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.

In a Missouri case (McAllum v. B.W.A. v. Farmington R-7 School Dist., 2009), the court concluded that school officials reasonably predicted a substantial disruption 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 displayed 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.

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 appropriateness of allowing the Confederate flag to be displayed on school grounds, as long as it is a reasonable prediction of a substantial disruption or materially interfere with school activities. 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.

While no federal court in New York has addressed the specific issue of displaying the Confederate flag on public school 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 constitutional issues 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.

Members of the New York State Association of School Attorneys represent school boards and school districts. This article was written by Monica Skanes of the Whiteman, Osterman and Hanna law firm.