Out-of-state court rulings offer clues on handling Confederate flag displays

By the New York State Association of School Attorneys

Recently, in some school districts across the state, students have chosen to display Confederate flags on school grounds. Some students have worn T-shirts emblazoned with the Confederate "Southern Cross," and some have hung large Confederate flags from their vehicles in school parking lots. These displays often trigger complaints from other students and community members who consider the Confederate flag to be a symbol of racial oppression.

In a 2015 poll by CNN, 33 percent of Americans said they considered the flag to be a symbol of racism, while 57 percent said it represented Southern pride. Among whites with a college degree, 51 percent said it was a symbol of pride, and 41 percent said it represented racism.

The appropriateness of allowing the flag to be flown in official spaces has been debated in both the North and the South. After a shooting left nine black churchgoers dead in South Carolina in 2016, state officials stopped flying the Confederate flag at the state Capitol.

How should school administrators respond when a student displays the Confederate flag at school? What are a school district's obligations to students who want to display the flag as well as others who object to or feel threatened by its display? Is the district on safe legal ground if it prevents displays of the flag or punishes students who do so?

The answers to these questions – as well as similar questions about expressions of anti-Muslim, anti-immigrant or anti-gay sentiments in school – depend on the circumstances and the history of relevant incidents in the school district.

While students do not shed their First Amendment rights at the schoolhouse gate, school officials can lawfully restrict the ability of students to express themselves in some instances. For example, school districts have wide discretion to prohibit student speech that is vulgar, lewd, indecent or plainly offensive. School districts may also censor any school-sponsored student speech, as long as the censorship is reasonably related to legitimate pedagogical concerns.

For all other student speech, however, courts will apply the standard first articulated by the U.S. Supreme Court in its famous decision in 1968's *Tinker v. Des Moines Independent Community School Dist.* In the decision, the High Court held that school districts are generally prohibited from restricting student speech, unless the speech would materially and substantially disrupt classwork and discipline in the school district.

While no federal court in New York has addressed the specific issue of whether and how the *Tinker* standard applies to the display of the Confederate flag at school, six federal circuit courts with jurisdiction in other states have. These courts found that school districts can restrict the display of the Confederate flag if school authorities have facts that allow them to reasonably forecast that the flag will substantially disrupt or materially interfere with school activities.

These rulings provide valuable guidance on what kinds of circumstances can lead a school administrator to reasonably predict that a display of the Confederate flag could cause substantial disruption or materially interfere with school activities. In many cases, courts have been persuaded by evidence of a history of racial incidents.

In a Missouri case (*B.W.A. v. Farmington R-7 School Dist.,* 2009), the court concluded that school officials could reasonably predict a substantial disruption resulting from any display of the Confederate flag, based on evidence of the following incidents: (1) a skirmish between the school and an opposing team after two of the school's players allegedly used racial slurs against black players from the other team in connection with a Confederate flag's display outside of the locker rooms; (2) a white student urinating on a black student, causing the black student to withdraw from the school; (3) a fight between a black student and white students at the black student's home, leading to a later confrontation at the school; (4) numerous racial slurs occurring at the school; and (5) students drawing offensive symbols, such as swastikas, in their notebooks and on the chalkboard.

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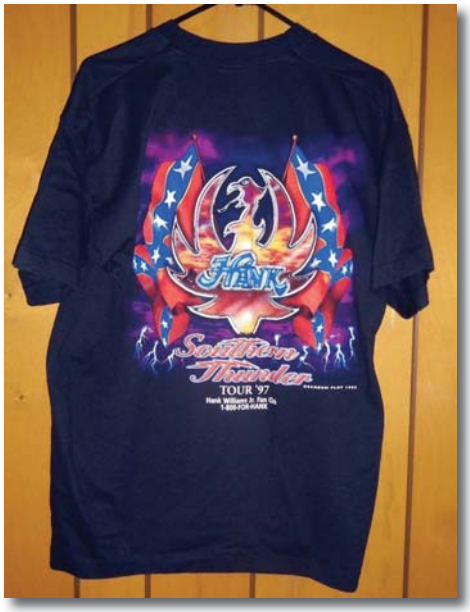

Two Kentucky high school students were suspended for wearing this T-shirt, but a federal circuit court ruled that this could have been a violation of the students' First Amendment rights. Determinations in such cases depends on how the school district administers its policies and whether there is a history of racial unrest in the district or surrounding community. ❖ *Photo courtesy of eBay.com*

In a case involving a Texas high school, the court ruled that school officials reasonably predicted a substantial disruption from displaying the Confederate flag based on multiple incidents that, for the most part, were not as shocking as the ones in the Missouri case. In *McAllum v. Cash*, these incidents included: (1) racially hostile graffiti and vandalism, (2) multiple disciplinary referrals involving racial epithets, (3) a physical confrontation between white students and African-American students of another high school within the school district, (4) an incident in which a white student waved the flag in the direction of an opposing school's predominantly African-American volleyball team, (5) Confederate flags being flown over the flagpole on Martin Luther King Jr. Day, and (6) a white student simulating the lynching of an African-American student.

The history of the school and its community can also be factors in whether school officials could reasonably predict a material and substantial disruption, according to a ruling in a South Carolina case, *Hardwick v. Heyward.* The court said school administrators acted properly to prohibit a student from wearing Confederate flag T-shirts in the 2005-06 school year based on racial incidents from decades earlier – including a sartorial battle. After a white student and an African-American student attended the prom together in the mid-1980s, white students responded by wearing Confederate flag apparel and African-American students donned Malcolm X apparel.

While most cases involving banning the Confederate flag turn on evidence of a history of racial animosity, a Florida school district prevailed in a case with no such record beyond some fights involving students of different races. In *Scott v. School Bd. of Alachua County* (2003), a high school principal had suspended two students who had worn shirts with the Confederate flag. A three-judge panel for the U.S. Court of Appeals for the 11th Circuit wrote: "One only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke." The 11th Circuit also said: "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."

In at least one case, a federal circuit court ruled against a school district that had disciplined students for displaying the Confederate flag on First Amendment grounds. Two high school students in Kentucky were suspended twice (for three days each time) for wearing T-shirts with a portrait of country singer Hank Williams Jr. on the front and two Confederate flags as part of a design on the back. A federal district court judge saw no free speech issue and granted the school district's motion for summary judgment. On appeal, the Sixth Circuit Court of Appeals noted that the students initially wore the shirts on Sept. 17, which is the birthday of the singer's father, country music legend Hank Williams. Circuit Court Judge Gilbert Merritt ruled that the students wore the shirts "to express their southern heritage" and that this "constituted protected speech under First Amendment." He also noted that students were not disciplined for wearing clothing venerating Malcolm X.

Judge Merritt remanded the case to the lower court for trial. "After reviewing (the) decision, we find that we are unable to resolve the constitutionality of the school board's actions without knowing the manner in which the school board enforced its dress code and whether Madison County High School had actually experienced any racially based violence prior to the suspensions." In 2002, the school board settled the lawsuit by agreeing to amend a dress code to have administrators consider a "student's purpose" when determining whether clothing is inappropriate.

It appears that, under the *Tinker* standard, school districts must decide on a case-by-case basis whether it is appropriate to prohibit students from displaying the Confederate flag at their schools, based on the history of race-based tensions at the school and other relevant factual considerations.

This assumes that federal judges in New York will rule similarly to federal courts in other states. While federal judges in New York have not been asked to rule in any cases involving the specific issue of displaying the Confederate flag on school grounds, they have applied the Tinker standard in other contexts.

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For instance, the U.S. Court of Appeals for the Second Circuit, which has jurisdiction over all of New York State, has ruled that school administrators do not have to prove that actual disruption occurred or that substantial disruption was inevitable to justify a curtailment of student speech. Instead, they only have to be able to show that it was reasonable to predict that disruption would occur, according to the Second Circuit's 2012 ruling in *Cuff ex rel. B.C. v. Valley Cent. School Dist.*, which involved a fifth-grader who made a crayon drawing that staff perceived as disturbing. The test is objective, focusing on the reasonableness of the school administration's response – not on the intent of the student.

The Second Circuit has also ruled that, under *Tinker*, school officials have an affirmative duty to not only ameliorate the harmful effects of disruption, but to prevent them from happening in the first place. After a Hispanic student died in a motorcycle accident, a rumor spread that one student said, "one down, 40,000 to go," prompting administrators to take actions based on fear for the identified student's safety (*DeFabio v. East Hampton Union Free School Dist*., 2010).

In addition, civil rights laws could be relevant in future rulings. Under Title VI of the Civil Rights Act, a school district can be held liable for being deliberately indifferent to severe, race-based peer harassment of a student. Moreover, under New York's Dignity for All Students Act, school districts have an obligation to create and implement policies to afford a school environment to all students that is free of discrimination and harassment.

Notably, school districts are required under the Dignity Act to adopt policies that prohibit harassment, even if the harassment does not rise to the "severe" level. Thus, under the Dignity Act, school districts have a broader obligation to prevent racial discrimination and harassment in their schools than what would otherwise be required under Title VI.

A recent ruling by a state appellate court suggests that school districts cannot be sued under the Dignity Act (*Motta ex rel. Motta v. Eldred Cent. School Dist*, 2016). Even if that were not the case, a school district's compliance with its anti-bullying policies and other policies related to the Dignity Act should help districts mitigate or avoid liability.

So, what should school districts do when a student displays a Confederate flag at school? The district could find itself facing a legal claim no matter what its response, including no response. As a result, when these situations arise, districts should consult their school attorneys to analyze the specific facts of the case facing the school district.

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