



219 North Main Street, Suite 402  
Barre, VT 05641 (p) 802-479-1030 | (f) 802-479-1835

## Guidance on School Dress Codes

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The Agency has received multiple queries about how to manage offensive speech, which often feels hostile to other students, and in particular, the use of Confederate symbols. We offer this guidance for you to share with your Boards as you develop local policy that preserves a safe school environment that respects and supports all students.

School dress codes must be “viewpoint neutral” as written and in enforcement.

The following dress code (and similar wording) has been used to ban racial symbols in schools and was upheld by federal district courts. This particular language was upheld in the 4<sup>th</sup> Circuit:

The middle school’s dress code prohibits clothing that would “distract others, interfere with the instructional programs, or otherwise cause disruption...or that displays profane language, drugs, tobacco, or alcohol advertisements, sexual innuendoes or anything else deemed offensive...”

The high school policy forbid shirts with “obscene/derogatory sayings.” *Hardwick v. Heyward*, 711 F.3d 426 (4<sup>th</sup> Cir. 2013).

These two policies were used to successfully prohibit clothing depicting the Confederate flag in particular.

The dress code ban on the Confederate flag has been upheld in schools that had experienced racially charged incidents in the past. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> Circuits have upheld school policies which administrators used to prohibit students from wearing clothing with images or references to the Confederate flag because those schools could “reasonably predict disruption in the school” if the symbol were allowed.

As additional support for a *general dress code* prohibiting “**offensive**” or “**disruptive**” words/symbols, a district court in California upheld a vice-principal who banned the wearing of the American flag on Cinco de Mayo. He would not let three high school students into school wearing the American flag that day due to safety concerns because the school had experienced racial violence the prior year on Cinco de Mayo (with a makeshift American flag). The school had long-standing tension between white students and Mexican students.

Of note, the U.S. Supreme Court permits schools to punish offensive speech that is a violation of school conduct rules. Prohibiting the use of vulgar or offensive speech is an exception to *Tinker*. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (student gave a sexually suggestive

speech at school assembly). However, given the attention the Confederate flag has received lately at the national level, the school should view the banning of symbols as not just offensive from a racial standpoint, but also the likelihood of disruption as both permissible bases to prohibit and/or punish student speech.

In Vermont, all schools have a legal obligation to provide a safe, orderly, civil and positive learning environment. Accordingly, schools may prohibit or punish student-speech that they predict will lead to substantial disruption or which will collide with the rights of others. The content of the speech is irrelevant. The proper focus is whether the banned speech is predicted to cause disruption. School officials do not have to wait for the disruption to prohibit the speech. "As long as a student's speech is likely to cause a substantial disruption, school officials can prohibit or punish the speech." See *Hardwick v. Heyward*, 711 F.3d 426 (4<sup>th</sup> Cir. 2013).

School dress codes must be viewpoint neutral both as written and in enforcement. Rather than a ban on racial symbols, better option is a prohibition on words or symbols that are *offensive* or *disruptive*. This allows for discretion by school officials for whatever the current circumstances may be at the time.

If you have further questions or need more information, please contact Clare O'Shaughnessy at 802-479-1761.