



*Sent via Email and U.S. mail*

October 11, 2017

Wesley Smith  
Association of California School Administrators  
1029 J Street, Suite 500  
Sacramento, CA 95814  
wsmith@acsa.org

Re: Protecting freedom of expression for students who exercise their right to refuse to participate in patriotic exercises

Dear Dr. Smith:

We are writing to provide guidance about student freedom of expression in the wake of the well-publicized protests before NFL games when some players have chosen to kneel, sit on benches, or raise a fist in the air during the national anthem to protest racial injustice and police violence against African Americans and other people of color.<sup>1</sup> Athletes across the country have conducted similar protests, highlighting longstanding economic inequities, racial discrimination, and other systems of oppression. While some school districts outside California have attempted to discipline students for engaging in such non-disruptive protests, please be aware that punishing – or threatening to punish – students in public schools who engage in that kind of protest would violate their rights under the First Amendment, California Constitution, and California statutory law.<sup>2</sup>

California statutory law also bars teachers or school administrators from disciplining – or threatening to discipline – students in charter schools and in private high schools. California Education Code § 48950 applies to both charter and private high schools and bars them from disciplining students for engaging in speech that would be protected by the First Amendment if engaged in outside campus.

We urge you to educate your members on the importance of protecting student expression by either sending them this letter or your own guidance on the matter. Most importantly, we hope that you will encourage your members to speak with any students who

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<sup>1</sup> Scott Smith, *Bossier schools chief: All athletes should stand for anthem*; *Shreveport Times*, Sept. 27, 2017 <http://www.shreveporttimes.com/story/news/2017/09/27/bossier-schools-chief-all-athletes-stand-anthem/708368001/>

<sup>2</sup> Educ. Code Section 48907 (students may not be punished for conduct that would be protected speech off campus).

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\*deceased

protest and take the opportunity to teach them about the value of civic engagement and of having robust, open, and respectful dialogues about these complex issues.

Courts have repeatedly held that students may not be forced to participate in patriotic exercises under threat of punishment. The seminal case affirming a public school student's First Amendment right not to participate in the recitation of the Pledge of Allegiance is *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In the years since the Supreme Court's *Barnette* decision, numerous federal courts nationwide have held that the First Amendment also protects a student's choice not to stand during the Pledge of Allegiance or the National Anthem. See *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (holding that punishment, including verbally chastising a student in front of the class for his constitutionally protected actions – either failing to salute the flag or silently expressing his opinion by raising his fist during the recitation of the Pledge – would violate a student's First Amendment rights); *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 442 (7th Cir. 1992) (Constitution requires that statute requiring that the Pledge “shall be recited each school day by pupils” in public schools must be interpreted to apply only to pupils who wish to participate); *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978) (requiring a student to stand at attention while other students recite the Pledge is forbidden compulsion); *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973) (same); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263 (N.D.N.Y. 2000) (“It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so.”). *Frain v. Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969) (students who exercise their right not to participate in Pledge may not be forced to leave the classroom); *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963) (student may not be disciplined for choosing not to stand during the national anthem).

The principle that public school students may not be disciplined for non-disruptive protests during patriotic exercises applies regardless of whether the exercise occurs during mandatory school activities, such as at the beginning of the class day, or during voluntary extracurricular activities. Indeed, the Supreme Court has twice rejected a school district's arguments that it was not violating a students' First Amendment rights because the challenged action took place in the context of activities that students were not required to attend, including sporting events like football games. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000) (high school football games); *Lee v. Weisman*, 505 U.S. 577, 594-96 (1992) (school graduation ceremony). As the Supreme Court held in *Tinker*, a student's rights “do not embrace merely the classroom hours” but instead extend to when “he is in the cafeteria, or on the playing field, or on the campus during the authorized hours.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

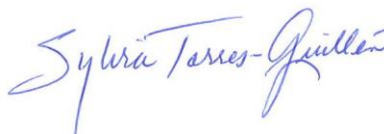
Of course, some, including the President of the United States, view the refusal to participate in the Pledge of Allegiance or stand at attention during the National Anthem as unpatriotic. Yet, in *Barnette*, issued by the U.S. Supreme Court during World War II, a time when loyalty to the United States assumed heightened importance, the Court succinctly and eloquently articulated that true patriotism thrives only in an environment governed by freedom of expression:

“To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. \* \* \* If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by or act their faith therein.”<sup>3</sup>

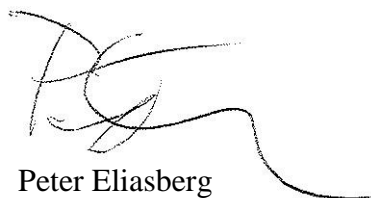
Because the law is well-established in this area, and student protests – including those addressing deep and longstanding racial and economic inequities – are consistent with core constitutional values, we urge you to inform your members that students, teachers, coaches, and other relevant school personnel that the First Amendment protects this form of protest. We understand that we live in complicated and uncertain times and that students will hold differing views on a variety of issues. Instead of suppressing student protest, we believe that educators have a responsibility to engage students in a respectful discussion about the issues, even when it is challenging and when they express themselves in ways in which you disagree.

Please contact us by email at [storres-guillen@clusocal.org](mailto:storres-guillen@clusocal.org) or [peliasberg@clusocal.org](mailto:peliasberg@clusocal.org) or by telephone at 213-977-5220 or 213-977-5228 if you have questions or need additional guidance on anything we raised in this letter. Additional resources for students and educators are available at [www.myschoolmyrights.org](http://www.myschoolmyrights.org).

Sincerely,



Sylvia Torres-Guillén  
Director of Education Equity  
ACLU of California



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

cc: Iván Carrillo

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<sup>3</sup> *Barnette*, 319 U.S. at 641-42.