Gillman v. School Board for Holmes County: A Student's Challenge to Her High School's Ban on Pro-Gay Messages

I. INTRODUCTION

Plaintiff Heather Gillman (Gillman), through her next friend and mother, Ardena Gillman, brought suit against the School Board for Holmes County, Florida (School Board) for prohibiting students at Ponce de Leon High School from displaying slogans or symbols advocating the acceptance and fair treatment of homosexuals.[1] After the Ponce de Leon high school principal, David Davis, rebuked a lesbian student, Jane Doe, on the basis of her sexual orientation, several students defended Jane "by writing 'GP' or 'Gay Pride' on their bodies, [and] wearing t-shirts [and accessories] with messages supportive of gay rights," among other gestures.[2] In response, Principal Davis interrogated approximately thirty students about their sexual orientations and involvement in the "Gay Pride movement at the school," suspended eleven students, and initiated a school-wide ban on expressing pro-gay messages.[3]

Shortly after Davis prohibited pro-gay expression, Gillman and her homosexual cousin, one of the students whom Davis suspended, sent a letter through legal counsel to the attorney for the School Board seeking clarification on which phrases, symbols, and images the students could permissibly display at school.[4] Specifically, Gillman sought permission from the School Board to display rainbows, pink triangles, and the following slogans: "Equal, Not Special Rights," "Gay? Fine By Me," "Gay Pride" or "GP," "I Support My Gay Friends," "I support Gays,"

1. Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1361-62 (N.D. Fla. 2008).
2. *Id.* at 1362.
3. *Id.* at 1363.
4. *Id.* at 1363.

"God Loves Me Just the Way I Am," "I'm Straight, But I Vote Pro-Gay," "I Support Equal Marriage Rights," "Pro-Gay Marriage," and "Sexual Orientation is Not a Choice. Religion, However, Is."[5] The School Board replied that no such expressions were allowed because they supposedly "indicated membership in an 'illegal organization' prohibited by School Board policy and were disruptive to the educational process."[6] Gillman brought First and Fourteenth Amendment claims against the School Board, seeking declaratory and injunctive relief to allow the speech and expression at issue. She also sought nominal damages, attorneys' fees and costs, and retention of jurisdiction by the court to enforce the terms of its orders.[7] The United States District Court for the Northern District of Florida *held* that the School Board's actions prohibiting students from expressing messages in support of homosexuality constituted (1) a violation of free speech and political expression, and (2) viewpoint discrimination, contrary to the First and Fourteenth Amendments to the United States Constitution, and granted all relief requested by Gillman, including an award against the School Board for attorneys' fees and costs in the amount of $325,000.00. *Gillman v. School Board for Holmes County, Florida*, 567 F. Supp. 2d 1359, 1365, 1378-79 (N.D. Fla. 2008).

II. BACKGROUND

A. Free Speech Claim

The First Amendment to the United States Constitution prohibits Congress from "abridging the freedom of speech."[8] This First Amendment free speech protection is safeguarded from invasion by the states through the Fourteenth Amendment's Due Process Clause.[9] Moreover, the United States Supreme Court held in the landmark case of *Tinker v. Des Moines Independent Community School District* that the First Amendment protects free speech rights in public schools.[10] In *Tinker*, the school district banned students from wearing black armbands to school in protest of the Vietnam War.[11] Although the regulation was motivated by the school district's desire to avoid controversy associated with the war, the Supreme Court deemed it an unconstitutional denial of

5. *Id.*
6. *Id.* at 1364.
7. *Id.*
8. U.S. CONST. amend. I.
9. Near v. State of Minn. *ex rel.* Olson, 283 U.S. 697, 707 (1931).
10. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
11. *Id.* at 504.

students' right to expression of opinion.[12] After declaring that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech and expression at the school house gate," the *Tinker* Court explained:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'[13]

However, the Supreme Court has recognized several categories of student speech that are necessarily limited, including: (1) vulgar, lewd, obscene, or plainly offensive speech;[14] (2) school-sponsored speech;[15] and (3) pure student expression under *Tinker*.[16] In addition, the Supreme Court has recognized limitations on student speech in school that promotes behaviors, such as drug use, that are antithetical to a strong government interest.[17]

Under *Tinker*, censorship of student speech in public schools is only permitted if such speech would "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school" or "collid[e] with the rights of others."[18] According to the decision in *Tinker*, schools must also be able to articulate specific, constitutionally valid reasons for regulating student speech.[19] This requirement was reaffirmed in *Holloman v. Harland*,[20] where the United

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12. *Id.* at 514.

13. *Id.* at 512 (citation omitted) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

14. Bethel Sch. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (upholding student's suspension for delivering speech containing sexually explicit metaphors at school assembly).

15. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-73 (1988). The Court upheld a school's refusal to allow publication of controversial material in the student-run school newspaper that the public could reasonably mistake for the official opinions of the school.

16. *Tinker*, 393 U.S. at 505-506, 508.

17. Morse v. Fredrick, 551 U.S. 393 (2007) (finding that a principal's confiscation of a student's banner promoting illegal drug use and the student's subsequent suspension did not violate his First Amendment rights on the ground that school administrators may take steps to prevent speech promoting unlawful activity).

18. *Tinker*, 393 U.S. at 509, 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (internal quotations omitted)). Because the School Board conceded that the speech at issue was not vulgar, lewd, obscene, plainly offensive, or sexually suggestive, the court analyzed Gillman's speech as pure student expression. *Gillman*, 567 F. Supp. 2d at 1365. Therefore, *Tinker* provided the proper test for regulating Gillman's speech. *Id.*

19. *Tinker*, 393 U.S. at 511.

20. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1273, 1277 (11th Cir. 2004).

States Court of Appeals for the Eleventh Circuit held that a student's constitutional rights were violated when school officials punished him for silently raising his fist during the Pledge of Allegiance.[21] In determining the degree of disturbance sufficient to justify censorship of speech, the court in *Holloman* stated that "[w]here students' expressive activity does not materially interfere with a school's vital educational mission, and does not raise a realistic chance of doing so, it may not be prohibited simply because it conceivably *might* have such an effect."[22] When a school board implements a policy that regulates student expression, and "the constitutionality of [that] school regulation is questioned, it is settled law that the burden of justifying the regulation falls upon the school board."[23]

B. Development of Students' Free Speech Rights in the Law

Leading up to its decision in *Holloman*, the Eleventh Circuit has consistently protected the right of public school students to free speech that does not cause material and substantial disruption or collision with the right of other students to be secure and to be let alone. For example, the court held in *Burnside v. Byars* that school officials' prohibition against students wearing "freedom buttons" promoting the lawful and peaceful abolition of racial segregation was contrary to the students' free speech right; the evidence did not indicate that the buttons caused a disturbance nor were they intended to cause a disturbance.[24] Likewise, in a related case, the Northern District of Georgia stated that the censorship of a student newspaper was unlawful because it is "inconceivable that the use of the word 'damn' one time in the newspaper would have caused material and substantial interference with school activities."[25]

Moreover, there are many decisions affirming students' right to free speech and expression regarding the topic of homosexuality. For example, the United States District Court for the District of Rhode Island ruled in *Fricke v. Lynch* that a homosexual student's high school violated his First Amendment right by forbidding him to bring a same-sex date to

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21. *Id.* at 1259.
22. *Id.* at 1274.
23. Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 969 (5th Cir. 1972).
24. *See* Burnside v. Byars, 363 F.2d 744, 746, 747 n.5, 748-49. On October 1, 1981, the Fifth Circuit was divided to create the new Fifth and Eleventh Circuits. *See* Banner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Footnote three in the noted case explains that "the Eleventh Circuit adopted, as binding precedent, all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981." *Gillman*, 567 F. Supp. 2d at 1368 n.3.
25. *See* Reineke v. Cobb County Sch. Dist., 484 F. Supp. 1252, 1258 (N.D. Ga. 1980).

the prom.[26] Significantly, the court acknowledged the school principal's credible and legitimate concerns for the plaintiff student's safety; nonetheless, the court regarded the expressive act of bringing a same-sex date as within the ambit of a jurisdiction's established First Amendment jurisprudence.[27] Likewise, in *Henkle v. Gregory*, the United States District Court for the District of Nevada held that a student stated a colorable claim for violation of his First Amendment free speech right when school officials proscribed him from disclosing his homosexuality and then retaliated against him once he did.[28]

Conversely, the Eleventh Circuit has upheld the censorship of speech and expression by school officials in cases where such activity caused material and substantial disruption at school or collided with the rights of others. For example, in *Scott v. School Board of Alachea County*, the existence of strong racial tensions at the school was key to the court's determination that the school's ban on Confederate flags on school property was constitutionally valid because the Confederate flag is so "associated with racial prejudice [and] so likely to provoke feelings of hatred and ill will in others that [it is] inappropriate in the school context."[29] Similarly, in *Blackwell v. Issaquena County Board of Education*, the United States Court of Appeals for the Fifth Circuit upheld the school's ban on freedom buttons because the students' conduct in skipping classes, ignoring teachers, pinning buttons on other students without their permission, causing a younger student to cry, and throwing buttons through school windows "constituted a complete breakdown in school discipline."[30] In contrast, in *Burnside v. Byars*, a companion case to *Blackwell*, the court held that a school ban on freedom buttons was an unconstitutional infringement on the students' free speech right because the students' speech (their wearing of the buttons) was not accompanied by disruptive behavior.[31] Thus, although wearing a freedom button might not be disruptive by itself, the school may nonetheless ban the expression if it is linked to disruptive behavior.[32]

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26. *See* Fricke v. Lynch, 491 F. Supp. 381, 383, 387 (D.C. R.I. 1980).
27. *Id.* at 385.
28. *See* Henkle v. Gregory, 150 F. Supp. 2d 1067, 1070, 1075-1076 (D. Nev. 2001).
29. *See* Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003) (quoting Denno *ex rel.* Denno v. Sch. Bd., 218 F.3d 1267, 1273 (11th Cir. 2000)).
30. Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966).
31. Burnside v. Byars, 363 F.2d 744, 748-749 (5th Cir. 1966).
32. *Blackwell*, 363 F.2d at 754.

C. Viewpoint-Based Discrimination Claim

The First Amendment also protects individuals from viewpoint-based discrimination, which occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[33] Courts consider viewpoint-based discrimination in American public schools to be particularly unconstitutional because educators are charged with the responsibility to expand, rather than constrain, students' knowledge, beliefs, and perceptions.[34] A school board may be held liable for the viewpoint-based discrimination of its subordinates under theories of ratification, delegation, or deliberate indifference.[35] Ratification occurs when a school board, as the authorized policymaker with the final word on matters, incurs liability for approving the decisions of its subordinates.[36] Delegation occurs when a school board assumes liability for delegating decision-making authority to its subordinates.[37] And finally, a school board may be held liable for acting with deliberate indifference to matters involving claims of First Amendment violations.

III. COURT'S DECISION

In *Gillman v. School Board*, the United States District Court for the Northern District of Florida applied the analysis promulgated in *Tinker* to determine whether the School Board's ban on student expression of messages and symbols advocating homosexuality constituted a violation of the students' First Amendment right to freedom of speech.[38] After emphasizing the gravity of Principal Davis's "particularly deplorable" conduct by citing several studies confirming the vulnerability of young gay and lesbian students, the court arrived at three major conclusions concerning Gillman's free speech claim.[39] First, the court found that no sufficient connection existed between the prohibited speech and symbols and the students' behaviors to justify the School Board's ban.[40] Second, applying the *Tinker* test, the court concluded that the proscribed speech

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33. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 828-829 (1995).

34. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511-12 (1969).

35. Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989, 998 (11th Cir. 1990) (ratification and delegation theories); Sherrod v. Palm Beach County Sch. Dist., 424 F. Supp. 2d 1341, 1347-1348 (S.D. Fla. 2006) (deliberate indifference theory).

36. *See id.* (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 130 (1988)).

37. *See id.* (citing *Praprotnik*, 485 U.S. at 126-27; Parker v. Williams, 862 F.2d 1471, 1478 (11th Cir. 1989)).

38. *See* Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1366, 1370-1375 (N.D. Fla. 2008).

39. *Id.* at 1370-71, 1375.

40. *Id.* at 1375.

did not and would not create any material or substantial interferences with the school's ability to maintain order, nor did it clash with the rights of others.[41] Third, the court declared that the School Board failed to articulate any reasonable explanation for violating Gillman's free speech right as a result of alleged disruptions caused by other students.[42] The court also found that Principal Davis engaged in blatant viewpoint discrimination and held the School Board liable for his conduct under all three theories of ratification, delegation, and deliberate indifference.[43]

The court clarified, "[I]t is clear that principal Davis, [and] not the innocuous symbols and phrases at issue, bears sole responsibility for any unrest that occurred at Ponce de Leon in September 2007."[44] Students testified that it was Davis's animosity toward homosexuality, mistreatment of his students, and relentless crusade to suppress pro-gay speech that inspired their conduct in connection with the gay pride movement.[45] Principal Davis attempted to justify the ban on speech in part by arguing that rainbow stickers and phrases like "Gay? Fine By Me" are "sexually suggestive and immediately conjure images in children's minds of people engaging in sexual acts."[46] However, the court characterized Davis's assertions as an unsubstantiated and "obvious mis-characterization of the speech as sexual in nature"; and, it pointed out that children would likely benefit more from the "expressions of tolerance and acceptance inherent in the banned expressions" than from the "sexually explicit articles" in the magazines available in the school library and "the sexual content to which children are exposed daily in the popular culture."[47] Thus, the court concluded that no nexus existed between the banned gay pride speech and the students' behaviors to justify upholding the School Board's prohibition.[48]

Further, the School Board failed to meet the requirements under *Tinker* to justify censorship of student speech in public schools.[49] The court first found that the minor incidents that did occur in response to Davis's conduct did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[50]

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41. *Id.*
42. *Id.*
43. *Id.* at 1376-78.
44. *Id.* at 1371.
45. *Id.* at 1371-72.
46. *Id.* at 1377.
47. *Id.* at 1374.
48. *Id.* at 1375.
49. *See id.*
50. *Id.* at 1366, 1372.

The students' gay pride movement consisted of gestures such as whispering and note-passing, occasionally shouting "Gay Pride" in the hallways, debating about gay rights, circulating petitions, and writing symbols and slogans on their bodies, clothes, accessories, and notebooks.[51] The court concluded that the "vast majority of episodes involving the speech at issue were indistinguishable from the typical background noise of high school."[52] Although rumors had circulated about a plan to walk out of a mandatory morality assembly orchestrated by Davis, no student walked out in protest or expressed any kind of verbal or written pro-gay sentiment at the assembly.[53] Davis also did not interview any of the teachers during his investigation of the alleged disruptions.[54] Nor could he provide any evidence to justify the restriction under *Tinker*'s second proviso that the banned speech must infringe upon the rights of others.[55] The court emphasized that the "[s]tudents who advocated tolerance and acceptance of homosexuals at Ponce de Leon did not force their views and opinions on other students[,] . . . [who] were free to disagree with the message or walk away." [56]

The court also concluded that Heather Gillman should not lose her right to free speech as a consequence of other students' allegedly disruptive behavior.[57] The School Board did not contend that Gillman caused any disruption, nor was she suspended or punished for expressing support for her cousin or acceptance of homosexuality generally.[58] Thus, even assuming that other students acted in a materially and substantially disruptive manner, the court held that the School Board failed to articulate any acceptable reason for banning Gillman's speech specifically.[59] The court noted that the issues surrounding equal rights for homosexual citizens are currently "topic[s] of fervent discussion and debate within the courts, Congress, and the legislatures of the States, including Florida."[60] The court added, "The nation's high school students, some of whom are of voting age, should not be foreclosed from that national dialogue."[61]

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51. *Id.* at 1373.
52. *Id.*
53. *See id.* at 1362-1363, 1373.
54. *Id.* at 1373.
55. *Id.* at 1373-1374.
56. *Id.* at 1373.
57. *Id.* at 1375.
58. *Id.* at 1363, 1374.
59. *Id.* at 1374.
60. *Id.*
61. *Id.*

Finally, after upholding Gillman's free speech claim against the School Board, the court held the School Board responsible for Davis's actions, as well as its own, in engaging in blatant viewpoint-based discrimination.[62] The evidence overwhelmingly established that Davis banned the speech because of his personal disagreement with and hostility toward its message:

> Numerous witnesses testified that Davis interrogated students about their sexual orientations, told them that homosexuality was wrong, instructed students who were homosexual "not to go down that road," preached that homosexuality was against the Bible, and warned students who were homosexual to stay away from other students. . . . Davis [even] told a mother that he could secretly "send her [daughter] off to a private Christian school down in Tallahassee" and that "if there was a man in your house, [and] your children were in church, you wouldn't be having any of these gay issues."[63]

Also, Davis responded to Jane Doe's complaint of harassment by other students by preaching to her that being a homosexual was not "right," outing her to her parents, warning her to stay away from other students, and ultimately suspending her for expressing support for herself and other homosexual students at the school.[64] The court stressed that while Davis, like Heather Gillman, was entitled to his own opinions about homosexuality, he could not lawfully silence and suspend students for expressing views contrary to his own.[65] Moreover, the court exposed the School Board's viewpoint-based discrimination by highlighting the incongruity of banning students from displaying rainbows while simultaneously permitting the display of both swastikas and the Confederate flag.[66]

Although the School Board disclaimed responsibility for Davis's actions, the court held the School Board liable for its unconstitutional ban on speech under the theories of ratification, delegation, and deliberate indifference.[67] The court found that the School Board approved Davis's actions and decisions without conducting any real investigation into the allegations described in Gillman's letter.[68] After asking Davis if the allegations were true and then accepting his denial, "the School Board wholesale delegated its policymaking authority, as

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62. *Id.* at 1376-78.
63. *Id.* at 1376-77.
64. *Id.* at 1370.
65. *Id.* at 1376-77.
66. *See id.* at 1377-78.
67. *Id.* at 1378.
68. *See id.*

such authority related to the speech at issue, to Davis and ratified his ban on speech."[69] The court described the School Board's conduct as a complete abrogation of its responsibilities, as it also failed to question Davis or any teachers, other administrators, students, or parents about the dispute despite its awareness of the alleged constitutional violations.[70] The court found that the School Board's inquiry "amounted to no investigation at all, [which] render[ed] the School Board deliberately indifferent"[71] as a matter of law.

IV. ANALYSIS

The noted case is only one example of the recent progress made in broadening LGBT legal rights in the public education system generally and in Florida public high schools specifically. Shortly after the publication of the opinion in the noted case, the United States District Court for the Southern District of Florida confirmed the right of a student-organized Gay-Straight Alliance (GSA) to receive official recognition as a noncurricular student group at Okeechobee High School (OHS) under the Equal Access Act (EAA), 20 U.S.C. § 4071.[72] The EAA requires that if a federally funded secondary school permits the establishment of any noncurricular student group, the school shall not discriminate against or deny access to any other noncurricular student group on the basis of the content of the group's speech.[73] After explaining that recognition of the GSA was consistent with the high school's participation in the State Abstinence Education Program, the court in *Gonzalez v. School Board of Okeechobee County* articulated the principle that schools should provide for the well-being of gay students to the same extent as straight students.[74] In its ruling, the court held that Okeechobee High School "must grant the GSA all attendant benefits uniformly afforded to each of its noncurricular student groups and may not place restrictions on the GSA that are not uniformly applied to all noncurricular student groups."[75] *Gonzalez*, as well as the noted case, demonstrates the court system's willingness to recognize the importance of protecting and promoting the rights of gay students.

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69. *Id.*
70. *Id.*
71. *Id.*
72. Gonzalez v. Sch. Bd. of Okeechobee County, 571 F. Supp. 2d 1257, 1260, 1270 (S.D. Fla. 2008).
73. *See* 20 U.S.C. § 4071(a)-(b) (2006).
74. *See Gonzalez*, 571 F. Supp. 2d at 1263-67.
75. *Id.* at 1267.

However, an interesting paradox exists between the recent LGBT rights awarded to students in Florida's public school system and the slow progress that has occurred in the fight for legalization of gay marriage in Florida.[76] Florida law explicitly prohibits marriages or the recognition of marriages between persons of the same sex, which many people regard as the major barrier to achieving full legal recognition for homosexual individuals.[77] Thus, the messages of acceptance and fairness conveyed to students in these successful student rights cases will likely seem questionable to students as they grow older and come to realize that this same court system denies homosexuals the ultimate legal recognition of marriage.

Nevertheless, the recent strides made in expanding gay and straight students' rights to express support for homosexuality in public schools are significant, because "[t]he classroom is peculiarly the 'marketplace of ideas' [and] [t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.'"[78] In the noted case, Principal Davis attempted to shut down the marketplace, expose students to an "exchange" of ideas consisting entirely of his own, and silence the multitude of tongues. Heather Gillman's brave challenge to her high school's ban on pro-gay messages helped restore the "marketplace of ideas" and remind the nation that antigay sentiments persist in our public school system today.

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76. *See, e.g.*, Bashaway v. Cheney Bros., 987 So. 2d 93, 93-94 (Fla. Dist. Ct. App. 2008) (dismissing a lesbian woman's claim for loss of consortium because such claims under Florida law are derivative claims dependent upon the legal status of marriage).

77. *See* FLA. STAT. § 741.212 (2004).

78. Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1365-1366, 1376 (N.D. Fla. 2008) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969)).

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