each other about the t-shirt is not enough. *Id.* at 513. In *Tinker*, middle school and high school students wore black armbands to protest the Vietnam war. According to the school, the armbands had led to "comments, warnings by other students, [and] the poking of fun at them" and a math teacher's belief that the armband "practically wrecked" his lesson. 393 U.S. at 517-18. The Court nonetheless concluded that this was not a material or substantial disruption attributable to the armbands.

Courts have extended the *Tinker* rule into the modern era. For example, in *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002), a school faced a pattern of disturbing racial incidents. They enacted a policy to forbid racial intolerance. The plaintiff student was suspended for wearing a t-shirt inscribed with "redneck" jokes. Though the trial court found the record clearly supported a finding that the high school was afflicted with pervasive racial disturbances throughout the school year, and though the word "redneck" had come to connote racial intolerance, the suspension was unconstitutional for violating the student's free speech rights.

Similarly, in *Chandler v. McMinnville School District*, 978 F.2d 524 (9<sup>th</sup> Cir. 1992), students supporting a teacher's strike wore buttons reading "I'm not listening, scab" and "We want our real teachers back." The Court said that the school was wrong to assume that "scab" is an inherently disruptive word, and that there must be more evidence

to support a prediction of problems resulting from the students' strongly-worded messages on a controversial topic.

Even very startling speech from a student is protected by the First Amendment. A student wearing a shirt with a picture of President Bush over the phrase "International Terrorist" was protected in *Barber v. Dearborn Public Schools*, 286 F.Supp.2d 847 (E.D. Mich. 2008). In that case, the school argued the shirt was likely to provoke violence among students who supported the President, but the Court held the school failed to show that the student's shirt had caused a substantial disruption of or material interference with school activities.

The 8th Circuit has followed this rule, as well, requiring a palpable threat before permitting censorship of student speech.


"... a school cannot punish a student for expressing his personal views on the school's premises unless "school authorities have reason to believe that such expressions 'will substantially interfere with the work of the school or impinge upon the rights of other students.'" An "undifferentiated fear or apprehension" of a disturbance is not enough. Rather there must be "substantial facts which reasonably support a forecast of likely disruption." *B.W.A. v. Farmington R-7 School District*, 508 F.Supp. 740, 747 (E. Mo. 2007) (internal citations omitted)

In light of these cases, there is currently no sufficient basis to think that the shirts worn by students today will *actually* lead to a *substantial* disruption. The phrase "RIP" is so established in our culture as a traditional gesture of respect for the deceased that it begs credulity to argue that its predominant meaning is gang-related. I understand it is not a phrase the Omaha Police consider to be an automatic gang-threat message. Thus, lacking any evidence that the phrase is gang-related, it certainly makes sense to begin by assuming that your students are mature enough and well-supervised enough to respond to (or ignore) this message without disrupting the school day.

ACLU Nebraska is asking you to review this issue and take action to set aside the suspensions for all students involved. In case you are not yet willing to make that decision, we would ask you suspend imposition of the remaining days while the students appeal their suspensions--thus, the students will not miss any further days of school while this matter is resolved.

I appreciate your attention and look forward to hearing from you with your decision.

Very Truly Yours,



Amy A. Miller  
Attorney at Law

cc: Dr. Curtis Case, Principal, Millard South, Fax (402) 715-8472