

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Gainesville Division

WAYNE SAPP, individually and as
next friend to his minor children,
E.S., J.S., and F.S.; STEPHANIE SAPP;
LUDGER BOECKEN, individually
and as next friend to his minor
children, A.B., M.B., L.B., and H.B.;
and HEIKE BOECKEN,

Plaintiffs,

No. 09-242

v.

SCHOOL BOARD OF ALACHUA
COUNTY, FLORIDA,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action challenges the constitutionality of Alachua County School Board's policies or practices which permit school administrators to ban any messages on clothing which they find "offensive to others" and which permit school administrators to allow messages which they determine to be "positive" while banning messages they determine to be "negative." Defendant's school administrators, pursuant to Board policies or practices, have banned various t-shirts containing messages that are constitutionally

protected, both during school and at an extra-curricular school event, and have punished the student plaintiffs for exercising their right to free speech under the First Amendment to the United States Constitution.

2. At issue in this case is whether school officials may lawfully prohibit non-vulgar and non-obscene student religious expression at school or school events because such speech may be offensive to others. Similarly, at issue in this case is whether school officials may lawfully apply student dress codes to adults attending school sponsored events and force them to leave school grounds because of messages on t-shirts that school officials find may be offensive to others. Finally, at issue in this case is whether school officials may lawfully permit what they consider to be “positive” messages about religion, faith or other matters while prohibiting what they consider to be “negative” messages about those same matters.

3. Defendant’s policies or practices have violated plaintiffs’ freedom of speech under the First Amendment to the United States Constitution, as applied to the Alachua County School District through the Fourteenth Amendment. Plaintiffs are entitled to exercise their First Amendment right to express their religious beliefs and, as a part of that expression, speak about Islam. Having been disciplined and removed from School District property under defendant’s policies or practices, plaintiffs reasonably fear further disciplinary action if they exercise their

constitutional rights. Defendant's policies or practices, therefore, chill plaintiffs' exercise of their rights under the First Amendment.

JURISDICTION

4. Plaintiffs bring this action pursuant to 42 U.S.C. §1983 for violation of their rights under the First and Fourteenth Amendments to the United States Constitution.

5. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1343(a)(3). Declaratory relief is authorized by 28 U.S.C. §§2201 and 2202, and injunctive relief pursuant to Fed.R.Civ.P. 65.

PARTIES

6. Plaintiffs Wayne and Stephanie Sapp are parents of E.S., formerly a tenth-grade student, J.S., an eighth-grade student, and F.S., a fifth-grade student, all in Alachua County Public Schools. Wayne and Stephanie Sapp bring this action on their own behalf. E.S., J.S. and F.S. bring this action through their father and next friend, Wayne Sapp.

7. Plaintiffs Ludger and Heike Boecken are parents of A.B., formerly a twelfth-grade student, M.B., a tenth-grade student, L.B., an eighth-grade student, and H.B., a sixth-grade student, all in Alachua County Public Schools. Ludger and Heike Boecken bring this action on their own behalf. A.B., M.B., L.B., and H.B. bring this action through their father and next friend, Ludger Boecken.

8. Alachua County School District is a public entity created by Florida Statute §1001.30. The District is governed by the School Board of Alachua County, which is subject to suit pursuant to Florida Statute §1001.41(4).

FACTS

9. Plaintiffs are all members of the Dove World Outreach Center, a church in Gainesville, Florida.

10. Prior to the commencement of the 2009-10 school year, the Dove World Outreach Center posted a billboard on church property with the statement “Islam is of the Devil.” As part of their religious beliefs, church members believe the message to be true and desire to publicly express their beliefs.

11. The billboard generated a significant amount of publicity in the Gainesville area and a number of protests on the public property adjacent to the church property. In accordance with the protections guaranteed by the First Amendment, government officials neither tried to force the Dove World Outreach Center to remove the sign nor tried to interfere with the right of protestors to express their disapproval or outrage at the message being conveyed by the church.

12. However, when this message was brought into several public schools in Alachua County, administrators suppressed the message by ordering that t-shirts displaying the message be removed or covered up.

13. The original t-shirts in question had two statements printed on the front – “Jesus answered ‘I am the way and the truth and the life; no one goes to the Father except through me,’” and “I stand in truth with Dove World Outreach Center.” School officials do not object to these messages and will permit the student plaintiffs to wear t-shirts with those messages.

14. The statement “Islam is of the Devil” was printed on the back of the original t-shirts. All of the student plaintiffs, except for J.S., wore this t-shirt on the first day of school in August 2009.

15. With both the front and back of the t-shirts plainly visible, all of the Boecken student plaintiffs and E.S. wore the t-shirts the first day without incident. No disruption or interference with school work occurred.

16. F.S. wore the t-shirt the first day and although there were no negative reactions from students or teachers, she was removed from class and ordered to change the shirt or be removed from school.

17. Starting the second day of school, the student plaintiffs who wore these t-shirts were subjected to disciplinary actions by school officials, ranging from requiring the student to change or cover up the t-shirt to suspension.

18. Subsequently, school officials prohibited the student plaintiffs from wearing t-shirts with: (1) "I.I.O.T.D" printed on the back (with the same front as the original t-shirt), and (2) either "I.I.O.T.D." or "Islam is of the Devil" covered up so that the message was not visible. School officials had no problem with the messages printed on the front of the t-shirts; they objected only to the messages printed (even when covered) on the back of the t-shirts and prohibited those messages.

19. None of the student plaintiffs engaged in any conduct that was actually or potentially disruptive.

20. Neither the work of any of the schools nor any class was disrupted by the student plaintiffs wearing the t-shirts with these messages.

21. In response to a public records request for records regarding any of the t-shirts "having disrupted the educational process or having been offensive to others within the Alachua County Public Schools," defendant produced a DVD of the September 1, 2009, School Board meeting in which people (one student and several parents) spoke during the Board meeting and also produced copies of e-mails received regarding the t-shirts.

22. While the speakers at the Board meeting decried the message on the t-shirts, none offered examples of any instances of interference or disturbance in the schools caused by the student plaintiffs' actions or conduct.

23. Similarly, the e-mails generally condemn the message as being offensive or hateful (and support the Board's policies and practices in banning the t-shirts with that message) but offer no evidence of interference or disturbance in the schools caused by the student plaintiffs' actions, conduct or message.

24. Nothing was said or otherwise presented at the Board meeting that would give the Board reason to believe that the plaintiffs' shirts would materially and substantially disrupt the work and discipline of the district's schools.

25. Finally, all plaintiffs, and others, wore three versions of the t-shirt ("Islam is of the Devil," "I.I.O.T.D.," and "Don't Hate Me Because I Speak the Truth") to an Alachua County high school football game on October 2, 2009.

26. Plaintiffs sat together while watching the game and engaging in conversation amongst themselves. Plaintiffs did not engage in any conduct that was actually or potentially disruptive of the football game.

27. Near the end of the first quarter, school officials instructed plaintiffs that the messages on the t-shirts were forbidden on school property. Officials then had plaintiffs escorted by police off school property.

28. The decision to remove plaintiffs was made because the messages purportedly offended others present at the game. Plaintiffs had

taken no action or engaged in any conduct that disrupted the football game or interfered with others attending the football game.

29. In an effort to ascertain what messages may be permitted by defendant's policies or practices, and what messages may be prohibited, plaintiffs, through counsel, sent defendant's Superintendent a letter on September 28, 2009, asking, *inter alia*, to advise them as to whether specific phrases would be permitted or prohibited. *See* ACLU Letter, Attachment 1.

30. Defendant's counsel responded on the Superintendent's and School Board's behalf, declining to advise plaintiffs whether any of the speech would be permitted or prohibited, offering only that "the School Board will not ban positive messages" and "will not ban phrases or symbols which advocate fair treatment and tolerance of differing viewpoints." *See* Dell Graham letter, Attachment 2.

31. School officials continue to prohibit student plaintiffs from wearing the original "Islam is of the Devil" t-shirts, as well as t-shirts with: (1) "I.I.O.T.D" printed on the back (with the same front as the original t-shirt), (2) "Islam is of the Devil" or "I.I.O.T.D." covered up so that the wording is not visible.

32. Plaintiffs believe they have a right under the First Amendment to convey the messages that have been prohibited by school officials and the

other messages for which they sought approval but which the Board declined to address.

33. Having been removed from School District property, and having been subjected to disciplinary action in the schools, plaintiffs have refrained from exercising that right for fear of further punishment.

34. Plaintiffs E.S. and A.B. decided to withdraw from school because of school officials' interference with their First Amendment rights.

35. While the remaining student plaintiffs desire to express their religious beliefs through messages printed on t-shirts, they cannot ascertain in advance which speech will be permitted and which speech will be prohibited by defendant's policies and practices. Thus, they subject themselves to disciplinary action, including suspension from school, should they exercise their right of free speech in a manner in which any school official finds may be offensive to others.

36. Unless defendant's policies or practices are declared unconstitutional by this Court, and their enforcement enjoined, all plaintiffs will continue to be subject to disciplinary action or removal from school property if they convey the messages in question. Plaintiffs have been, and will continue to be, irreparably harmed by this continued threat which results in the denial of their constitutional rights.

37. Plaintiffs have no adequate remedy at law because the denial of their constitutional rights cannot be remedied through legal relief. Indeed, plaintiffs seek mainly declaratory and injunctive relief and seek only nominal damages.

38. Defendant's school officials' actions were under color of state law and pursuant to defendant's custom, practice or policies.

39. Defendant's policies include School Board policy 5511, Code of Student Conduct for Secondary Schools (2009-2010), Code of Student Conduct for Elementary Schools (2009-2010), Gainesville High School Student Handbook, and Eastside High School Student Handbook, all of which permit the banning of clothing, and messages on clothing, which is "offensive to others or inappropriate at school and at school sponsored events." These policies also vest final decision making authority in each school's "principal or the principal's designee" as to whether the "dress is appropriate," which also includes the authority to determine what speech is offensive.

40. Defendant's policies vest excessive subjective discretion in school officials by permitting each school official to determine on a case by case basis whether any particular message is "offensive" under defendant's policies.

CAUSE OF ACTION

41. School officials' actions in banning various messages on t-shirts, in accordance with defendant's policies and practices, violate the student

plaintiffs' right to free speech in violation of the First and Fourteenth Amendments to the United States Constitution. This deprivation may be redressed pursuant to 42 U.S.C. §1983.

42. Defendant's policies and practices with regard to prohibiting messages on t-shirts are vague and substantially overbroad, in violation of the First and Fourteenth Amendments to the United States Constitution, and deprive the student plaintiffs of their right to free speech. This deprivation may be redressed pursuant to 42 U.S.C. §1983.

43. Defendant's policies and practices with regard to permitting "positive" messages on t-shirts while prohibiting "negative" messages regarding the same subject matter constitutes viewpoint discrimination and violates the student plaintiffs' right to free speech in violation of the First and Fourteenth Amendments to the United States Constitution. This deprivation may be redressed pursuant to 42 U.S.C. §1983.

44. School officials' removal of all plaintiffs from an Alachua County high school football game because of the messages on the t-shirts that they were wearing violated their right to free speech in violation of the First and Fourteenth Amendments to the United States Constitution. This deprivation may be redressed pursuant to 42 U.S.C. §1983.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request this Court:

- (a) declare that defendant's policies and practices which permit school administrators to ban any messages on clothing which they find "offensive to others" are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution;
- (b) declare that defendant's policies and practices which permit school administrators to allow messages which they find to be "positive" while banning messages they find to be "negative" are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution;
- (c) declare that defendant's policies and practices which permit school administrators to remove spectators from extra curricular activities because of the content of messages on t-shirts are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution;
- (d) enter a preliminary and permanent injunction enjoining the defendant from prohibiting plaintiffs from wearing clothing which contains non-vulgar and non-obscene messages, regardless of whether school officials find the messages offensive;

- (e) award plaintiffs nominal damages not to exceed twenty dollars total;
- (f) award plaintiffs their costs, litigation expenses and attorneys' fees pursuant to 42 U.S.C. §1988; and
- (g) retain jurisdiction of this case and grant plaintiffs such other and further relief as is just and proper.

Respectfully submitted,

/s Randall C. Marshall

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September 28, 2009

Dr. W. Daniel Boyd, Jr.
Superintendent of Schools
Alachua County Public Schools
620 East University Avenue
Gainesville, FL 32601-5498

Re: t-shirts, offensive dress, public records request

Dear Dr. Boyd:

We represent the following students: E█████ S█████, a tenth grade student at Gainesville High School; J█████ S█████, an eighth grade student at Westwood Middle School; F█████ S█████, a fifth grade student at Talbot Elementary; I█████ B█████, an eighth grade student at Westwood Middle School; H█████ B█████, a sixth grade student at Westwood Middle School; A█████ B█████, a twelfth grade student at East Side High School; and M█████ B█████, a tenth grade student at East Side High School.

Each of these students initially wore a t-shirt to school with two statements printed on the front – “Jesus answered I am the way and the truth and the life; no one goes to the Father except through me,” and “I stand in trust with Dove Outreach Center.” The statement “Islam is of the Devil” is printed on the back. While the individual school’s reaction to each student varied, ultimately school officials prohibited each student from wearing the original t-shirt under School Board policy 5511 B as either disrupting the educational process or as being offensive to others.

In undertaking representation of these students, the ACLU is not defending the content of the messages that they and their families have chosen for their t-shirts. Rather, we seek to defend the right to express their religious beliefs consistent with the constitutional right to engage in First Amendment activity within public schools.

The school District’s response has been inconsistent to the t-shirts. Some of the students were allowed to wear the t-shirt as long as the back was covered; others were prohibited from wearing it at all, even with the back covered. E█████ S█████ was told that she couldn’t wear the t-shirt even if there was nothing on the

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back because others would know what it had previously said. Subsequently, the students wore a similar t-shirt (with the front identical to the original) but with "I.I.O.T.D." on the back. All were prohibited from wearing the second t-shirt, again under policy 5511 B. Several have been subjected to disciplinary action as a result of having worn different versions of the t-shirts.

We understand that the t-shirts did not appear in a vacuum. Rather, the Dove Outreach Center, of which the students are members, has had a sign posted in front of its property for several weeks that states "Islam is of the Devil." Indeed, church members have sincerely held religious beliefs that are conveyed in both messages – "Jesus answered I am the way and the truth and the life; no one goes to the Father except through me" and "Islam is of the Devil." Further, as part of their religious mission they seek to engage others in a discussion about those beliefs. The message, and its display, has become a matter of much public debate and concern. Alachua County Public Schools is not immune from this community interest and while it may have temporarily suppressed the message, the School District's response to ban the t-shirts will not end the debate. Indeed, suppression of ideas cannot make those ideas disappear. Censoring the message, forcing the views expressed on the t-shirts underground as if they do not exist, is not consistent with the Constitution's guarantee of the right of free speech for students – even speech that is offensive or divisive.

We urge the School District to consider responses other than censorship and use this expression as a teachable moment to increase understanding, and possibly diminish animosity to religious traditions that are minority faiths within Alachua County, and which, in this instance, is aimed at one of the world's oldest and largest religious traditions.

As the Supreme Court held forty years ago, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). It is true that the First Amendment rights of students are not necessarily co-extensive with the rights of adults outside of the school setting. See, e.g.: *Morse v. Frederick*, 551 U.S. 393, 396-7 (2007) (school officials need not tolerate "speech that can reasonably be regarded as encouraging illegal drug use."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988) (high school principal may delete materials he found objectionable from school sponsored newspaper, as "[a] school need not tolerate student speech that is inconsistent with its basic educational mission."); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (a student may be disciplined for delivering a speech that was sexually explicit, but not legally obscene, at a school assembly).

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However, none of these special, limited circumstances are present here. Rather, the students' choice to express their religious beliefs is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003).

In a case strikingly similar to the situation here, a federal district court in Ohio held that a school district violated a student's First Amendment rights when it banned a t-shirt with written messages on the front and back. The front of the shirt stated: "INTOLERANT Jesus said ... I am the way, the truth and the life. John 14:6." The back of the shirt contained the following statements: "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" The t-shirt was banned because "the message on his shirt was offensive and inappropriate." See *Nixon v. Northern Local School District Board of Education*, 383 F.Supp.2d 965, 967 (S.D. Ohio 2005). The Ohio school district had a policy nearly identical to policy 5511 B: "[a]ny fashion (dress, accessory, or hairstyle) that disrupts the educational process ... will not be permitted.... The following styles or manners of dress are prohibited ... clothing with ... offensive ... words and/or pictures"

As written, and as applied to these students, policy 5511 B sweeps in a substantial amount of protected speech by giving school administrators the unfettered discretion to ban speech that they find "offensive." Moreover, the application of this policy to the initial t-shirt constitutes viewpoint discrimination. The School District permits comments about Christianity while at the same time prohibiting comments about Islam. Indeed, to a non-Christian, the front of the t-shirt may well be offensive.

At this point, these students wish to engage in speech about their religious beliefs and want to do so without being subjected to disciplinary action. Because each school building administration interprets the policy differently, we seek permission for and on behalf of the named students to express themselves through the following phrases¹ printed on a T-shirt or another article of clothing or accessory:

1. "Islam is of the Devil."
2. "I.I.O.T.D."
3. Either number 1 or number 2 with those statements covered by blank cloth.

¹ In addition to: "Jesus answered I am the way and the truth and the life; no one goes to the Father except through me," and "I stand in trust with Dove Outreach Center," which the Alachua County Public Schools has permitted.

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4. Either number 1 or number 2 with those statements covered by cloth with "censored" printed on it.
5. "X.X.X.X.X."
6. "Don't hate me for speaking the truth."
7. "Ask me about Islam."
8. "Censored."
9. "Islam is a Lie."
10. "Islam is Anti-American."
11. "Islam is not a religion of peace."
12. "This is a Christian nation, not an Islamic state."
13. "Wake up before it's too late."
14. "I'm not allowed to wear the T-Shirt you are thinking of."
15. "Jesus is the only way - everything else leads to condemnation."
16. "It is not a message of hate but of love."
17. "We cannot make friends with enemies."
18. "Building bridges to the Muslim world will get us killed."
19. "Women are treated like dirt in Muslim nations."
20. "Islam is not a religion of peace."
21. "Education is not the most important thing in life."
22. "Do you really want to be like everyone else?"
23. "Every Christian should agree with the message."
24. "Freedom of speech denied."

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25. "American slavery 300 years - Islamic slavery 1400 years."
26. "Muhammed was never resurrected."
27. "Kill those who change their Islamic religion" – Muhammed

Please advise (1) which of the above forms of expressions may be prohibited as a matter of course under the School Board policies, and (2) if any or all of them are not absolutely prohibited, the circumstances under which they are not prohibited and the rationale for the limited prohibition.

We would appreciate receiving your written response on or before October 7 so that we may properly advise our clients regarding the specific forms of expression for which they may be reprimanded or punished. If we do not receive a timely response, we will understand that the general prohibition under policy 5511 B prohibits each specific example above in all circumstances, and we will discuss further options with the students and their families.

Finally, pursuant to Fla. Stat. Chapter 119, we ask that the following records be copied for us:

1. All records regarding any t-shirt described above having disrupted the educational process or having been offensive to others within the Alachua County Public Schools;
2. All records regarding the prohibition of other t-shirts for having disrupted the educational process or having been offensive to others within the Alachua County Public Schools within the past five school years; and
3. Any Alachua County Public Schools' policy other than policy 5511 B utilized to justify the prohibition of any of the t-shirts described above.

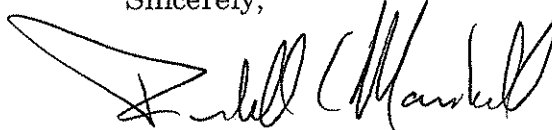
If your office has a policy of requiring the payment of a copying charge for such records, we ask that you inform us of that charge and advise us of the estimated cost prior to the copying of the documents.

If any of the requested documents are withheld under a claim that they are exempt from disclosure under Fla. Stat. Chapter 119 or other statutory provisions, please identify each such document and the precise statutory basis on which it has been withheld.

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Should you have any questions about the public records request, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Randall C. Marshall". The signature is written in a cursive style with a large, sweeping initial "R" and "M".

Randall C. Marshall

DELL GRAHAM

JOHN D. JOPLING* CARL B. SCHWARTZ† ELLEN R. GERSHOW‡ DALE J. PALESCHIC JENNIFER C. LESTER DAVID M. DELANEY SUSAN M. SEIGLE
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October 9, 2009

Randall C. Marshall
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Re: Letter Dated September 28, 2009 regarding your clients, the Sapps and the Boechkens

Dear Mr. Marshall

This is in response to your letter dated September 28, 2009, to Dr. W. Daniel Boyd, Jr., as Superintendent of the Alachua County Public Schools, regarding your clients, the Sapps and the Boechkens. I understand a response to your public records request has been sent by separate cover. This letter will address your contentions that your clients' First Amendment rights have been violated.

Your clients are the children of two families that are affiliated with the Dove Outreach Center in Gainesville, Florida. As you know, prior to the commencement of the 2008-2009 school year, the Dove Outreach Center posted a large billboard on its church property with the statement "Islam is of the Devil". This billboard generated a significant amount of negative publicity and outrage in Gainesville, with a number of groups protesting its message of intolerance on the public roadways adjacent to the church property.

Shortly thereafter, during the first few days of the school year, your six clients, who range in age from a fifth-grade elementary student to a high school senior, came to school wearing T-shirts that had the message "Islam is of the Devil" on the back of the T-shirt. As an initial consideration, we do not agree that the response of the Alachua County School District was inconsistent regarding the shirts. The principals all required that the students not display the message in school, whether by changing shirts or covering the offensive message. We believe that the School District was well within its rights to prohibit display of messages of religious intolerance during the school day in order to protect the rights of other students.

We are certainly aware that a public school student does not lose her constitution rights to freedom of speech when she comes to school every day, under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). However, a school may regulate a student's free speech rights if the exercise of those rights materially and substantially interferes

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** Florida Board Certified in Health Law

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with maintaining appropriate discipline at school, or if the conduct impinges on the rights of other students. *Tinker*, 393 U.S. at 509. You have been provided with a copy of the video taken of the Alachua County School Board meeting of September 1, 2009, where one student and several parents of school age children, all of the Muslim faith, made public comment about the upsetting message sent to them by the billboard and the T-shirts, and their commendation of the School Board for removing that message from display at school during the school day. This is clear evidence that your clients' conduct did, in fact, impinge on the rights of other public school students, which is sufficient justification for prohibiting your clients from continuing to wear their T-shirts during school.

Moreover, under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, (1986), the freedom of a student to advocate a controversial view in school is balanced against society's interest in teaching students the boundaries of socially acceptable behavior, regardless of whether there was an imminent fear of disruption or not. You are certainly aware that numerous courts have upheld bans on certain speech during the school day on the basis of both *Tinker* and *Fraser*, as well as speech that advocates use of illegal drugs. See e.g., *Morse v. Frederick*, 551 U.S. 393 (2007)(banner containing phrase "Bong hiTS 4 Jesus" may be banned as promoting illegal drug use); *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), *vacated on grounds of mootness*, 549 U.S. 1262 (2007)(the wearing of a T-shirt expressing religious condemnation of homosexuality is injurious to rights of gay and lesbian students); *Scott v. School Board of Alachua County*, 324 F.3d 1246 (11th Cir. 2003), *cert. den.* 540 U.S.824 (2003)(ban of display of confederate flags on school grounds is not an unconstitutional restriction of a student's free speech rights).

You should also be aware that several persons attended a football game between Gainesville High School and Eastside High School last Friday night, wearing T-shirts that bore the phrase "Islam is of the Devil". Some of the other students became anxious and fearful for their safety, because there were persons in the crowd wearing clothing with the offensive message. One student phoned her parents because she was so frightened that the "extremists" in the crowd might harm her, and asked to be taken home. The persons wearing the T-shirts were asked to leave the game because of the disruption they had caused.

Being a college town, Gainesville has a very diverse population, including a large number of families of the Muslim faith, many of whose children attend our public schools. The School Board has never prohibited the free and open exchange of ideas, but does draw the line when a student wears clothing that advocates a negative and divisive position that is injurious to other students. We will not permit a child to come to school wearing a T-shirt with language traditionally viewed as indecent or that denigrates the faith, national heritage, race, sex, or sexual preference of other students. Indeed, one of your clients was sent home very recently because he wore a T-shirt bearing the phrase "Homo leads to hell don't go there."

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We are aware of the holding in *Nixon v. Northern Local School District Board of Education*, 383 F.Supp. 2d 965 (S. D. Ohio 2005), but do not believe the holding is applicable to the situation involving your clients. Being a district court opinion from Ohio, the case does not have precedential value in the Eleventh Circuit. Further, the *Nixon* holding was premised in part on the holding of *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001), which upheld a student's constitutional right to wear clothing depicting the Confederate flag as an exercise of free speech. Interestingly enough, however, the Sixth Circuit, in a later case, held that the prohibition on wearing clothing depicting the Confederate flag did not constitute viewpoint discrimination. *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008). Indeed, the *Barr* court, although it did not reverse the *Castorina* holding, did note the tension between that holding and an earlier holding in *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972) that upheld the constitutionality of such a ban.

The Eleventh Circuit has held otherwise in *Denno v. School Board of Volusia County, Florida*, 218 F.3d 1267 (11th Cir. 2000), in which disciplinary proceedings against a student for display of the Confederate flag at school were upheld on the basis of *Tinker* and *Fraser*, as well as *Scott, supra*, which arose in Alachua County. To my knowledge, the Supreme Court has not spoken to this issue, but most of the other circuits that have addressed the issue are in agreement with the Eleventh Circuit. *See also, B.W.A. v. Farmington R-7 School District*, 554 F.3d 734 (8th Cir. 2009); *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000).

We therefore do not see the *Nixon* opinion as requiring the School Board of Alachua County from retreating from its position that your clients will not be permitted to wear clothing to school bearing the phrase "Islam is of the Devil."

In your letter, you demand that we address whether School Board Policy 5511B would prohibit twenty-seven separate slogans. We decline to provide an advisory opinion on each of those categories. Suffice it to say, however, the School Board will not ban positive messages that do not denigrate the faith, national heritage, race, sex, or sexual preference of other students. Likewise, in keeping with other precedent in the Northern District of Florida, the School Board will not ban phrases or symbols which advocate fair treatment and tolerance of differing viewpoints. *See e.g., Gillman v. School Board of Holmes County, Florida*, 567 F.Supp.2d 1359).

Very truly yours,



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DELL  GRAHAM

Randall C. Marshall, Esq.
October 9, 2009
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cc: Members, Alachua County School Board
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