



FIRE

Foundation for Individual
Rights and Expression

November 13, 2023

Dr. Lamont Jackson
Office of the Superintendent
4100 Normal Street, Room 2219
San Diego, California 92103

Sent via Next-Day Delivery and Electronic Mail (ljackson@sandi.net)

Dear Superintendent Jackson:

FIRE was disappointed to learn that the San Diego Unified School District has denied J.A.'s appeal of his suspension.

We note the notice of the decision is dated November 8, 2023, the same day FIRE sent the district and Muirlands Middle School the enclosed letter explaining that J.A.'s punishment violates the First Amendment. We therefore write to confirm the district's decision is final and will not be reconsidered.¹

We respectfully request a response no later than Wednesday, November 15, 2023.

Sincerely,

Aaron Terr
Director of Public Advocacy

Cc: San Diego Unified School District Board of Education
San Diego Unified School District Office of Placement and Appeals
Michelle Irwin, Area Superintendent of Middle Schools
Andra Greene, General Counsel
Jeff Luna, Principal, Muirlands Middle School

Encl.

¹ FIRE does not currently represent J.A. or his family. However, if the district stands by its decision, FIRE will use the resources at our disposal to secure a just outcome.



FIRE

Foundation for Individual
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November 8, 2023

Principal Jeff Luna
Muirlands Middle School
1056 Nautilus Street
La Jolla, California 92037

Sent via U.S. Mail and Electronic Mail (jluna@sandi.net)

Dear Principal Luna:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Muirlands Middle School's discipline of student J.A.² for wearing exaggerated eye black to a recent football game. As the First Amendment protects J.A.'s non-disruptive expression of team spirit via a style commonly used by athletes and fans—notwithstanding your inaccurate description of it as “blackface”—FIRE calls on the school to remove the infraction from J.A.'s disciplinary record and lift the ban on his attendance at future athletic events.

Our concerns arise out of J.A.'s attendance at a football game between La Jolla High School and Morse High School on October 13 with another student and that student's mother.³ Many at the game wore face or body paint. At J.A.'s request, his classmate painted J.A.'s face, as reflected in the picture below, taken that night:



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

² To protect the student from harassment and retaliation, FIRE uses his initials for the purposes of identification in this letter.

³ The narrative in this letter reflects our understanding of the pertinent facts, but we appreciate you may have more information. If so, we invite you to share it with us.

J.A.’s appearance emulated the style of eye black worn by many athletes, as shown below. Such use of eye black began as a way to reduce glare during games, but long ago evolved into “miniature billboards for personal messages and war-paint slatherings.”⁴ J.A. wore his eye black throughout the game without incident.



Six days later, on October 19, you summoned J.A. and his parents to a meeting, where you told them J.A. was suspended for two days and banned from future athletic events for wearing “blackface” to the football game. You did not indicate that anyone complained about J.A.’s face paint or that it caused any sort of disruption. Similarly, the suspension report says only that J.A. “painted his face black at a football game” and lists his alleged offense as “Offensive comment, intent to harm.”⁵ Yet J.A.’s non-disruptive, objectively inoffensive face paint was constitutionally protected expression.

⁴ Jeré Longman, *Eye Black Used to Cut Glare, or Turn Up Spotlight*, N.Y. TIMES (Dec. 3, 2006), <https://www.nytimes.com/2006/12/03/sports/03eyeblack.html>.

⁵ *Report on Suspension*, San Diego Unified Sch. Dist., Oct. 20, 2023 (on file with author).

The First Amendment protects not only pure speech, but non-verbal expression such as music (with or without lyrics),⁶ dance,⁷ painting,⁸ and parades.⁹ The U.S. Court of Appeals for the Ninth Circuit—whose decisions bind Muirlands Middle School—has similarly held tattoos, which may consist of “words, realistic or abstract images, symbols, or a combination of these,” are a form of “pure expression” entitled to First Amendment protection.¹⁰ The same logic applies to face and body paint.

It is well-established that public school students do not shed their constitutional rights at the schoolhouse gate.¹¹ As the Supreme Court recently reaffirmed, “America’s public schools are the nurseries of democracy.”¹² They accordingly maintain an interest in *protecting* students’ freedom to express themselves.¹³ While public school administrators may restrict student speech in limited situations for certain limited purposes, they “do not possess absolute authority over their students,” such that “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”¹⁴

In the seminal student speech case *Tinker v. Des Moines*, the Supreme Court held the First Amendment protected public school students’ right to wear black armbands to school to protest the Vietnam War.¹⁵ The Court made clear 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.¹⁶ Rather, *Tinker* requires evidence that the speech has or will “materially and substantially disrupt the work and discipline of the school.”¹⁷

There is no evidence J.A.’s face paint caused a disruption—let alone a material and substantial one—at the football game or at school afterward.¹⁸ The complete lack of disruption is unsurprising, as the sight of fans in face paint is familiar to and expected by anyone who has ever attended a football game or other sporting event.

⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

⁷ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981).

⁸ *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007).

⁹ *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. Of Bos., Inc.*, 515 U.S. 557, 568–69 (1995).

¹⁰ *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

¹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹² *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

¹³ *Id.*

¹⁴ *Tinker*, 393 U.S. at 511.

¹⁵ *Id.* at 514.

¹⁶ *Id.* at 511.

¹⁷ *Id.* at 513.

¹⁸ In fact, there is no evidence anyone complained about J.A.’s face paint. In any event, a single complaint or handful of complaints would, absent more, fall far short of *Tinker*’s requirement of material and substantial disruption.

The claim that J.A.'s face paint constituted blackface is frivolous. Blackface is "dark makeup worn to mimic the appearance of a Black person and especially to mock or ridicule Black people."¹⁹ It has its origins in racist minstrel shows that featured white actors caricaturing black people, and generally entails covering the entire face in dark makeup and exaggerating certain facial features. By contrast, J.A. followed a popular warpaint-inspired trend of athletes applying large amounts of eye black under their eyes, which has no racial connotations whatsoever.

Again, Muirlands Middle School has no authority to discipline J.A. for his non-disruptive, constitutionally protected display of team spirit.²⁰

FIRE therefore calls on Muirlands Middle School to immediately remove the infraction from J.A.'s disciplinary record, lift the ban on his attendance at future sports events, and reaffirm the school's commitment to its binding First Amendment obligations.

We respectfully request a substantive response to this letter no later than November 22, 2023.

Sincerely,



Aaron Terr
Director of Public Advocacy

Cc: San Diego Unified School District Board of Education
Dr. Lamont Jackson, Superintendent of Public Education, San Diego Unified School District
Michelle Irwin, Area Superintendent of Middle Schools, San Diego Unified School District
Andra Greene, General Counsel, San Diego Unified School District

¹⁹ *Blackface*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/blackface> [<https://perma.cc/T54C-LES2>].

²⁰ None of the other permissible grounds for restricting K-12 student speech apply here, as J.A.'s expression did not invade the rights of others, *Tinker*, 393 U.S. at 513; his expression was neither "lewd" nor "vulgar," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U. S. 675, 685 (1986); the school's censorship was not editorial control over school-sponsored speech like a student newspaper, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988); and J.A. was not promoting illegal drug use, *Morse v. Frederick*, 551 U.S. 393, 396 (2007).