Education Department
University of New Hampshire

Scholarly Interest Group (SIG)
Collaborative Leadership and Policy Studies

Policy Brief # 14-01
June 2014

The School Uniform and Compelled Speech

Frudden v. Pilling, 742 F.3d 1199 (9th Cir. 2014)

Todd A. DeMitchell
Professor, Education Department & the Justice Studies Program

engaged scholarship
Professional Graduate Study at a Research University
With Recognized Scholars and Professional Practitioners

www.unh.edu/education

LEGAL BRIEF

The School Uniform and Compelled Speech

Frudden v. Pilling, 742 F.3d 1199 (9th Cir. 2014)

What to wear to school today? Does a student's morning ritual of searching through the closet to find clean clothes to wear to school implicate the U.S. Constitution? Is the selection of pants (yoga pants, shorts, jeans, etc.) and tops (with written statements, or crop tops, etc) protected speech? The answer to the first question is typically yes. The answer to the second question has been mixed depending on the clothes selected and the dress code of the school.

The issue of what to wear to school has traveled from the clothes closet to the courtrooms across the United States, including New Hampshire. The twist in the morning ritual is not what clothes can be selected; rather the issue, both political and legal, is that the decision has been taken from students by the public school requiring what must be worn. However, mandating a uniform dress for students may have solved the morning question of what to wear, it has not resolved the issue of student expressive rights. Does a required school uniform abridge the rights of public school students?

I. INTRODUCTION

An online petition against Pinkerton Academy's "Unified Dress Code" gathered 285 signatures against the proposed code,[1] which is essentially a school uniform.[2] The petition, initiated by Savana Melanson, stated, "[A school uniform] takes away individuality. Also will not change study habits of students. Too much money for each child, parents do not have that type of money especially in this economy. We have the right to freedom of expression and would like to keep it that way."[3] The responses supporting the petition to stop the proposed school uniform policy capture much of the broader debate across the nation about adopting mandatory school uniforms. For example, petitioners wrote:

- "I do not want my freedom of expression taken away."Alinah Domings
- "its [sic] my right to wake up in the morning and have my own unique individuality." Jade Catizone
- "The way I dress, act, and speak are how I express my induvality [sic]. At school, the way I act and speak is already limited and surpressed [sic], but I can tolerate that! Trying to crush it further with a school uniform?! Absolutely not!" Tatiana McNeil[4]

---

[1] *See* Change.org, *Pinkerton Academy "Unified dress code" (uniforms): Stop the uniform proposal* (2013), available at https://www.change.org/petitions/pinkerton-academy-unified-dress-code-uniforms-stop-the-uniform-proposal. As of June 1, 2014, the 715 needed supporters for the petition was not met.

[2] The school administrators at Pinkerton Academy did not characterize the unified dress code as a school uniform. Hunter McGee, *Derry's Pinkerton Academy looks at narrowing dress code*. NEW HAMPSHIRE UNION LEADER (Sept. 22, 2013) available at http://www.unionleader.com/article/20130923/NEWS04/130929754.

[3] Change.org, *supra* note 1 at *Id*.

[4] *Id.*

The petitioners, many of them students and some of their parents based their argument against school uniforms on three pillars—freedom of speech/expression, the cost of the uniforms[5], and the belief that the school uniforms will not solve school issues (behavior/student achievement) at the school.[6] The Academy's final decision was to maintain the current "business casual" dress code rather than implement the proposed Unified Dress Code.[7]

School districts across the nation as well as in New Hampshire, struggle with which policy options for student dress are best.[8] There is no clear decision about whether school uniforms are best for education, let alone whether they are the right policy decision for a specific school, including New Hampshire schools. For example, the Long County Board of Education in Georgia rejected a recommendation from its

---

[5] *See* response from Solon Rawson, "One major problem is that the cost is simply unfeasible for just the impoverished students and families, but for the middle class who is still hard-hit by the recession. It is exponentially more viable for families to buy their clothing second-hand, and making everyone wear the same thing would amplify the differences between 'new' clothing and 'used' clothing." *Id.*

[6] *See* Lauren Finney, "I believe a healthy wholesome lunch would actually increase productivity exponentially more than a unified dress code, we need more broccoli and less mechanically separated chicken"; Michael Szekely, "I neither want uniforms, nor do I think it will solve any problems"; Carla Duarte, "Changing my clothes into something that makes me feel self-conscious and uncomfortable is not going to turn me into a better student." *Id.*

[7] Glenn Ahrens, Dean of Students, Pinkerton Academy, Letter to families of students of Pinkerton Academy (April 4, 2014) available at http://www.pinkertonacademy.net/announcements/April%204.pdf. For a copy of the dress code, *see* PINKERTON ACADEMY 2013-2014 STUDENT PLANNER, at 4 http://www.pinkertonacademy.net/resources/documents/Student%20Planner%202013-14.pdf.

[8] *See, e.g.*, school uniform considerations in New Hampshire (see agenda for Fremont School District, SAU #83 available at http://www.sau83.org/schoolBoard/documents/10-9-12Agenda.pdf. Not adopted) and Allentown, School District, Allentown, PA which adopted a policy in September of 2013. *See* http://www.allentownsd.org/Page/5031. For information on the school uniform policy, see http://www.allentownsd.org/Page/5638.

superintendent to implement a school uniform policy.[9] The faculty and school administrators were in favor of implementing a school uniform policy but the parents were not. Similarly, but with an opposite conclusion, the Bradford County School Board in Florida voted to continue its school uniform policy at the middle school in spite of a parent survey that was nearly two to one against the policy.[10]

This Brief will not review whether adopting a school uniform policy is a good or a bad policy decision.[11] Instead, this Brief will focus on the issue that surfaced in the policy discussion at Pinkerton Academy, what is the relationship between a mandatory school uniform policy and a student's free speech rights. More specifically, the Brief will review the recent 2014 case from the Ninth Circuit, *Frudden v. Pilling*[12], which analyzed the issue of whether wearing a school uniform with the logo "Tomorrow's Leaders" in addition to the school's name and Gopher logo constitutes compelled speech and whether the exemption to the olicy is content-neutral. We will begin with a brief review of public school students' right to free speech under the First Amendment.

II. STUDENT FREE SPEECH RIGHTS

Students have a constitutional right to free speech under the First Amendment, a right they do not relinquish when they walk through the schoolhouse gate. Commencing

---

[9] Mike Riddle, "Log BoE nixes student uniforms." *Coastal Courier* (May 29, 2009). Available at http://www.coastalcourier.com/news/article/14193/.

[10] Mark J. Crawford, "Board ignores survey to support uniforms," *Bradford County Telegraph* (May 28, 2009). Available at http://www.zwire.com/site/news.cfm?newsid=20321977&BRD=2150&PAG=461&dept_id=377017&rfi=6.

[11] For a discussion on school uniforms and research supporting or questioning the use of school uniforms, see Todd A. DeMitchell & Mark A. Paige, *School Uniforms in the Public Schools: Symbol or Substance?* 250 EDUCATION LAW REPORTER 847 (2010);

[12] 742 F.3d 1199 (9th Cir. 2014).

with *Tinker v. Des Moines Community Independent School District* in 1969,[13] the United States Supreme Court has issued four opinions articulating the constitutional rights of students in the schools.[14] Although students are considered "persons" and are therefore entitled to constitutional protections, their protected rights of speech and expression are limited. However, Chief Justice Burger asserted "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[15] Forms of expression allowed by adults may be prohibited to children in a public school.

A school is generally considered a nonpublic forum for purposes of the First Amendment; therefore, the state can exercise a greater degree of control than it could if schools were an open forum.[16] The courts have somewhat curtailed student First Amendment rights by giving deference to school administrators' judgment as to what speech is appropriate in the context of the public school.[17] For example, in a T-shirt case in Massachusetts, a federal court judge opined, "At least in high school. A political message does not justify a vulgar medium."[18]

School officials and students do not always share the same opinion of what is appropriate to wear to school. But if a school chooses to adopt a specific policy that

---

[13] 393 U.S. 503 (1969).
[14] Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); Bethel School District No. 403 v. Fraser, 478U.S. 675 (1986); Hazelwood School District v. Kuhlmeier,484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).
[15] Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
[16] *See e.g.,* Lamb's Chapel v. Center Moriches Free School District, 508 U.S. 384 (1993); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). For a discussion of fora in public educational settings, *see* Perry Educational Association v. *Perry Local* Educator's Association*,* 460 U.S. 37 (1983).
[17] Denno v. School Board of Volusia County, 959 F.Supp. 1481 (M.D. Fla. 1997).
[18] Pyle By and Through Pyle v. South Hadley School Committee, 861 F.Supp. 157, 169 (D.Mass 1994).

restricts what students may wear to school, that policy must comport with established and guaranteed constitutional freedoms.[19]

Of course, students' constitutional rights are subject to some limitations in the school environment, including their right to freedom of speech and search and seizure.[20] After all, schools have a legal responsibility to provide an environment conducive to learning. "The very nature of public education requires limitations on one's personal liberty in order for learning process to proceed."[21] Therefore, a student's First Amendment right to free speech must be "balanced against the need to foster an educational atmosphere free from undue disruptions to appropriate discipline."[22] Consequently, "[s]chool administrators have a legitimate and pressing need to gain a broad understand of the rights guaranteed to students by the First Amendment and how these rights are applied in the school setting.[23] Only the *Tinker* case will be reviewed because it provides the beginning point for the articulation of a public school student's right to free speech.

A. The Black Armband Case: Tinker v. Des Moines

The Supreme Court first recognized a student's right to free speech in the school environment more than forty years ago in the landmark decision of *Tinker v. Des Moines Independent Community School District*.[24] The case involved facts that occurred in 1965,

---

[19] RICHARD FOSSEY & TODD A. DEMITCHELL, STUDENT DRESS CODES AND THE FIRST AMENDMENT: LEGAL CHALLENGES AND POLICY ISSUES (2014).
[20] *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).
[21] Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970).
[22] Bivens v. Albuquerque Public Schools, 899 F. Supp. 556, 559 (D.N.M. 1995).
[23] DEBORAH A. BEMIS, FREEDOM OF SPEECH AND STUDENT CONDUCT: THREATS, RIGHTS, AND THE STANDARD OF CIVILITY (Unpublished dissertation, University of New Hampshire) 4 2012),
[24] 393 U.S. 503 (1969).

when Des Moines School officials suspended John and Mary Beth Tinker and Chris Eckhart for wearing black-arm bands to school in protest of the Vietnam War.

The school administration had learned about the Tinker children's planned protest in advance and hastily developed and implemented a policy targeting the protest. The three students brought suit in federal court arguing that the First Amendment gave them the right to express themselves in this quiet and dignified way.

The federal district court dismissed their complaint. On appeal, the Eighth Circuit Court of Appeals heard the case *en banc* but the court was equally divided. The Tinkers then proceeded to the United State Supreme Court to press their case that they had a constitutional right to quietly and passively wear a two-inch wide black armband in protest of the war in Vietnam.

In its 1969 decision, the Supreme Court declared that "[s]tudents in school as well as out of school are 'persons' under the Constitution. They are possessed of fundamental rights that the state must respect, just as they themselves must respect their obligations to the State."[25] Although, school officials possess "the comprehensive authority . . . to prescribe and control conduct in the schools,"[26] they must exercise that authority within the bounds of the Constitution. "In our system", the Court emphasized, "state-operated schools may not be enclaves of totalitarianism."[27] Therefore, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.

[25] *Id.* at 511.
[26] *Id.* at 507.
[27] *Id.* at 509.

They may not be confined to the expression of those sentiments that are officially approved."[28]

The Supreme Court found that school authorities could not justify the prohibition of student expression unless the conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collid[e] with the rights of others."[29] The Court asserted that "undifferentiated fear or apprehension of disturbance" couldn't trump this "hazardous freedom" and replace it with rigid regimentation.[30]

Using this line of reasoning, a restriction on student clothing that arguably has some symbolic or explicit expression cannot be suppressed unless school officials can show the clothing might "materially disrupts classwork" or provoke "substantial disorder" in the school environment.[31] In addition, the Court ruled, student speech may be prohibited when it involves a "collision with the rights of other students to be secure and to be let alone."[32]

However in *Tinker*, the Supreme Court expressly differentiated between a school's restrictions on a student's constitutionally protected speech and a school's dress code. In fact, the Court emphasized that "[t]he problem posed by the present case does

---

[28] *Id*. at 511

[29] *Tinker*, 393 U.S at 513. Justice Black's dissent lamented that this case is "wholly without constitutional reasons in my judgment subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.* at 525 (J. Black dissenting).

[30] *Id*. at 508.

[31] *Id*. at 513.

[32] *Id*. at 508. The use of the second prong has been spotty. The Third Circuit Court of Appeals wrote, "The precise scope of Tinker's' interference with the rights of others' language is unclear." Saxe v. State College Area School District, 240 F.3d 200, 217 (3d Cir. 2001).

not relate to regulation of the length of skirts or the type of clothing. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"[33] In spite of this seeming restriction on the applicability of *Tinker*, it used extensively in dress code cases.[34]

Nevertheless, in spite of the fact that the Supreme Court implicitly differentiated between pure speech from clothing issues, several courts have cited *Tinker* for the proposition that a student's choice of clothing style carries the protection of the United States Constitution. For example, only a year after the *Tinker* decision, a New Hampshire sixth grader persuaded a federal court that he had a liberty interest in wearing blue jeans to school, even though he had violated the school's dress code.[35] Although the judge admitted that the constitutional interest was minor, he ruled that the school district had not justified its infringement on a child's right to choose his own pants.[36]

III. DRESS CODES VS. SCHOOL UNIFORMS

Although lawsuits against school dress codes and school-uniform policies often involve similar legal arguments, a school student-dress code is different from a school uniform policy. A dress code states what cannot be worn while a uniform policy states what must be worn. Dress codes contract clothing options for students, whereas mandatory school uniforms define the clothing options.

---

[33] *Id.* at 513.

[34] The Ninth Circuit Court of Appeals unanimously affirmed the district court's use of *Tinker* to establish that the administration had forecast a substantial disruption based on previous incidents of threats, ongoing racial tension, gang violence, and a near-violent altercation over the display of the American flag at the last Cinco de Mayo celebration, Dariano *v.* Morgan Hill Unified School District, 822 F. Supp. 2d 1037 (N.D. Cal. 2011).

[35] Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970).

[36] For a contrary view on a school restriction against wearing blue jeans, *see* Fowler v. Williamson, 448 F. Supp. 497 (W.D.N.C. 1978) (school principal's prohibition against wearing blue jeans to graduation ceremony did not violate student's constitutional rights).

Dress codes bring to mind revealing clothing, advertisements for drugs and alcohol; boxers pulled with jeans pulled down, as well as gang colors and symbols. While school uniforms often conjure visions of private,[37] often Catholic,[38] school students where girls wear plaid skirts and boys wear ties and jackets, most public school uniforms require that specific colors such as khaki and blue be worn. In some ways, dress codes are intended to protect the school environment from inappropriate influences, while school uniforms are intended to improve the school environment.[39] School uniform policies are more restrictive of student choices than dress codes.[40] (see below)

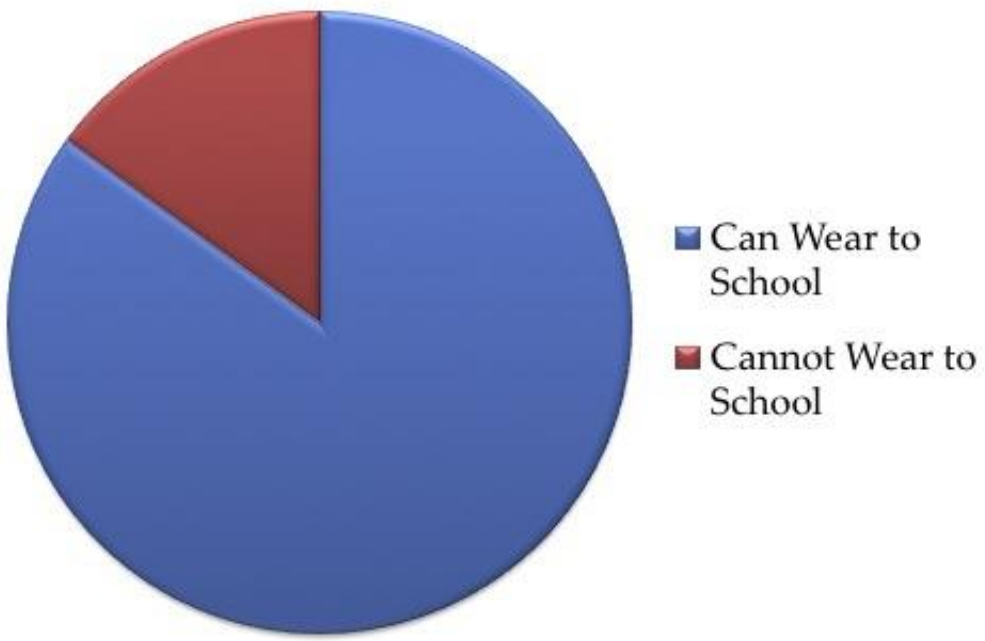
---

[37] Michael Firmin, Suzanne Smith, & Lynsey Perry, *School Uniforms: A Qualitative Analysis of Aims and Accomplishments at Two Schools*, (Cedar University) (A parent in a study of school uniforms at two Christian schools stated, "When they are out in our society, they're representing . . .[the school] . . . and we hope that with them being in those uniforms it would be a reminder to them that they are from a Christian school and they are to put forth a Godly appearance as a witness."). Available at http://www.albany.edu/eqre/papers/21EQRE.doc.

[38] *See* Susan McBrayer, "The School Uniform Movement and What It Tells Us about American Education: A Symbolic Crusade", *Catholic Education* (Sept. 2007) ("The plaid uniform has been culturally synonymous with Catholic schools. Today, however, uniforms have become less formal, replacing dress shirts for polo shirts emblazoned with the school name or mascot. Sweaters and blazers have given way to sweatshirts in many Catholic schools. Administrators and teachers may have initiated this change in keeping with the more secular phenomenon of 'business casual.' Furthermore, rising tuition, declining enrollment, and a change in demographics may have also contributed to new trends in the Catholic school uniform.") http://findarticles.com/p/articles/mi_6936/is_1_11/ai_n28543541/pg_2/?tag=content;col1.

[39] For example, in the first school uniform case, Phoenix Elem. Sch. Dist. No 1 v. Green, 943 P.2d 836 (Ariz. Ct. App. Div. 2 1997), the school asserted and the court accepted the argument that school uniforms have the following impact:

1. Promotes a more effective climate for learning;
2. Creates opportunities for self-expression;
3. Increases campus safety and security;
4. Fosters school unity and pride;
5. Eliminates "label competition";
6. Ensures modest dress;
7. Simplifies dressing; and
8. Minimizes costs to parents.



Id. at 839. However, for a critique of these assertions, *see* Todd A. DeMitchell, *School Uniforms: There Is No Free Lunch*, TEACHERS COLLEGE RECORD (Dec. 18, 2006) ID 12897.

[40] *See* Jacobs v. Clark County School District, 526 F.3d 419 (9th Cir. 2008) ("There are interesting and important questions about the legal difference between dress codes (which limit the universe of clothing options) and mandatory uniform policies (which define the universe of clothing.") *Id*. at 444 (Thomas, J., dissenting).

IV. SCHOOL UNIFORM LITIGATION

As can be seen from the discussion above, school uniform policies are more restrictive than dress codes. However, school uniform litigation outcomes have been more consistent than dress code litigation. In fact, of the eight school uniform cases that I found, the school district won every time; that is until *Frudden v. Pilling's*[41] Ninth Circuit Court of Appeals decision in February of 2014. Aside from the consistency of wins for school districts upholding school uniform policies, the other striking part of these cases, including the Court of Appeals decision in *Frudden*, none

[41] 742 F.3d 1199 (9th Cir. 2014).

of the four major U.S. Supreme Court's student free speech cases[42] were used as the central legal precedent. Instead the courts used precedents from a flag burning case, parental rights to direct the upbringing of their children, religion, and substantive due process. The school uniform cases are listed below.

School Uniform Cases
Phoenix Elem. Sch. Dist. No. #1 v. Green, 943 P.2d 836 (Ariz. Ct. App. Div. 2 1997).
Hicks v. Halifax County Brd of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999).
Byars v. City of Waterbury, 795 A.2d 630 (Conn. Super. Ct. 2001).
Canady v. Bossier Parish Sch. Dist., 240 F.3d 437 (5th Cir. 2001).
Littlefield v. Forney Independent Sch. Dist., 268 F.3d 275 (5th Cir. 2001).
Lowry v. Watson Chapel Sch. Dist., 508 F. Supp.2d 713 (E.D. Ark. 2007).
Derry v. Marion Community Schools, 790 F. Supp.2d 839 (N.D. Ind. 2008).
Jacob v. Clark County Sch. Dist., 526 F.3d 419 (9th Cir. 2008).

And, along comes *Frudden* from the Ninth Circuit Court of Appeals to break the streak of unbeaten school uniform cases and to interject a new cause of action, compelled speech. The discussion below will focus on the appellate decision and not on the district court decision, which granted summary judgment in favor of the defendant school district.[43]

V. COMPELLED SPEECH: "TOMORROW'S LEADERS"

[42] *See supra* note 14.
[43] Frudden v. Pilling, 842 F. Supp.2d 1265 (D.Nev. 1012).

A. The Facts

Roy Gomm Elementary School in Reno, Nevada passed a school uniform policy (May 2011) with two-thirds of the families voting to approve the mandatory school uniform policy.[44] Students were required to wear red or navy polo-style shirts and tan or khaki bottoms during school hours. Students were not allowed to alter the uniform. The uniform shirts had the Roy Gomm logo of a gopher with the words "Roy Gomm Elementary School" with the message above it, "Tomorrow's Leaders."[45] The school uniform was objected to and the motto, "Tomorrow's Leaders" became the focus of the ensuing lawsuit. The exemption to the mandatory school policy was wearing a uniform form a nationally recognized youth organization such as the Boy Scouts or the Girl Scouts.

In early fall, soon after the policy was implemented, the Frudden children (a fifth-grade boy and a third-grade girl) did not wear the required uniform; no action was taken by the school. Approximately two weeks later they wore uniforms from the Youth Soccer Organization. The students were asked to change because neither was a meeting of the organization nor was there practice that day. The following day the same thing happened with the same result. On the following day, September 14, 2011, the fifth-grade boy wore their uniform shirts inside out so that the logo was

[44] Frudden v. Pilling, 742 F.3d 1199, 1201 (9th Cir. 2014).
[45] *Id.*

not visible. He was asked to turn it right-side-out and he complied.[46] The Frudden's brought suit.[47]

Aside from the four student free speech cases, two other Supreme Court cases help to frame the *Frudden* discussion of the school uniform's "Tomorrow's Leaders" logo as compelled student speech. First, the right to speak connotes a complimentary right to refrain from speaking.[48] Second, in a teachers union case, the Supreme Court wrote, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[49] In other words, concomitant with the right to speak is the right not to be compelled to speak.

B. The Ninth Circuit Court of Appeals

The federal district court, upon the defendant school district's motion, and dismissed the case finding the school uniform policy to be constitutional. Among other findings,[50] the court found the motto[51] with the picture of a gopher, while

---

[46] *Id*. at 1202.
[47] The Frudden's original brought suit on July 1, 2011, prior to their children's actions. On October 18, 2011, they amended their complaint alleging 16 complaints. *Id.*
[48] Riley v. National Federation of the Blind, Inc., 487 U.S. 781, 797 (1988).
[49] Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977).
[50] The Frudden's alleged violations First Amendment expressive rights, First Amendment associational rights, procedural and substantive due process, equal protection, and viewpoint discrimination. The plaintiff lost on all counts. *Id*. at 1273-78.
[51] The district court stated that the motto was "one team, one community" Frudden, 842 F. Supp. 2d at 1274. The Ninth Circuit Court of Appeals stated that the logo was "Tomorrow's Leaders." Frudden, 742 F.3d at 1201. No explanation for the difference in logos was offered by the Appellate Court. An Internet search showed the use of the "Tomorrow's Leaders" logo.

slightly complex, was innocuous and that there was no meaningful risk that the students would be conveying a message of conformity. The plaintiffs alleged the school uniform compelled students to wear an expressive statement that is not viewpoint-neutral, "and that the very fact of wearing a uniform compels the expression of support for group affiliation."[52] The district court disagreed.

There were two issues before the Ninth Circuit. First, is the required logo "Tomorrow's Leaders" unconstitutionally compelled speech on leadership?[53] Second, does the policy contain a content-based exemption for nationally based student organizations, such as the Boy Scouts and the Girl Scouts.

1. Compelled Speech Analysis

Frudden came on the heels of another Ninth Circuit cases involving a mandatory school uniform. The case arose out of a Nevada, *Jacobs v. Clark County School District*.[54] The Appellate Court upheld the school's school uniform policy. Some of the schools displayed the school logo but none of the school uniforms had written communications. Therefore, the defendant schools did not force to students to communicate any message. The policy merely required students to wear solid-colored tops and bottoms.[55] Consequently, the *Frudden* court distinguished the *Jacobs'* court holding.

---

[52] Frudden, 842 F. Supp. 2d at 1274.
[53] Frudden, 742 F.3d at 1202.
[54] 526 F.3d 419 (9th Cir. 2008).
[55] *Id.* at 438.

This analysis starts with the Supreme Court case *West Virginia Board of Education v. Barnette*.[56] This is the classic flag salute case in which a state law requiring students to stand and recite the Pledge Allegiance to the Flag was found to be unconstitutional. The Supreme Court held that the compelled flag salute violates the Bill of Rights, which protects the individual's right to speak his own mind and not be compelled by the government "to utter what is not in his mind."[57] Essentially, the Court that the individual's right of conscience and intellect is inviolable by government. Government cannot compel individuals to espouse that which the individual does not hold.

> 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 their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of 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*, 319 U.S. 624, 642 (1943).

[56] 319 U.S. 624 (1943). The plaintiff students who refused to stand and salute the flag had been expelled and their parents had been prosecuted for "causing delinquency." *Id*. at 629-30.
[57] *Id.* at 634.

Thirty-four years after the *West Virginia* case, the Supreme Court in A New Hampshire case heard another case of compelled speech, *Wooley v. Maynard*.[58] New Hampshire's license plate, "Live Free or Die", was the subject of the free speech case. Were the plaintiffs' compelled by government to express a position by carrying the license plate with a motto they felt was "repugnant to their religious and political beliefs"?[59] The plaintiffs became the instrument, through the license plate motto, to convey government's normative statement, a statement with which the plaintiffs' disagreed. This is the essential reasoning of *West Virginia*.[60]

Similarly, the Fruddens' argued that the mandated written motto conveys two viewpoints. First, "leadership should be celebrated (or at least valued above being a follower), and second, Roy Gomm Elementary School is likely to produce '[t]omorrow's leaders.'"[61] The Court of Appeals agreed that the motto on the mandatory school uniform conveyed a message to which the Frudden's disagreed but were compelled to passively advocate. The court held that the motto was not meaningfully distinguishable from the New Hampshire license plate.[62] The school uniform with its mandated motto violated the free speech of the plaintiffs through compelled speech.

2. Content-Neutral Policy?

---

[58] 430 U.S. 705 (1977).
[59] *Id.* at 707-08.
[60] The Supreme Court in Wooley, reasoned, "[compelling 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" *Id.* 715 (quoted by Frudden, 742 F.3d at 1203.).
[61] Frudden, 742 F.3d at 1204.
[62] "[B]y mandating the written motto on the uniform shirts, the RGES policy compels speech under Wooley" *Id* at 1205.

The plaintiffs next argued that the school uniform policy exemption for nationally recognized youth organizations is not content-neutral. When government favors the content of one speech over another with a different content it comes before the courts with an exacting test it must meet. The classic example of content-neutral restrictions are time, place, and manner restrictions. The burden is placed on the government/school district to meet the burden of its restriction on speech based on the content of the speech.

The court asserted that the exemption favors the speech of some organizations (nationally recognized student organizations but not locally or regionally recognized youth organizations) but not others.[63] Therefore," the RGES school uniform policy's exemption indicates a content-specific distinction between favoring certain clothing-related speech."[64]

3. Reversed and Remanded

The Frudden's case was dismissed by the district court. They appealed the dismissal. The Ninth Circuit Court of Appeals held for the plaintiff Fruddens' finding that the motto on the school uniform constituted compelled speech. The court also asserted that the exemptions were not content neutral. When government compels speech or does not treat all speech neutrally by applying restrictions that are based on the content of speech, the courts hold the action of government to the highest level of review––strict scrutiny analysis. This analysis asks whether the goal of the policy serves a compelling state interest and whether the means (a school uniform

[63] *Id.* at 1206. Furthermore, the court raised the issue of what criteria are used to determine national recognition. *Id.*
[64] *Id.* at 1207.

policy) are narrowly tailored to serve the interest. Therefore, the court reversed the decision of the district court and remanded it back to the lower court to allow the school district the opportunity to justify placing the written motto on the uniforms and the exemption in the policy. Likewise, the Frudden's must also be given the opportunity to produce "countervailing evidence" in the strict scrutiny analysis if the policy is to survive.[65]

V. LESSONS LEARNED

New Hampshire may not have any, or many, school uniform policies and at first blush the case may seem removed from the realities of school life and educational policymaking in the Granite State. However, as we have seen above, the case for school uniforms has been introduced and in the absence of Supreme Court precedent, any litigation will search for persuasive authority in other jurisdictions, such as the Ninth Circuit. The *Frudden* case is of national interest (the first case in which a mandatory school policy did not prevail), and informed policy makers need a broad understanding of the issues surrounding school uniform policies to balance a local understanding of the circumstance, which gave rise to the proposed policy. Clearly, any school considering adopting a school uniform policy should be aware of this case. The one outcome, at least at this point, that appears to be clear is that a school should refrain, at least in the Ninth Circuit, from having a motto on its uniforms. Another outcome may be a reluctance to assert the school's position, aspirations, and message through broad-based means for fear of lawsuits. The

[65] *Id.* at 1207-08.

school district spent over $100,000 in legal fees, not counting the amount of educator time required.[66]

This case is interesting and instructive on several levels.

Compelled Speech

The compelled speech section of the *Frudden* court's holding raises issues. If mottos and their use in schools is constructed liberally, the application of compelled speech may proliferate beyond school uniforms. While the students in *West Virginia v. Barnette* suffered expulsion for their decision to violate the policy on the flag salute, the Frudden's suffered no such adverse action, and discipline was not central to the case. While the Frudden's suffered no state sanctioned adverse action as opposed to *Barnette* (expulsion)[67] and *Wooley* (imprisonment)[68], the court considered a lack of adverse action to be irrelevant. Therefore, no additional harm other than compelled speech is necessary under *Frudden* to assert a cause of action.

• *Frudden* introduced at the federal appellate level, compelled speech, which has not surfaced in any meaningful way since *West Virginia v. Barnette*. Once a cause of action has entered the court system, the tendency is for it to proliferates beyond the original fact pattern. For instance, if a school has students who violate the dress code and is told to wear a T-shirt in place of or over the questionable attire or face suspension, and that T-shirt states something more than the name of the school, is it compelled speech?

---

[66] Siobhan McAndrew, *Proposed Washoe Policy Addresses School Uniforms* RENO GAZETTE-JOURNAL (May 12, 2014) available at http://www.rgj.com/story/news/education/2014/05/12/proposed-washoe-policy-addresses-school-uniforms/8985163/.
[67] *See supra* note 56.
[68] *Id.* at 1205.

• Do all aspirational statements/mottos, such as "Everyone Successful Everyday", "Where Kids are #1", and "*Scientia*, *Concordia*, *Sapientia*: Knowledge, Harmony and Wisdom", or even such descriptions as "Home of the Warriors" or "Home of the Crusaders" constitute speech? And under *Frudden,* if they are speech it may constitute compulsion to carry the statement on school materials or to recite the non-"ideological speech"?[69] Does a required school identification card with the school's motto constitute compelled speech?

• It is problematic whether the slogan "Tomorrow's Leaders", will survive strict scrutiny analysis. Does it serve a compelling state interest and is it narrowly drawn? Will any motto or slogan reach this exacting and high standard? Will any hortatory statement about the goals of the school reach this standard?

• A statement about the student's being the leaders of tomorrow is innocuous. Yet, it is considered compelled speech. The unresolved issue that both *Frudden* and *Jacobs* dodged, was whether the logo (the gopher in *Fridden*) constitutes speech and thus can be compelled speech. If the logo is compelled speech, the constitutional protection may reach beyond school uniforms to any other identification with the school that students may encounter in which they wear, carry, or identify their school.

Content-Neutral Exemptions

The requirement for greater specificity for exemptions may involve an attempt to narrow exemptions through a tighter definition or to expand them to include everything. The proper response may be to not allow any restrictions, much

[69] "Finally, we do not believe the First Amendment analysis turns on an examination of the ideological message (or lack thereof) of 'Tomorrow's Leaders." *Id.* at 1206.

like *Palmer v. Waxahachie Independent School District* [70] , which banned all messages on student clothing. This content-neutral finding may not be specific to just exemptions for school uniforms. Is an exemption for religious beliefs content-neutral or does it favor religious beliefs over other kinds of beliefs?

Frudden restricts the ability of school authorities to make reasoned and rationale decisions regarding student discipline. Another hurdle has been placed in front of educators who must carry with them the constitutional knowledge and application of legal concepts that do not abridge a student's constitutional rights. For example, what constitutes lewd and vulgar language, what constitutes a matter of public concern, when is the student speaking as a student and not as a citizen who just happens to be at school, what constitutes a prior restraint, and what Internet/ electronic communication off campus requires on campus discipline. And, now educators may have to possibly parse what constitutes compelled speech.

Wearing "Tomorrow's Leaders" logo on a school uniform is not the same as being forced to stand, under the threat of expulsion to publically state an allegiance to the State's preferred position. It is also not the same as being required, under penalty of law, to affix a license plate to your vehicle with a slogan that espouses a political viewpoint. The court's holding on compelled speech is particularly

---

[70] Palmer v. Waxahachie Independent School District, 579 F.3d 502 (5th Cir. 2009). For a discussion of Palmer, *see* Richard Fossey, Todd A. DeMitchell, & Suzanne Eckes, *The End of the T-Shirt Wars in the Public Schools? Palmer v. Waxahachie Independent School District*, TEACHERS COLLEGE RECORD (September 28, 2009) http://www.tcrecord.org ID Number: 15775.

problematic and may raise mischief in the near future. [71] *Frudden* provides little guidance for school administrators who must almost daily chart a path through the thicket of First Amendment rights and still manage the culture of the school, provide a safe environment, and meet the curricular demands of the curriculum. Today's leaders are ill served by the ruling on "Tomorrow's Leaders."

[71] "If every time a citizen was outraged by the workings of a rather unimaginative bureaucracy he claimed a harm of constitutional dimensions, the courts would not just be crowded—they would be paralyzed." Swany v. San Ramon Valley Unified School District, 720 F. Supp. 764, 783 (N.D. Calif. 1989).