



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Southern California

Sent via Electronic Mail and U.S. Mail

Oakland USD

Attn: Supt. Dr. Kyla Johnson-Trammell
1000 Broadway
Ste. 680
Oakland, CA 94607-4099
Email: kyla.johnson@ousd.org

April 19, 2018

Dear Superintendent Johnson-Trammell,

A Follow-Up to Our March 13, 2018 Letters to California School Officials:

Last month, in anticipation of the national student movement to demand action on school safety and gun control, we sent letters to school officials across the state, explaining schools' obligations to ensure that students attend schools where they can openly express themselves and that are supportive, welcoming, and safe. Our letter also reiterated some important points, including constitutional requirements, for school staff to keep in mind as they responded to the student protests.

The first of such events occurred on March 14, 2018, when students across California peacefully protested in many ways, including some of them walking out of class. We are heartened by the many school administrators who commended students for being civically engaged and expressed support for student-led events. We have heard reports that many schools provided a space for students to express themselves, learn more about the issues, and engage in a vigorous debate from many different perspectives. But we also received some disturbing reports of schools addressing the recent student actions in ways that violate students' rights.

We describe below some of the reports we received from students, parents, and school staff and offer guidance on how school staff can respond to students' future political activity, including the planned national walkout April 20, 2018, in a way that does not violate California law or the state and U.S. Constitutions.

Issue 1: Disciplining, or Threatening to Discipline, Student Political Speech More Harshly than Non-Political Speech

We received numerous reports of school staff's disciplining, or threatening to discipline, students for engaging in political activity more severely than they ordinarily would for non-political activity, in violation of the Constitution. For example, students at one campus had their ability to

“walk” for graduation revoked as a result of participating in the March 14 protest. This response likely violates the law because the school typically would not revoke that privilege for other students with a single unexcused absence. We also received a report of a school’s threatening to arrest every student who participated in the walkout.

As we noted in our prior letters, the Constitution prohibits school officials from punishing students more harshly for participating in walkouts or off-campus protests than for any other purpose. Because the law requires students to attend school, the administration may take corrective action against students for tardiness or unexcused absences, including when students miss school to participate in a political protest. However, the Constitution does not permit schools to punish students more harshly for speech-related walk-outs than for missing school for any other unexcused reason. For example, students might have to serve detention or may receive a low grade for a missed test for being away from school to attend a protest if that is how the school typically deals with unexcused absences.

It is just as unconstitutional to threaten to more harshly discipline students as it is to actually impose harsher discipline for engaging in political activity. A school’s threat to discipline students can have a chilling effect on students’ political activity, thus violating their First Amendment rights. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (recognizing informal measures, including “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,” may sufficiently inhibit speech to violate the First Amendment). Indeed, many students described being deterred from participating in the walk-out because of their school’s unconstitutional threat to discipline their political activity more harshly than the school typically would for an unexcused absence.

Issue 2: Disciplining, or Threatening to Discipline, Students in Ways that Violate State Law

We receive many reports of schools disciplining, or threatening to discipline, students in ways that clearly violate state law, including by threatening to mark students as truant or issuing suspensions or expulsions. For example, we received multiple reports that school administrators threatened to suspend students if they participated in the walkout. We also received multiple reports of schools issuing blanket statements that every student who participated in the walk-out would be marked truant. For the reasons discussed below, threatened or actual suspensions, expulsions, and blanket trancies violate state law.

As we noted in our prior letters, students may not be suspended or expelled for participating in walkouts or off-campus protests. California law spells out the only types of acts a school district can suspend a student for committing, and missing class is not on the list. Cal. Educ. Code § 48900. The law specifically states that “[i]t is the intent of the Legislature that alternatives to suspension or expulsion be imposed against a pupil who is truant, tardy, or otherwise absent from school activities.” Cal. Educ. Code § 48900(w). The law is also clear that, except with certain serious offenses (which do not include unexcused absences), schools may only suspend students when they have tried other ways to correct the misbehavior such as restorative justice or other forms of discipline. Cal. Educ. Code § 48900.5. Thus, schools that threatened to, or actually did, suspend or expel students on the basis of engaging in walkouts or

off-campus protests, by itself, violated state law and must immediately rescind the discipline and remove it from students' records.

A student cannot be marked truant based on a single unexcused tardy or absence, and school administrators should not threaten students with truancy violations when the student does not have at least two prior unexcused absences. Under California law, students are considered truant only if they are “absent from school without a valid excuse three full days in one school year or tardy or absent for more than a 30-minute period during the schoolday [*sic*] without a valid excuse on three occasions in one school year, or any combination thereof.” Cal. Educ. Code § 48260. In other words, schools may not report students unless they have had at least three unexcused absences or tardy violations in this school year. *See also* <https://www.myschoolmyrights.com/student-protests-political-speech/>. Accordingly, school staff who threatened to report all students who participated in a walkout as truant, without investigation into the student's past behavior record, misstated state law and likely impermissibly discouraged student expression. Similarly, any school administrators who actually marked students as truant when the student did not have three unexcused absences should immediately eliminate the designation on students' records.

Issue 3: Refusing to Accept Parent Permission as a Valid Excuse

We received reports of schools disciplining, or threatening to discipline, students even if they had a parent's signed permission slip to leave campus and participate in the walkout.

Depending on the school and district's policies and practices, it may be unconstitutional to refuse to excuse an absence when a student has a parent's written and signed permission. California law permits a school to excuse an absence for several reasons, including “[f]or justifiable personal reasons” so long as the absence is “requested in writing by the parent or guardian and approved by the principal or a designated representative pursuant to uniform standards established by the governing board.” Cal. Educ. Code § 48205(a)(7).

Whether it is unconstitutional to refuse to accept a parent permission depends on a school's policies and its practice of enforcement, or non-enforcement, of those policies. Where a school ordinarily accepts a parent-signed letter as establishing a “justifiable personal reason,” regardless of the basis for the absence, it would be unconstitutional for the school to not accept that letter when the absence is due to the student's political activity. That is because doing so would punish students more harshly for participating in walkouts or off-campus protests than for any other purpose, in violation of the Constitution. On the other hand, where a school has a pre-established set of reasons that show a “justifiable personal reason,” and does not accept parent permission that does not show one of those reasons, then the school may refuse to accept the parent's permission to engage in a walkout just as it would decline other parent permissions that do not meet those pre-established criteria.

Issue 4: Prohibiting the Carrying of Banners or Signs

We received reports of schools' prohibiting the carrying of banners or signs with images of guns during the March 14 walkout.

Any attempt to punish a student for carrying such a banner would be inconsistent with California Education Code § 48950(a). It states: “A school district operating one or more high schools, a charter school, or a private secondary school shall not make or enforce a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.” Outside of campus, carrying a banner with an image of a gun to protest gun violence is expressive activity protected by the First Amendment. Although the First Amendment does not protect expression that incites illegal activity or violence, banners that depict guns unquestionably does not fit within that exception, particularly when the banners are protesting against gun violence.

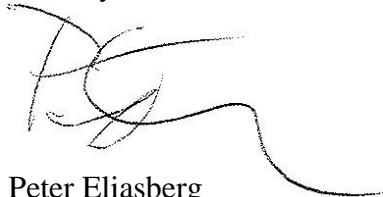
Issue 5: Prohibiting Exit from Building or Campus

We received several reports of schools physically blocking students from exiting the school’s building or campus. In multiple cases, some or all gates that were not ordinarily locked were locked during the anticipated time of the student walkout. And in at least one case, we received a report that locking gates specifically created a fire hazard on campus.

As we noted in our My School My Rights material, locking exits to the school can pose serious health and safety concerns for students and staff. *See* <https://www.myschoolmyrights.com/student-protests-political-speech/>. Indeed, some of the students we heard from were specifically concerned about their safety because of the school’s decision to limit their ability to exit campus. We continue to encourage students and teachers to notify parents and their district superintendent’s office about any locked exits. We also continue to encourage students and staff, where there is no way to exit the building in the event of an emergency, to consider reporting the hazard to the local fire department.

For additional resources, please review the ACLU SoCal’s Know Your Rights on student protest rights available at <https://www.myschoolmyrights.com/student-protests-political-speech/>.

Sincerely,



Peter Eliasberg
Chief Counsel/
Manheim Family Attorney
For First Amendment Rights
ACLU of Southern California



Sylvia Torres-Guillén
Director of Education Equity
ACLU of California