

CLIENT NEWS BRIEF

Ninth Circuit Affirms School Officials' Authority to Regulate Student Expression Where Disruption and Student Safety is at Issue, Even if Such Expression is the American Flag

On February 27, 2014, in *Dariano v. Morgan Hill Unified School District* (9th Cir. 2014) __ F.3d __ 2014 WL 768797, the U.S. Ninth Circuit Court of Appeals held that a school district administrator did not violate students' constitutional rights by requiring them to remove American flag clothing on Cinco de Mayo. The court's opinion primarily hinged upon: (1) the foreseeable threat of violence that day to the students wearing such apparel; and (2) the school's history of gang and race-related violence at the school, including a similar threat of violence on Cinco de Mayo the prior school year. The opinion generally underscores the sanctity of the standard established in *Tinker v. Des Moines Independent Community School District*, (1969) 393 U.S. 503, which permits the regulation of student expression to quell actual or foreseeable disruption to the school environment.

On May 5, 2010, a high school sponsored a celebration of Cinco de Mayo. That day, several students chose to wear shirts that displayed the American flag. During a break, students advised the assistant school principal that "there might be some issues (in the quad area)...(and that) there might be a problem." The administrator interpreted these comments to mean there might be a physical confrontation. Among other facts, the assistant principal was asked why the Caucasian students were able to wear the American flag shirts and the Mexican students were not able to wear clothing displaying the Mexican flag. Ultimately, school administrators directed the students wearing the American flag shirts either to remove the shirts or turn them inside out. When the students refused, they were sent home with excused absences. No student was disciplined for refusing to remove their American flag shirt.

As the *Dariano* court explained, to pass constitutional muster under *Tinker* and its progeny, school officials must demonstrate that regulation of student speech is in response to behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others (or might reasonably lead school authorities to forecast such disruption)." Importantly, the school had experienced prior fights between gangs and between Caucasian and Hispanic students. On Cinco de Mayo the year prior, there was an altercation at the school between students of different ethnicities. Based on these facts, the court found the administrators' actions were lawful under the *Tinker* standard.

The court also found the school administrators' actions did not simply result from an "urgent wish to avoid controversy," as school officials made clear their response hinged upon the need to quell anticipated disruption and violence. The court noted that "school officials have greater constitutional latitude to suppress possible student speech than to punish it," and the school did not impose discipline on any student due to the failure to remove an American flag shirt. Finally, the court held that school officials did not enforce a general ban on clothing bearing the American flag—indeed, students were permitted to continue to wear shirts that depicted the American flag where such shirts were unlikely to make students targets of violence.

In addition to the claim that school officials' violated their free speech rights, the

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Sloan R. Simmons
Partner and Litigation
Practice Group Chair
Sacramento Office
ssimmons@lozanosmith.com



Gabriela D. Flowers
Associate
Sacramento Office
gflowers@lozanosmith.com



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students alleged they were treated differently than students who wore the colors of the Mexican flag, in violation of constitutional equal protection rights. Courts have established that schools do not violate equal protection when they “ban certain images...even though such bans might constitute viewpoint discrimination.” The *Dariano* court rejected the students’ equal protection claim, holding the students offered no evidence that students wearing the colors of the Mexican flag were “targeted for violence.”

The court also addressed the students’ final claim that the District’s dress code policy, which prohibited clothing that “indicate(s) gang affiliation, create(s) a safety hazard, or disrupt(s) school activities,” violated their due process rights as unconstitutionally vague. The court summarily rejected this claim as similar policies had been upheld by other courts around the country, and the policy actually contemplated and incorporated the *Tinker* standard.

Although involving the American flag, this opinion is consistent with prior cases that limited the display of the Confederate flag because of “the potential disruption that the displaying of Confederate symbols would likely create.” The involvement of the American flag in *Dariano*, however, has caused the case to garner national attention. While an admittedly unique set of facts in terms of the subject matter of the students’ expressive activity, *Dariano* reiterates the applicable *Tinker* standard, and centers on school officials’ authority to regulate speech based on the disruption or the potential for disruption that it causes to the school environment, including where student safety is at issue. Such decisions by school officials will be judged on the particular facts present in a given case.

At the time of this news brief’s publication, the students have filed a Petition for Rehearing and Rehearing *En Banc* with the Ninth Circuit, requesting the court to reconsider its opinion.

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