



FIRE

Foundation for Individual
Rights and Expression

September 27, 2023

Dr. Wendy Birhanzel
Superintendent, Harrison School District Two
Administration Complex
1060 Harrison Road
Colorado Springs, Colorado 80905

Sent via U.S. Mail and Electronic Mail (wbirhanzel@hsd2.org)

Dear Superintendent Birhanzel:

FIRE is disappointed not to have received a response to our August 31 letter concerning The Vanguard School's removal of student Jaiden Rodriguez from class for displaying Gadsden flag and Firearms Policy Coalition patches on his backpack. As our enclosed letter explains, the school's ongoing restrictions on what patches Rodriguez may display violate the First Amendment. Likewise, Harrison School District Two's overbroad prohibition on clothing, patches, and other paraphernalia that "[r]efer to drugs, tobacco, alcohol, or weapons" infringes upon the First Amendment rights of *all* students in the district and cannot stand.

These unconstitutional actions and policies demand immediate corrective action by the school and the district. As the Supreme Court has made clear, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."¹ We request a substantive response no later than October 4, 2023.

Sincerely,

Aaron Terr
Director of Public Advocacy, FIRE

Cc: Mike Claudio, Assistant Superintendent of Personnel Support Services, Harrison School District Two
The Vanguard School Board of Directors
Renee Henslee, Executive Director, The Vanguard School
Jeff Yocum, Director of Operations, The Vanguard School

Encl.

¹ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).



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Dr. Wendy Birhanzel
Superintendent, Harrison School District Two
Administration Complex
1060 Harrison Road
Colorado Springs, Colorado 80905

Sent via U.S. Mail and Electronic Mail (wbirhanzel@hsd2.org)

Dear Superintendent Birhanzel:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by The Vanguard School's removal of student Jaiden Rodriguez from class for displaying Gadsden flag and Firearms Policy Coalition patches on his backpack. As over fifty years of Supreme Court precedent makes clear, the First Amendment protects Jaiden's silent, non-disruptive expression of his views at school. FIRE calls on Harrison School District Two and The Vanguard School to confirm they will permit Jaiden to attend school with the patches on his backpack without facing discipline or removal, and for the district to revise its unconstitutionally overbroad dress code.

I. The Vanguard School Removes Jaiden from Class for Displaying Gadsden Flag and Firearms Policy Coalition Patches on His Backpack

Jaiden Rodriguez is a seventh-grade student enrolled at The Vanguard School, a tuition-free public charter school within Harrison School District Two.² For two years, Jaiden has displayed various patches on his backpack without incident, including one depicting the Gadsden flag, which shows a coiled rattlesnake above the words "DONT TREAD ON ME."³ The flag was designed during the Revolutionary War and symbolized the American colonies' united resistance against the British monarchy.⁴ Jaiden has also long displayed a Firearms Policy Coalition ("FPC") patch, which includes an image of a rifle. FPC is a nonprofit organization whose "efforts are focused on the right to keep and bear arms and adjacent issues including

¹ More information about FIRE's mission and activities is available at thefire.org.

² The narrative in this letter reflects our understanding of the pertinent facts, but we appreciate you may have more information and invite you to share it with us.

³ The flag traditionally lacks an apostrophe in the word "don't."

⁴ *Gadsden Flag*, BRITANNICA, <https://www.britannica.com/topic/Gadsden-flag>.

freedom of speech, due process, unlawful searches and seizures, separation of powers, asset forfeitures, privacy, encryption, and limited government.”⁵

Earlier this month, one of Jaiden’s teachers complained about some of his patches to the administration, including patches that featured Pac-Man characters holding guns. Jaiden removed the Pac-Man patches, but kept the FPC patch and a parody version of the Gadsden flag patch, which reads “DONT TELL ON ME.” When Jaiden returned to school, the administration pulled him out of class. In a meeting with Jaiden and his mother, Eden Hope Rodriguez, administrators said Jaiden also needed to remove the parody Gadsden flag patch and the FPC patch.

On August 21, Vanguard School Director of Operations Jeff Yocum emailed Ms. Rodriguez a link to the Harrison School District Two dress code, which prohibits clothing, patches, and other paraphernalia that “[r]efer to drugs, tobacco, alcohol, or weapons.”⁶ Two days later, Mr. Yocum emailed Ms. Rodriguez a list of patches Jaiden could continue to put on his backpack—which excluded the Gadsden flag and FPC patches—along with a mandate that “[a]ll other patches contain symbols or images that can be deemed disruptive or potentially disruptive to the classroom environment.”⁷

Jaiden replaced the “DONT TELL ON ME” patch with a regular Gadsden flag patch reading “DONT TREAD ON ME” and kept the FPC patch on his backpack. On August 25, Executive Director Renee Henslee emailed Ms. Rodriguez that the school had again “noticed that Jaiden had two patches on his backpack that are not acceptable under HSD2’s Dress Code Policy.”⁸ She warned that if Jaiden returned to school on Monday with any unacceptable patches, he would be sent to the front office until they were removed. When Ms. Rodriguez replied to ask which patches the school considered unacceptable, Ms. Henslee identified the Gadsden flag and FPC patches.⁹ Jaiden removed only the FPC patch.

On Monday, August 28, Jaiden returned to school and the administration again pulled him out of class for having the Gadsden flag on his backpack. In a meeting with Jaiden and Ms. Rodriguez, a Vanguard School administrator told them Jaiden could not display the Gadsden flag patch because of its “origins with slavery and slave trade.”¹⁰ Jaiden’s mother explained that the flag has its origins in the American Revolution, and Jaiden noted that students regularly wear other patches without getting in trouble. In turn, Mr. Yocum emailed Ms. Rodriguez later that day to expand on the school’s rationale for banning display of the Gadsden flag by

⁵ *About FPC*, FIREARMS POLICY COALITION, <https://www.firearmspolicy.org/about>.

⁶ Email from Jeff Yocum, Director of Operations, The Vanguard School, to Eden Hope Rodriguez (Aug. 21, 2023, 8:57 AM) (on file with author); *see also Student Dress Code*, HARRISON SCHOOL DISTRICT TWO, <https://go.boarddocs.com/co/hsd2/Board.nsf/goto?open&id=AQ9N5M5E1DD5>.

⁷ Email from Yocum to Rodriguez (Aug. 23, 2023, 3:54 PM) (on file with author).

⁸ Email from Renee Henslee, Executive Director, The Vanguard School, to Rodriguez (Aug. 25, 2023, 3:51 PM) (on file with author).

⁹ Email from Henslee to Rodriguez (Aug. 25, 2023, 4:39 PM) (on file with author).

¹⁰ @cboyack, X (Aug. 29, 2023, 9:01 AM), <https://twitter.com/cboyack/status/1696508336345153691>.

providing links to an Equal Employment Opportunity Commission complaint concerning the flag and stories describing its alleged connection to “hate groups.”¹¹

On August 29, Connor Boyack, president of the think tank Libertas Institute, posted video on X (formerly Twitter) of the previous day’s meeting, and various news outlets reported on the story.¹² That same day, in a message to students’ families, The Vanguard School Board of Directors recounted events and claimed that the board and District had “informed the student’s family that he may attend school with the Gadsden flag patch visible on his backpack.”¹³ However, Ms. Rodriguez has informed FIRE that the only communication she received was from Harrison School District Two Assistant Superintendent Mike Claudio, who told her Jaiden could continue to display the Gadsden flag patch only so long as no staff member or student complained about it. Jaiden also is still not allowed to display the FPC patch on his backpack under any circumstances.

II. The First Amendment Protects Students’ Silent, Non-Disruptive Display of Patches on Their Backpacks

It is well-established that public school students do not shed their First Amendment rights at the schoolhouse gate.¹⁴ As the Supreme Court recently reaffirmed, “America’s public schools are the nurseries of democracy.”¹⁵ They accordingly maintain an interest in *protecting* students’ freedom to express themselves, especially when that expression is unpopular.¹⁶ Under these principles, The Vanguard School may not prohibit Jaiden from displaying his Gadsden flag and FPC patches or condition his right to display any patch on the absence of complaints from staff and students.

While public school administrators may restrict student speech in limited situations for certain limited purposes, they “do not possess absolute authority over their students In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”¹⁷ The Vanguard School justified its prohibitions on Jaiden’s Gadsden flag and FPC patches on asserted grounds that they are “disruptive or potentially disruptive to the classroom environment.”¹⁸ But the school cannot

¹¹ Email from Yocum to Rodriguez (Aug. 28, 2023, 4:46 PM) (on file with author).

¹² See *supra* note 10; Lindsey Jensen & Jackie Alcon, *Colorado Springs 12-year-old did not back down from wearing symbolic ‘Don’t Tread on Me’ patch to school*, KOAA NEWS5 (Aug. 29, 2023), <https://www.koaa.com/news/covering-colorado/colorado-springs-mom-says-son-kicked-out-of-class-over-gadsden-flag-patch>; Andrew Kenney, *Gov. Jared Polis defends Gadsden flag after student reportedly removed from Colorado Springs class*, COLORADO PUBLIC RADIO (Aug. 29, 2023), <https://www.cpr.org/2023/08/29/gadsden-flag-vanguard-school-colorado-springspolis>.

¹³ @cboyack, X (Aug. 29, 2023 9:17 PM), <https://twitter.com/cboyack/status/1696693472533635562>.

¹⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁵ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

¹⁶ *Id.*

¹⁷ *Tinker*, 393 U.S. at 511.

¹⁸ Email from Yocum to Rodriguez, *supra* note 7.

satisfy the relevant constitutional standard for banning disruptive speech to justify its actions here.

The Supreme Court established that standard in *Tinker v. Des Moines Independent Community School District*, holding the First Amendment protected public school students’ right to wear black armbands to school to protest the Vietnam War.¹⁹ The Court made clear that school officials cannot restrict student speech based on speculative, “undifferentiated fear” that it will cause disruption or feelings of unpleasantness or discomfort among the student body.²⁰ Rather, *Tinker* requires evidence of a threat that would “materially and substantially disrupt the work and discipline of the school.”²¹ As the Court wrote:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.²²

The United States Court of Appeals for the Tenth Circuit—whose decisions bind Colorado’s school districts—has likewise made clear that any forecast of substantial disruption must rest on a “concrete threat” of substantial disruption.²³ One or even several complaints about a student’s expression does not equate to substantial disruption. As the Tenth Circuit explained, “*Tinker* rejected the idea that a ‘silent, passive’ expression that merely provokes discussion in the hallway constitutes such a threat, particularly if that expression is political.”²⁴ More recently, in *Cl.G v. Siegfried*, the Tenth Circuit held that four emails from parents, an in-school discussion, and news reports about a student’s Snapchat post fell short of “*Tinker*’s demanding standard” for substantial disruption.²⁵

As The Vanguard School Board of Directors appears to acknowledge, Jaiden’s Gadsden flag patch is constitutionally protected expression. This is true regardless of whether some dislike the flag—an enduring symbol of the American Revolution—because it has been utilized by certain disfavored groups. That fact alone does not take it outside the First Amendment’s protection, any more than an unpopular group’s decision to fly the American flag would justify prohibiting the American flag in public schools. Absent more, a speaker’s actual or perceived

¹⁹ 393 U.S. at 514.

²⁰ *Id.* at 511.

²¹ *Id.* at 513.

²² *Id.* at 509–09.

²³ *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 37 (10th Cir. 2013); see also *Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004) (stating there must be “a real or substantial threat of disorder, as opposed to the mere possibility”).

²⁴ *Taylor*, 713 F.3d at 37.

²⁵ *Cl.G v. Siegfried*, 38 F.4th 1270, 1279 (10th Cir. 2022).

viewpoint can never be grounds for censorship. Viewpoint discrimination is an “egregious” form of censorship, and the “government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”²⁶

Nor can The Vanguard School condition Jaiden keeping the Gadsden flag patch on his backpack on the absence of student or staff complaints. Without more, a single complaint about a student’s speech cannot constitute substantial disruption. The First Amendment does not allow the “heckler’s veto” as envisioned by the district’s assistant superintendent, where anybody can suppress a student’s speech or viewpoint simply by objecting to it.²⁷

Jaiden’s display of an FPC patch is likewise constitutionally protected. The district’s policy prohibiting *any* reference to drugs, tobacco, alcohol, or weapons is unconstitutionally overbroad,²⁸ as becomes obvious with a few examples. Under the policy, students cannot wear D.A.R.E. shirts or Everytown for Gun Safety pins. The policy goes far beyond prohibiting expression that promotes illegal activity or that would substantially disrupt the school environment.²⁹

This explains why federal appellate courts have rejected public school efforts to ban clothing depicting guns, drugs, or alcohol absent evidence the clothing did or would cause substantial disruption.³⁰ For example, in *Newsom v. Albemarle County School Board*, the U.S. Court of Appeals for the Fourth Circuit preliminarily enjoined a public school dress code prohibiting any messages that relate to weapons, observing that it excluded “a broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory.”³¹ The Fourth Circuit emphasized the complete lack of evidence that even clothing expressing nonviolent and nonthreatening messages related to weapons “ever caused a commotion or was going to cause one” at the school.³² “Banning support for or affiliation with the myriad of organizations and institutions that include weapons (displayed in a nonviolent and

²⁶ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

²⁷ *See, e.g., Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (speech cannot “be punished or banned, simply because it might offend a hostile mob”).

²⁸ An overbroad regulation prohibits “a substantial amount of protected speech” relative to the regulation’s “plainly legitimate sweep.” *United States v. Williams*, 553 U.S. 285, 292 (2008).

²⁹ *See Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (explaining that Court’s decision goes no further than holding that public school may restrict speech advocating illegal drug use, and “provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue”).

³⁰ *See, e.g., N.J. v. Sonnabend*, 37 F.4th 412, 425 (7th Cir. 2022) (public school student’s T-shirt bearing logo of gun rights group, which included image of handgun, was “materially indistinguishable from the black armbands in *Tinker*”); *Guiles v. Marineau*, 461 F.3d 320, 330–31 (2d Cir. 2006) (First Amendment protected public school student’s right to wear at school T-shirt featuring images of President Bush, drugs, and alcohol); *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (dress code prohibiting any messages relating to weapons violated First Amendment).

³¹ 354 F.3d at 260.

³² *Id.* at 259.

nonthreatening manner) in their insignia,” the court wrote, “can hardly be deemed reasonably related to the maintenance of a safe or distraction-free school.”³³

Jaiden’s FPC patch expresses a political message in support of Second Amendment rights. Speech on “public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”³⁴ The patch does not endorse unlawful activity or convey any threat, there is no evidence it has caused actual (or anticipated) substantial disruption of the school environment, nor is the mere fact that it depicts a firearm concrete evidence it will. As a federal appellate court said of a student’s T-shirt with the logo of a gun rights group that included an image of a handgun, Jaiden’s patch is “materially indistinguishable from the black armbands in *Tinker*” in expressing a “political opinion, just like the armbands expressed the students’ opposition to the Vietnam War.”³⁵

III. Conclusion

FIRE calls on The Vanguard School to immediately and publicly confirm it will allow Jaiden Rodriguez to display on his backpack at school his Gadsden flag and Firearms Policy Coalition patches—and any others that cause no substantial disruption—without facing punishment or removal, regardless of whether students or staff complain. We further call on Harrison School District Two to revise its dress code to eliminate the categorical ban on references to drugs, tobacco, alcohol, or weapons. In doing so, the school and district will reaffirm to students and staff that “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”³⁶

We request a substantive response no later than September 14, 2023.

Sincerely,



Aaron Terr
Director of Public Advocacy, FIRE

Cc: Mike Claudio, Assistant Superintendent of Personnel Support Services, Harrison School District Two
The Vanguard School Board of Directors
Renee Henslee, Executive Director, The Vanguard School
Jeff Yocum, Director of Operations, The Vanguard School

³³ *Id.* at 260. The court gave examples of the policy’s absurd reach, such as a University of Virginia shirt featuring the institution’s logo, which includes two crossed sabers. *Id.*

³⁴ *Connick v. Myers*, 461 U. S. 138, 145 (1983) (cleaned up).

³⁵ *Sonnabend*, 37 F.4th at 425.

³⁶ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).