

District Ordered to Allow Student's Anti-Gay T-Shirt

A federal appeals court has ordered an Illinois school district to allow a student to wear a T-shirt proclaiming "Be Happy, Not Gay" to protest a high school event meant to promote tolerance of gay students.

A three-judge panel of the U.S. Court of Appeals for the 7th Circuit, in Chicago, ruled unanimously on April 23 that the student was entitled to a narrow injunction allowing that specific message, because school officials had stretched the district's policy against derogatory comments "too far" by forcing the deletion of "Not Gay" from such a shirt in a previous skirmish over the event called the Day of Silence.

"'Be Happy, Not Gay' is only tepidly negative; 'derogatory' or 'demeaning' seems too strong a characterization," Judge Richard A. Posner said in an opinion for himself and another judge on the panel.

The ruling was timed to allow Alexander Nuxoll, a sophomore at Nequa Valley High School in Naperville, Ill., to wear the shirt during an event called the Day of Truth, which is promoted by the Alliance Defense Fund, a religious-freedom group, as a response to the Day of Silence.

The Day of Silence, 'promoted by the Gay, Lesbian, and Straight Education Network, or GLSEN, was scheduled for Friday, April 25, while the Day of Truth was being promoted by the ADF for Monday, April 28. The Day of Silence and various responses to it have been a source of controversy in some schools. (See Education Week, April 23, 2008.)

Youth Vanguard

In his opinion, Judge Posner weighed the concerns of administrators in the 29,000-student Indian Prairie School District No. 204, who say they seek to maintain an orderly learning environment free of disparaging messages, against the free-speech rights of students to object to the Day of Silence.

"On the one hand, judges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere that is conducive to learning," the judge said. But he took exception to the district's argument that it was seeking to protect the rights of students against whom derogatory comments were directed.

"People do not have a legal right to prevent criticism of their beliefs or, for that matter, their way of life," the judge said.

Still, the injunction applied only to the "Be Happy, Not Gay" T-shirt, and did not broadly strike down the district's speech regulations. Nor did it give Mr. Nuxoll any guidance on the legality of stronger anti-gay messages he has suggested he might wish to convey in school.

Judge Posner's suggestion in his opinion that high school students could make only a "modest" contribution to the marketplace of ideas drew a rebuke from U.S. Circuit Judge Dana Rovner.

Judge Rovner, who also voted to grant the injunction, said in a concurring opinion that "youth are often the vanguard of social change" and "are leading a broad, societal change in attitude towards homosexuals."

"To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults, is contrary to the values of the First Amendment," Judge Rovner said.

Lawyers React

Jonathan A. Scruggs, an ADF lawyer who represents the student, acknowledged that the injunction was limited in scope, but he said Judge Posner's opinion "is going to prevent school officials from using some of these fallacious arguments to suppress speech that they deem offensive."

"This has major implications," Mr. Scruggs added.

John F. Canna, a lawyer representing the Indian Prairie school district, said he had discussed with district and school administrators the possibility that Mr. Nuxoll would win an injunction.

"The school administration felt the T-shirt was derogatory," Mr. Canna said. "On the other hand, we were pleased with much of what the majority determined."

He noted that after this year's Day of Silence and Day of Truth pass, the lawsuit will return to federal district court for further proceedings beyond the injunction.

Adam Schwartz, a lawyer with the American Civil Liberties Union of Illinois, said the ruling was consistent with free-speech protections guaranteed to high school students under the U.S. Supreme Court's 1969 ruling in *Tinker v. Des Moines Independent Community School District*.

"The \$64,000 question is whether or not the school district's policy [barring all derogatory speech], on its face, is consistent with the First Amendment," he said. "That question was not resolvable on this

motion."

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By Mark Walsh

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