

November 18, 2020

Dr. Brian Fellows
Deep Run High School
4801 Twin Hickory Road
Glen Allen, VA 23059
bpfellow@henrico.k12.va.us

Dear Dr. Fellows:

The ACLU of Virginia was recently retained by Kenton Vizdos and his parents regarding his suspensions from school for expressing his beliefs in the virtual classroom environment. It is our understanding that Deep Run High School has repeatedly suspended Kenton for “displaying a political protest slide using a webcam during his classes.”



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Virginia

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The ACLU of Virginia is concerned about protecting the First Amendment rights of students enrolled at Deep Run High School, like Kenton. Because of the nature of the virtual classroom and its limitations, it is imperative schools both exist as a forum for students to exercise their First Amendment rights and protect against the invasion of those rights by others. Fifty-one years ago, the Supreme Court declared that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 506 (1969). Applying *Tinker* in the 21st Century, particularly as children all over the Commonwealth are attending school virtually due to COVID-19, the “schoolhouse gate” necessarily extends to virtual learning. The First Amendment is not limited to only brick and mortar schools.

Henrico County Public Schools’ (HCPS’s) Learning Plan emphasizes the importance of treating the virtual school experience as a normal school day. “At all levels, the schedule and expectations of the ‘virtual’ school day [must] resemble a ‘normal’ school day to the greatest extent possible.” HCPS, *2020-21 Learning Plan: A Handbook for Families and Students*, 10 (2d ed. 2020). Further, “students should follow the HCPS Student Code of Conduct, just as they would for the in-person school day.” *Id.* at 12. Yet, nothing about Kenton’s suspensions are “normal.” In a normal in-person school setting, Kenton would be guaranteed a forum to exercise his First Amendment rights by virtue of being present within the “schoolhouse gate.” He could wear or display public symbols of protest, initiate important conversations about political issues during non-instructional time, or stage a peaceful demonstration. Today, the virtual classroom setting creates barriers inconceivable to the Supreme Court in 1969. Yet, the First Amendment withstands the test of time and is not limited by modern technology.



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The classroom has long been considered a “marketplace of ideas.” *Tinker* 393 U.S. at 512. As host of that marketplace, HCPS has consistently recognized its role in creating “Global Citizens.” *HCPS 2020-21 Learning Plan* at 7. HCPS encourages each student to be an “active participant in a larger society,” and urges them to “contribute to solutions that address the needs of a broader community by building global awareness and demonstrating empathy, compassion, and respect for fellow community members.” *Id.* HCPS motivates students to “ask questions and explore solutions to problems that are important to them and their world” and “to contribute toward outcomes that have an impact.” *Id.* HCPS’s plan is consistent with longstanding First Amendment jurisprudence. “[S]peech on public issues occupies the ‘highest rung of the hierarchy of Amendment values,’ and it is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal citation omitted).

Because of the nature of virtual school, Kenton conducted his protest within the virtual classroom—the only forum afforded him by virtue of being enrolled in distance learning this semester. By engaging in a silent protest to raise awareness of racism in society and police-involved killings, Kenton is striving to be exactly the type of engaged citizen HCPS claims to applaud. He was trying to raise awareness about issues that are important to him and that permeate the school setting as well as the broader community in which he lives. The Supreme Court has never suggested that student speech on public issues be restricted to proscribed lesson plans, textbooks, or capstones. Quite the contrary, student speech on public issues is not confined to a “supervised and ordained discussion in the classroom.” *Tinker*, 393 U.S. at 512. Kenton’s protest did not include sound, vulgar language, or obscene images. And, yet, Kenton’s efforts to explore solutions to issues of immense public concern were met with pushback from the administration and ultimately two out-of-school suspensions.

In order for Deep Run’s disciplinary actions to pass constitutional muster, Kenton’s conduct must have materially and substantially interfered with school functioning and activities. *See Tinker*, 393 U.S. at 509. But instead, like in *Tinker*, Deep Run seeks to punish a student “for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Id.* at 508. It is also relevant to note that to our knowledge Deep Run has not punished other students for using virtual slides and backgrounds that vary from those authorized by HCPS or the administration. As explained in *Tinker*, this is clearly “the prohibition of expression of one particular opinion,” which is not constitutionally permissible. *Id.* at 511.

Although your administration attempted to redirect Kenton’s protests by suggesting that Kenton instead “join several student groups and/or local, state [and] national organizations,” schools do not get to determine how its students may express their speech on public issues in school.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Tinker, 393 U.S. at 511.

Kenton's exercise of his First Amendment rights did not materially or substantially disturb or interfere with the school's activities. Punishing him for his silent protest has a chilling effect on Kenton and other students who wish to exercise the rights guaranteed them by the First Amendment.

Lastly, Kenton's suspension raises serious due process concerns. Due process in connection with a suspension of 10 days or less requires that, at a minimum, a student be given notice of the charges against him/her and an opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). We are concerned about the adequacy of notice provided, post-hoc rationalizations, and the opportunity for a meaningful hearing. In addition to being denied his most basic rights – freedom of speech and due process – Kenton is being denied his right to an education. He has missed valuable class time which may create setbacks in his education and emotional development. Thus, we respectfully ask that you reverse Kenton's suspensions and immediately reinstate him in his classes, remove the disciplinary infraction from Kenton's permanent file, and update your school policies to ensure the virtual classroom is appropriately recognized as a forum in which students may safely exercise their First Amendment rights.

Thank you for your immediate attention to this matter. Please do not hesitate to contact me if you have questions or concerns. My email is ehelman@acluva.org and my direct line is (804) 523-2152.

Sincerely,



Eden B. Heilman
Legal Director

cc: Mary Hart, HCPS, mary.hart@henrico.k12.va.us



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