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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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MANDATORY SCHOOL UNIFORMS AND THE FIRST AMENDMENT: POLICY ISSUES

Overview

Another school year has started and once again some of the old issue producers are making their presence known. Among the persistent ones is student attire—especially dress. What students wear to school seems to change from year-to-year. As principals and teachers meet students at the school house door they often are taken aback, sometimes even shocked, at what they see. For as many years as our nation’s public schools have existed, student dress and attire (*e.g.*, face makeup, hair style and color, earrings and other items of jewelry, T-shirts, *et al.*), as matters of personal taste, have served and continue to serve as matters of personal expression. However, prior to the 1960s, with few exceptions, while students came to school dressed as either a matter of personal taste, or because of parental directives, or in response to peer group pressure, they knew that school systems had formal policies and rules governing what was or was not acceptable student attire on school property and at school sponsored events and that they had to be followed. As a general rule, where such formal policies and rules were legally challenged, courts were reluctant to substitute their judgment for that of school officials unless it could be shown that school officials acted arbitrarily, or capriciously, or beyond the scope of their legally granted authority. To put it another way, student dress was “a matter for school officials not judges.” (Vacca and Bosher, 2012)

Judicial Attitudes Change. As United States Supreme Court Justice Jackson opined more than seventy years ago, “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 word or act of faith therein...We think the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” [West Virginia State Board of Education v. Barnette](#) (1943) While in [Barnette](#) students who refused, for religious reasons, to comply with the compulsory pledge and flag salute mandate, were subject to school discipline for insubordination, the Supreme Court’s rationale has been more broadly applied over the years in a variety of First

Amendment cases. However, more than two decades later it took another Supreme Court decision to chart a new path for student speech and expression rights—one applicable to student uniforms.

Tinker v. Des Moines (1969). Because the United States Supreme Court made it clear in Tinker (involving students wearing protest arm bands) that students do not automatically shed their First Amendment expression rights “at the school house gate,” lower court decisions involving student dress and attire cases, post-Tinker, consistently held that school officials must show that the necessity to enact and enforce mandatory dress code policies and rules outweighs and sufficiently justifies any infringement of student rights. Crossen v. Fatsi (D. Conn. 1970) Beginning in the mid-1980s, while Tinker also established that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right of free expression,” the United States Supreme Court subsequently created a balance when it held that student expression rights within the special environment of a public school and at school sponsored or sanctioned events and activities are neither coextensive with those of adults, nor are they immune from the disciplinary prerogatives of school officials. Bethel School District v. Fraser (1986), Hazelwood v. Kuhlmeier (1988), and Morse v. Frederick (2007)

Student Uniforms

Until very recently, while mandatory student uniforms were typical in military schools and private schools, including church-related schools, they were not typical in public elementary and secondary schools. However, mandatory student uniforms in public schools has become and continues to be the focus of numerous articles in education literature and a major item on the agenda of local school board meetings. More often than not those who advocate uniform policies see a cause and effect relationship between requiring student uniforms and improving the school’s learning environment and the maintenance of school discipline, security, and safety. In communities where increased activity of street gangs has been experienced, student dress is the subject of intense debate and scrutiny.

As my colleague Professor Boshier and I have concluded based on our research, “in recent years some local public school boards have enacted mandatory uniform policies. Where these policies have passed muster under the first amendment, boards have been able to show that the intent of the policy is to prevent disruptive conduct and to improve the school’s learning environment.” (Vacca and Boshier, 2012). As an example we cite Littlefield v. Florney I.S.D. (N.D. Tex. 2000).

Frudden v. Pilling (9th Cir. 2014)

In a recent visit to the law library I came across a Nevada case in which parents of two elementary school students (a daughter in third grade, and a son in fifth grade) challenged a mandatory student uniform policy. I selected the case for review and comment because of a specific aspect of the policy that spawned the court challenge.

Facts. In May of 2011, the elementary school involved (Roy Gomm Elementary School, hereafter referred to as RGES) instituted a mandatory student uniform policy. Under the policy students were required to wear red or navy polo-style shirts and tan or Khaki bottoms. On the uniform shirts the school’s logo appears which depicts a gopher with the words “Roy Gomm Elementary

School.” The shirts also include a written message above the logo stating “Tomorrow’s Leaders.” Students were not allowed to alter the uniforms in any way. Students were required to wear the uniforms during school hours and during all formal class activities before and after school. The policy contained certain exemptions for students who wear a uniform of a nationally recognized youth organization such as the Boy Scouts and Girl Scouts on regular meeting days. If a student did not comply with the policy, parents would be informed and the student had to change into the approved uniform. Students who do not comply will be assigned to detention for the first offense, in-school suspension, Saturday school, work crew, or multiple detentions for the second offense and out-of-school suspension for any other offenses. While two-thirds of the school’s families voted to approve the policy, one parent (Mary Frudden) vigorously objected.

From the beginning of the 2011-2012 school year (August 29, 2011) to September 12, 2011, the Frudden children did not wear the required uniform. During this period school officials neither asked the children to change into the required uniform nor did they take disciplinary action. On September 12, 2011, both children wore American Youth Soccer Organization (a nationally recognized youth organization) uniforms (black shirts and shorts with the AYSO logo on the front) to school. The parent (Frudden) informed the school principal (Pilling) that her children were wearing uniforms that fell within the school’s uniform policy exemptions. The principal told the parent that the policy exemption did not apply because the children had neither a meeting nor soccer practice that day.

The parent protested the principal’s decision to the School System’s Area Superintendent for the Office of School Performance who subsequently agreed with the principal. In her view the principal can remove a student to compel performance of the uniform policy. Pilling then called the Frudden son into her office and asked him to change. He agreed and changed into a loaner shirt that the principal provided, and his sister later changed into the required uniform.

The next day, September 13, 2011, the Frudden children again came to school wearing their AYSO uniforms. Again the principal called them to the office and asked them to change. While the son initially said that he did not want to change, both children agreed to change clothes. On September 14, 2011, even though the Frudden son wore his required uniform shirt inside-out so the logo was not visible, he did turn it right-side-out when asked to do so by the principal.

Federal District Court Action. In October 2011, the Fruddens filed a First Amendment complaint alleging sixteen claims for relief. Subsequently, the court granted defendant’s motion to dismiss, at 842 F. Supp. 2d 1265 (D. Nev. 2012). The Fruddens appealed to the United States Court of Appeals for the Ninth Circuit, where the Court granted appeal only on the second claim for relief pursuant to 42 U.S.C. 1983, that the mandatory uniform policy violates the children’s First Amendment rights.

Ninth Circuit Rationale and Decision

On appeal the Fruddens contended, on two separate grounds, that the RGES student policy is subject to strict scrutiny review. First, because the policy-mandated shirt must contain a written motto, “Tomorrow’s Leaders,” it unconstitutionally compels speech about leadership. Second, the

policy contains content-based exemptions for “nationally recognized youth organizations, such as the Boy Scouts or Girl Scouts, on regular meeting days.”

Court Rationale. The Fruddens relied on Wooley v. Maynard (1977), a United States Supreme Court case in which a New Hampshire statute requiring motorists to display license plates embossed with the State’s motto, “Live Free or Die” was challenged, to unsuccessfully argue their “compelled speech claim” in district court. Because of this the Ninth Circuit begins by examining the Frudden’s claim that the RGES mandatory uniform policy requiring the wearing of shirts with the motto “Tomorrow’s Leaders” compels students “to express a particular viewpoint.” In Wooley, said the Ninth Circuit, the Supreme Court quoted directly from West Virginia State Board v. Barnette (1947), where a “compelled speech” doctrine was established, and held that “the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree.” Wooley (1977)

The Ninth Circuit next focused on its earlier decision in Jacobs v. Clark County School District (9th Cir. 2008)—one which the district court in Frudden relied on in reaching its decision. In Jacobs the Ninth Circuit held that a mandatory uniform policy survived First Amendment scrutiny. The school district’s standard dress code for all county schools “required students to wear solid color bottoms and solid colored polo, tee, or button-down shirts.” Some of the schools in the district “allowed uniform shirts to display a school logo as an option, although most did.”

In Jacobs a number of students and their parents challenged the uniform policy. One plaintiff argued that the policy “violated his First Amendment rights because it compelled him to convey a symbolic message, one of support for conformity.” In rejecting that argument the Ninth Circuit held that the uniform policy involved no “written or verbal expression of any kind...,” and the school did not force him to “communicate any message whatsoever....” It simply “required him to wear the solid-colored tops and bottoms mandated by its uniform policy.”

Contrasting Jacobs (2008) with Frudden (2014) the parents had argued that the RGES uniform policy mandates written expression. More specifically, they argued that the message “Tomorrow’s Leaders,” displayed on the uniform above the school’s logo, conveys two viewpoints—that “leadership should be celebrated (or at least valued above being a follower), and that RGES is, in fact, likely to produce ‘tomorrow’s leaders’.”

The Ninth Circuit disagreed with the district court’s application of Jacobs (2008) and found its reasoning inconsistent with Wooley (1977). The Court does comment, however, “Had the RGES uniforms consisted of plain-colored tops and bottoms, as in Jacobs, RGES would have steered clear of any First Amendment concerns.” And, in a footnote the Ninth Circuit adds that “the inclusion of the school logos in Jacobs was optional.”

While the Ninth Circuit agreed with defendant’s claim that “Wooley (1977) did not involve compelled speech in a public elementary school context, Barnette did.” Then, citing and quoting from Hazelwood v. Kuhlmeier (1988) the Court adds, “while the First Amendment rights of public school students ‘are not automatically coextensive with the rights of adults in other settings’ and must be ‘applied in light of the special characteristics of the school environment’ ..., [e]lementary

school students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Turning next to the parents’ argument in Frudden that the uniform policy is not content neutral (*i.e.*, it contained an exemption for uniforms of nationally recognized groups [*e.g.*, Boy Scouts and Girl Scouts, on regular meeting days], the Ninth Circuit concluded that the RGES policy is “content specific.” In a footnote the Court compared the exemption with a nearly identical one in Jacobs where after the district court in that case expressed strong reservations that the policy exemption was “not content-neutral” the defendant school district “voluntarily eliminated the exemption from the policy.”

Based on its analysis, the Ninth Circuit concluded that the Fruddens’ interests implicate First Amendment protections and that the RGES policy compels students to endorse a particular viewpoint, so strict scrutiny must be applied. However, said the Court, “because the district court granted defendants’ motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6), RGES was not required to make any showing regarding its justification for including the written motto or the exemption in the policy. Likewise, the Fruddens were not given the opportunity to produce any countervailing evidence. Nor is the record adequately developed on the issue.” Thus, “because the RGES policy compelled speech, a remand is necessary.”

Decision. The Ninth Circuit Court reversed the district and remanded the case to that court for further proceedings “consistent with the Court’s opinion.”

Policy Implications

The subject of mandatory student uniforms in public schools remains one of continuous debate. Is there a cause and effect relationship between the implementation of mandatory uniforms and maintaining a safe, secure, and non-disrupted learning environment in schools where teachers can teach and students can learn? What actual conditions or episodes inside schools and/or in the community have prompted school officials to consider enacting a student uniform policy? Why do it at all? In my view a case can be made in some communities to enact and implement such policies—especially where crime and violence persist. However, where such policies are enacted “the devil is in the details.”

Recognizing that Frudden is but one case from one jurisdiction, the Ninth Circuit’s rationale is nonetheless instructive and yields information worth pondering where mandatory student uniform policies are being considered. What follow are suggestions gleaned from the Court’s opinion.

Local school system policies must make it clear that:

- The sole purpose of the mandatory student uniform policy is to maintain a safe, secure, and non-disrupted learning environment.
- While the Board recognizes that students do not shed their speech and expression rights at the schoolhouse door, the Board, its administrators, teachers, and other staff have a responsibility to implement the mandates of the uniform policy.

- Students who violate that policy will be subject to disciplinary action as enumerated in the *Student Code of Conduct*.
- All students in this school system will be required to wear solid colored bottoms and solid colored polo, or tee tops. Individual school logos on uniforms are optional.
- School uniforms shall not be altered in any way and no other logo, insignia, slogan or motto shall be permitted to appear on a school uniform.
- School uniforms are to be worn to school each school day, and at all official school activities and other functions—whether these functions or activities occur during the school day, after school, or on weekends.
- Parents shall be completely informed and involved in any incident involving their child and an infraction of the uniform policy.

Final Thought: Where mandatory student uniforms are not considered appropriate should school system policies establish and publish expectations for student dress? Or, should building principals be granted discretion to determine and enforce rules dealing with “acceptable student attire” in their individual schools? Or, both? Or, should you simply have a “dress as you wish” policy for students?

One thing is certain - advice of the school attorney will be needed prior to moving ahead with the implementation of any choice.

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Richard S. Vacca

Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.