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September 28, 2009

Carol Boyce
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Kathleen Eagan
Principal - Palmerton Area High School
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VIA FACSIMILE to (610) 826-4958 and (610) 826-4929

Re: First Amendment Rights of Palmerton Area High School Students

Dear Superintendent Boyce and Principal Eagan:

The American Civil Liberties Union of Pennsylvania (ACLU-PA) has been contacted by parents of students prohibited from wearing to Palmerton Area High School t-shirts that bear their student identification numbers and the words: "Property of PHS." On September 15, 2009, the day of a Palmerton Area School District Board of Education meeting, approximately forty Palmerton Area High School students wore the "Property of PHS" t-shirts to protest new student dress policies prohibiting the wearing of body jewelry and "non-typical" hair coloring.

It is our understanding that on September 15, 2009, school officials ordered all students wearing the t-shirts to report to the cafeteria during their first block of classes. Once in the cafeteria, students were given three choices: 1) They could change into different shirts and return to class; 2) They could continue to wear the forbidden t-shirts and report to in-school suspension for the remainder of the day; or 3) They could continue to wear the forbidden t-shirts and leave the school property, accruing an "unlawful" or "unexcused" absence for the day. Any schoolwork, including tests and quizzes, missed

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during a period of “unlawful” or “unexcused” absence cannot be completed at a later date and is assigned a grade of zero. Palmerton Area High School Student Handbook 2009-2010 p. 1 (“Handbook”).

It appears that these actions were not taken because of any observed or expectation of class disruption from the wearing of the t-shirts, but because of the students’ vocal opposition to the student dress policy. On the morning of September 15, the students were told orally that they were being disciplined because the t-shirts were disruptive and because they violated a District policy against “clothing with any type of double meaning.”¹

Approximately twenty students, in protest of school officials’ efforts to quash their First Amendment speech rights, refused to remove their shirts and either served in-school suspension or were forced to leave school grounds, accruing “unlawful” or “unexcused” absences. Among these students were Brandon Mazepa.

Many of these students received zeros for schoolwork missed during the period of “unlawful” or “unexcused” absence. Also, on September 21, Brandon Mazepa was told that his previously arranged absence for job-shadowing on the day following his wearing of the shirt, September 16, would additionally be counted as an “unlawful” or “unexcused” absence. All of these students plan to apply to post-secondary education programs and harbor concerns that the “unlawful” or “unexcused” absences appearing on their high school transcripts may damage the competitiveness of their applications. Lastly, all of these students wish to wear the t-shirts in the future—in ongoing protest of student dress code policies prohibiting body jewelry and “non-typical” hair color. By punishing students for wearing the t-shirts, school officials have unconstitutionally restricted the students’ right to freedom of speech.

Palmerton Area School District’s prohibition against wearing the t-shirts is unconstitutional. For forty years, courts have recognized the U.S. Supreme Court’s ruling in *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969), as the lodestar for judging public school limitations on student speech. The U.S. Court of Appeals for the Third Circuit has frequently reiterated the rule in *Tinker* – public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506; *see, e.g. Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001). Student political expression may only be limited where that expression actually causes or threatens a material and substantial disruption of regular school activities. *Tinker*, 393 U.S. at 508-09. An “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Sypniewski*, 307 F.3d at 253 (*quoting Tinker*, 393 U.S. at 508). “As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.” *Saxe*, 240 F.3d at 211. The only disruption that took place with respect to the “Property of PHS” t-shirts was that caused by school officials removing

¹ To our knowledge, none of the suspended students has been issued a disciplinary notice, as required by 22 Pa. Code § 12.6(b)(1)(iii), setting forth the alleged rule infraction.

students from class. In similar situations, school officials have borne the burden of producing empirical evidence to support their conclusion that a substantial disruption is imminent. *See, e.g. Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 330-31 (2d Cir. 2006) (in absence of evidence about past disruption, prohibition against shirt critical of the U.S. President unconstitutional); *Sypniewski*, 307 F.3d at 246, 254 (in absence of evidence about past disruption surrounding use of the word "redneck," prohibition against Jeff Foxworthy shirt listing "redneck" jokes unconstitutional); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 543-44 (6th Cir. 2001) (in absence of evidence about past disruption surrounding the wearing of Confederate flags, prohibition against wearing such flags unconstitutional).

School officials' retaliation against Brandon Mazepa, by penalizing his participation in job-shadowing, amounts to a separate illegal penalty. "An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977)). When an individual engages in constitutionally protected speech, the government responds with retaliation and there exists some causal link between the protected speech and the retaliation, the elements of a constitutional retaliation claim are satisfied. *See, e.g. Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004). Brandon Mazepa had, prior to September 15, arranged for job-shadowing. Within days of his September 15 exercise of First Amendment speech rights on school grounds, he was punished for job-shadowing.

Furthermore, although school officials may generally prohibit attire that includes pro-drug, sexual and violent speech, the prohibition against "clothing with any type of double meaning" (Handbook p. 10) is unconstitutionally overbroad. "[A] regulation is unconstitutional on its face on overbreadth grounds where there is a 'likelihood that the [regulation's] very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court'." *Saxe*, 240 F.3d at 214 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). A great deal of protected speech may carry a double meaning. So long as neither meaning is pro-drug, sexual or violent, it must be permitted on school grounds. For this reason, the prohibition against "clothing with any type of double meaning" is unconstitutionally overbroad.

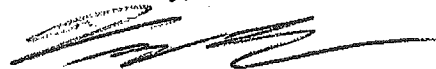
Our clients would prefer to resolve this matter without litigation. For that to be possible, Palmerton Area School District must, no later than the close of business on October 5, provide written assurance that:

1. No student will in the future be disciplined in any way for wearing the "Property of PHS" t-shirts or similar articles of clothing expressing political views protected by the First Amendment, absent evidence that the clothing has caused or threatens actual material and substantial disruption of regular school activities.
2. PASD will remove all disciplinary infractions, such as "unlawful" or "unexcused" absences, from the records of every student against whom infractions were imposed for the wearing a "Property of PHS" t-shirt.

3. PASD will permit all students who missed schoolwork on September 15, upon being sent home or to in-school suspension for wearing a "Property of PHS" t-shirt, to complete the schoolwork for full credit.
4. PASD will remove from Brandon Mazepa's student record any disciplinary infraction imposed against him for his job-shadowing absence on September 16, permit him to complete and receive credit for schoolwork missed on September 16, and recognize his completion of the job-shadowing on September 16.
5. PASD will revise the Student Handbook prohibition against "clothing with any type of double meaning" and clarify that only pro-drug, sexual and/or violent "double meanings" are prohibited and, pending that revision, will give notice to students and their parents that the prohibition will only be enforced as to pro-drug, sexual and/or violent messages.

If you believe that facts not set forth in this letter justify PASD's actions in prohibiting the t-shirts, we would appreciate the opportunity to discuss that with you. Otherwise, as the First Amendment rights of Palmerton High School students are presently being infringed upon, we respectfully must request a prompt response. If we do not receive a reply by the close of business on October 5, 2009, we will seek legal redress to protect our clients' constitutional rights.

Sincerely,



Valerie A. Burch
Staff Attorney

Witold J. Walczak
Legal Director

Cc: Steven R. Serfass
Solicitor – Palmerton Area School District
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