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1st Circuit may not have last word on ‘two genders’ T-shirt

Balance between free speech, safe schools seen as delicate

Kris Olson//June 21, 2024//

While it may be mere coincidence that the 1st U.S. Circuit Court of Appeals’ decision in L.M. v. Town of Middleborough, et al. came during Pride Month, how you feel about the ruling may well correlate with whether you believe rainbow flags deserve an unchallenged place in school buildings.

In L.M., the 1st Circuit was asked to assess whether a “hate speech” provision in the dress code of a public middle school passed constitutional muster under the seminal U.S. Supreme Court student speech case Tinker v. Des Moines Independent Community School District.

Middleborough school officials invoked the hate speech provision to prohibit a 12-year-old student from wearing a T-shirt that read “There Are Only Two Genders” and then from wearing that same T-shirt with the words “Only Two” covered by a piece of tape on which was written “CENSORED.”

The case thus presented for the first time in the 1st Circuit a “vexing question,” the court said: “when (if ever) public-school students’ First Amendment rights must give way to school administrators’ authority to regulate speech that (though expressed passively, silently, and without mentioning any specific students) assertedly demeans characteristics of personal identity, such as race, sex, religion, or sexual orientation.”

Borrowing language from a 2008 9th U.S. Circuit Court of Appeals case, Nuxoll ex rel. Nuxoll v. Indian Prairie School District #204, the 1st Circuit held that school officials may bar passive and silently expressed messages by students at school that target no specific student if: (1) the expression is reasonably interpreted to demean one of those characteristics of personal identity, and (2) the demeaning message is reasonably forecasted to “poison the educational atmosphere.”

But that test begs further challenge, attorneys told Lawyers Weekly, and at least some believe the U.S. Supreme Court might want to have the last word.

Deference to administrators

An attorney for the defendant school district, Gregg J. Corbo of Boston, wrote in an email that, based on the facts and circumstances of the case, he thought the court reached the right result. He declined to comment further.

But one of the plaintiff's attorneys, Tyson C. Langhofer of the Virginia-based Alliance Defending Freedom, said the plaintiff's team was still digesting the decision and plotting its "next steps."

"But I anticipate that it is not the end of the case," Langhofer said.

Specifically, what Langhofer and his colleagues find problematic is that the court carved out a category of speech for special protection and then let the school off the hook from making the type of showing of the likelihood of a substantial disruption that the Supreme Court has said the First Amendment demands.

"What the Supreme Court has said when schools are conducting this analysis is that unsubstantiated fear or apprehension about disruption is not sufficient, and that's what we have here," he said.

Even the ACLU of Massachusetts is sympathetic to that point of view, to a point. In its amicus brief, the ACLU advocated for vacating the denial of the preliminary injunction and remanding the case to the District Court to assess whether the school had met its burden to establish, based on "concrete facts," that the speech caused or was reasonably forecast to cause substantial and material disruption.

"Schools may not curtail student speech because it is 'merely offensive' to some listeners or might hurt the feelings of other students," the ACLU wrote in its brief. "It is a job of schools, after all, to teach students to tolerate unpopular speech that many might find offensive as part of preparing them to function in a democratic society."

But in an emailed statement, ACLU senior managing attorney Ruth Bourquin indicated that the 1st Circuit's decision was satisfactory.

"The court emphasized the unique facts of the case, ultimately concluding deference was due to school officials' reasoned judgment with regard to this particular speech in this specific middle school at one point in time," she wrote.

What the court is instructing schools to do, Bourquin said, is "make a careful case-by-case assessment when speech and equity rights are at issue."

Unlike the amici who lined up in support of the plaintiff, Boston attorney Joseph D. Lipchitz said he thought the school district made a reasonable showing

regarding serious concerns it had about students being alienated and bullied in school, with consequences that included suicidal ideation.

“The factual predicate that the school was able to establish in opposing the underlying motion for preliminary injunction can’t be understated,” he said.

In terms of who is best positioned to make that “forecast” of a poisoned educational atmosphere, it is not judges but school officials, who “must have some margin to make high-stakes assessments in conditions of inevitable uncertainty,” Chief Judge David J. Barron wrote for the court.

That endorsement of granting school administrators some level of discretion in drawing the line between truly disruptive clothing versus merely impolite or offensive attire is important, noted Kelly T. Gonzalez, counsel for the Massachusetts Association of School Superintendents, which filed a joint amicus brief in support of the defendants in L.M. with the GLBTQ Legal Advocates & Defenders.

How do you go to school and sit in a class and be successful when someone’s wearing a shirt that demeans who you are as a person?

— Kelly T. Gonzalez, Massachusetts Association of School Superintendents

In the Nuxoll case, a shirt bearing the message “Be Happy, Not Gay” was found to be only “tepidly negative” and thus not properly outlawed from school grounds. But in the 1st Circuit’s estimation, the “Only Two Genders” shirt was over the line.

“L.M. himself agrees that the message directly denies the self-conceptions of certain middle-school students, and those denied self-conceptions are no less deeply rooted than those based on religion, race, sex, or sexual orientation,” Barron wrote.

The constant presence of the T-shirt has the potential to inflict more harm than a stray remark on a playground or a point made during a classroom discussion, the court added.

Gonzalez noted that the plaintiff in L.M. had been allowed to wear other shirts to school that some may have found offensive.

What was different about the “two genders” shirt is that it struck at the core of the plaintiff’s classmates, she said.

“How do you go to school and sit in a class and be successful when someone’s wearing a shirt that demeans who you are as a person?” she asked.

‘Enclaves of totalitarianism’ feared

The L.M. case also attracted several amicus briefs from conservative groups that fear school administrators will use that discretion to quash dissenting views on matters of public concern.

“I think the biggest problem with [the decision] is it’s going to really limit the ability of students and schools to discuss controversial topics, and it really allows schools to take a position within those discussions and enforce a certain ideological orthodoxy that I don’t think the courts generally permitted under Tinker,” said Gary M. Lawkowski, who submitted an amicus brief on behalf of the Virginia nonprofit law firm Center for American Liberty.

Catherine W. Short of the Life Legal Defense Foundation, a California nonprofit that provides legal assistance to pro-life advocates, said she was disappointed the court did not engage with the issue her organization had raised.

The plaintiff in L.M. had not initiated the discourse, she noted. Rather, he was responding to Pride displays at the school and conveying that there are two sides to the issue.

“And the school was having none of it,” she said.

In its brief, the Life Legal Defense Foundation says its fear is that schools will create “enclaves of totalitarianism” in violation of its mission to educate students to function in a civil democratic society.

While the current case involves an issue of gender identity, tomorrow it might be the issue her organization cares most about, pro-life advocacy, that school administrators squelch, she said.

James L. Kerwin of the Mountain States Legal Foundation said he had an even more basic disagreement with the 1st Circuit’s decision.

“This shirt that this kid was wearing, I don’t think in any reasonable world could be considered the equivalent of an attack on someone’s fundamental character,” Kerwin said. “This is a statement about biology. It’s a statement about basic facts that people can agree with, I would think, or they used to be able to.”

All-or-nothing approach

A self-avowed “near absolutist” free speech advocate, Boston attorney Harvey A. Silverglate said what the Constitution demands is an all-or-nothing approach to speech in schools.

“My problem with the 1st Circuit opinion [in L.M.] is that it does not value speech equally,” Silverglate said.

In general, it is more important to protect “hate speech” than “love speech,” he added.

“I’m much more interested in knowing who hates me than who loves me because I know that I have to protect myself against the people who hate me,” Silverglate said.

Silverglate said his basic principle of constitutional interpretation in the free speech arena is “what is sauce for the goose is sauce for the gander.”

“If you look at a rule, you say, ‘Would I want this applied to me?’” Silverglate said. “That’s a very good test, and if you would like it applied to you, then it’s probably something that should be protected. If you don’t — if you would only want to apply it to somebody you dislike — then there’s a strong possibility of discriminatory enforcement.”

Silverglate said he would be fine, especially when younger children are involved, with a blanket rule of “no political messages on T-shirts.”

“Because a political message is bound to upset somebody, and if, especially with young students, your goal is to avoid hurt feelings, you don’t want to sacrifice some but not others,” Silverglate said.

The 1st Circuit did briefly address the notion that the school had essentially opened the door to a discussion that it was now trying to close because it did not approve of the plaintiff’s viewpoint.

“L.M. contends that he wore the Shirt to respond to Middleborough’s asserted views on gender,” Barron wrote. “But Tinker does not require a school to tolerate T-shirts that denigrate a race or ethnicity, for instance, just because the school celebrates Black History Month, Asian and Pacific American Heritage Month, and Hispanic Heritage Month.”

In its brief, the ACLU argued that “[s]chools can express and promote a message of inclusivity, equality, and respect without undermining their authority to regulate student speech that expresses a contrary view.”

That they “may engage in such speech and facilitation, and that some students voluntarily and without coercion choose to endorse a similar view, has nothing to do with whether L.M.’s speech can be restricted,” its brief reads. “If his speech is substantially disruptive, it can be restricted. If it is not disruptive, it cannot.”

GLBTQ Legal Advocates & Defenders attorney Chris Erchull agreed.

“There’s nobody whose First Amendment rights trump the right that the school has to fulfill its obligations to students,” he said.