LEGAL MAILBAG – MAY 29, 2025

By Attorney Thomas B. Mooney, Neag School of Education, University of Connecticut

The "Legal Mailbag Question of the Week" is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors.
Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

As the principal of a middle school, I am familiar with the challenges posed by some of the T-shirts that students wear. I want to be respectful of the free speech rights of students, but some T-shirts are just too much. In fact, I think that parents sometimes encourage their children to wear offensive T-shirts just to see what I will do.

Yesterday, a student came to school wearing a T-shirt with the simple message, "There are Only Two Genders," in large letters. A teacher reported that some of the students in her class expressed discomfort after seeing the student and his T-shirt in the hallway. Frankly, I wonder myself whether the student has crossed the line here. We want to be a safe inclusive school, and we are well aware of the fact that discrimination on the basis of sexual orientation or gender identity and expression is prohibited in Connecticut.

I called the student into the office at the end of the day, and when I asked him about the T-shirt, he responded with the question, "Don't you read the newspaper?" It was a short conversation because he didn't want to miss his bus, and he left before we could talk further. But he got me thinking. Legal Mailbag, what am I missing here?

Signed,
Ripped from the Headlines

Dear Ripped:

Your question is quite timely. On Tuesday, the United States Supreme Court declined to review a decision by the First Circuit Court of Appeals. That is not unusual because the Court receives about 7,000 requests for review of decisions of the lower courts each year, but chooses to hear only 100 to 150 cases. As discussed below, however, what was unusual was the issuance of opinions by Justices Alito and Thomas in which they dissent from the Court's decision to deny certiorari, *i.e.*, not to hear the appeal.

The case in question is *L.M. v. Town of Middleborough, Massachusetts*, 103 F.4th 854 (1st Cir. 2024). There, the First Circuit Court of Appeals (the federal appellate court for Massachusetts, Maine, New Hampshire, Rhode Island and Puerto Rico) ruled in favor of the school district in a challenge by parents, who claimed that school officials violated the free speech rights of their son by prohibiting him from wearing a T-shirt with the message, "There Are Only Two Genders." Relying on the seminal ruling of the United States Supreme Court on student free speech rights, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the First Circuit held that school officials were within their rights to prohibit the wearing of that T-shirt. As is widely understood, the Court held in *Tinker* that the First Amendment protects the free speech rights of students in school unless school officials can reasonably forecast that the speech will either cause material disruption of the educational process or will invade the rights of others. The parents claimed that their son's T-shirt did neither, but in affirming the lower court's ruling, the First Circuit disagreed.

Given Legal Mailbag's fascination with the First Amendment and its application in the school setting, we will indulge in a lengthy quotation from the First Circuit opinion in the *L.M. v. Town of Middleborough, Massachusetts* case that explains the court's reasoning why prohibiting the wearing of a T-shirt with the message "There Are Only Two Genders" did not violate the student's free speech rights:

> In consequence of what the record here shows about what Middleborough reasonably understood the message to convey and what it knew about the NMS student population, we do not understand *Tinker*, our own precedents, or any other circuits' decisions to support our second-guessing Middleborough's assessment that there was the requisite basis for the forecast of material disruption here.
>
> First, there is the demeaning nature of the message. To be sure, there is a spectrum of messages that are demeaning of characteristics such as race, sex, religion, sexual orientation, and so gender identity as well. It is hard to see how it would be unreasonable to forecast the disruptive impact of messages at the most demeaning end of that spectrum, given their tendency to poison the educational atmosphere. [Citations omitted].
>
> * * *
>
> Second, in making its assessment of how disruptive the Shirt would be on the educational atmosphere, Middleborough was not acting on abstract concerns about the potential impact of speech demeaning the gender identities of some students at NMS. Middleborough was not aware of any prior incidents or problems caused by this specific message. But it knew the serious nature of the struggles, including suicidal ideation, that

> some of those students had experienced related to their treatment based on their gender identities by other students, and the effect those struggles could have on those students' ability to learn. . . . In such circumstances, we think it was reasonable for Middleborough to forecast that a message displayed throughout the school day denying the existence of the gender identities of transgender and gender non-conforming students would have a serious negative impact on those students' ability to concentrate on their classroom work.
>
> * * *
>
> Against this backdrop, we see no reason to substitute our judgment for Middleborough's with respect to its application of its Dress Code here. We conclude the record supports as reasonable an assessment that the message in this school context would so negatively affect the psychology of young students with the demeaned gender identities that it would "poison the educational atmosphere" and so result in declines in those students' academic performance and increases in their absences from school -- in other words, what *Nuxoll* [*Nuxoll ex rel Nuxoll v. Indian Prairie School District # 204,* 523 F. 3rd 668 (7th Cir. 2008)] described as "symptoms of a sick school . . . [and] therefore of substantial disruption." *Id*. at 674, 676.
>
> * * *
>
> We close by emphasizing a point that may be obvious but should not be overlooked. The question here is not whether the t-shirts should have been barred. The question is who should decide whether to bar them -- educators or federal judges. Based on *Tinker*, the cases applying it, and the specific record here, we cannot say that in this instance the Constitution assigns the sensitive (and potentially consequential) judgment about what would make "an environment conducive to learning" at NMS to us rather than to the educators closest to the scene.

While there is no certainty, Legal Mailbag predicts that the Second Circuit Court of Appeals (the appellate court for Connecticut, New York and Vermont) would rule the same way. However, it is clear that Justices Alito and Thomas disagree and would hold that the student's free speech rights were violated here.

It is rare, but not unprecedented, for justices of the United States Supreme Court to publish dissenting opinion from a decision not to hear an appeal. Here, Justices Alito and Thomas joined in such a Dissenting Opinion. Justice Alito objects to the First Circuit's decision on two bases. First, he objects on the basis that the actions of school officials in the *L.M.* case constitute "viewpoint discrimination," which is prohibited under the First Amendment. Second, he objects on the basis that the facts in the case do not meet the "material disruption" standard required by *Tinker* to justify restricting student speech, a standard that Justice Alito described as "demanding."

For now, this matter is resolved. However, the decision not to grant review of a particular decision is not a precedent, and we simply do not know either why a majority of the Court did not wish to review the First Circuit decision in this case or when the Court may take on a similar case. The deference the First Circuit showed to the decisions of school officials is encouraging. However, any case involving the restriction of the First Amendment rights of students must be considered and decided on its specific facts.