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Court Upholds Constitutionality of Board's Dress Code Policy

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The Appellate Division recently upheld the Pleasantville Board of Education dress code policy. In *Dempsey v. Alston*, 2009 WL 536910 (App. Div. 2009), the parents of a child who attended both Pleasantville Middle School and the high school challenged the constitutionality of *N.J.S.A.* 18A:11-8 (“the Act”), which grants boards the authority to adopt uniform dress codes in public schools.

The Board adopted its dress code policy in 2001. Students were provided with opt-out forms that permitted them to opt out of the policy for religious and/or medical reasons. The child, O.D., did not comply with the dress code and the parents submitted an opt-out form on his behalf claiming that O.D. may opt out because of “Constitutional Rights, Fundamental Freedom, Individual Personal Choice and Philosophical Beliefs.” O.D. was suspended for his non-compliance with the policy and later graduated after voluntarily completing the required in-home instruction coursework. After entering the high school that fall, O.D. submitted another opt-out request, which was also denied by the Board. O.D. was assigned in-school suspension for his failure to comply with the dress code.

The parents filed a verified complaint against the interim superintendent, assistant high school principal and the Board seeking an order compelling O.D. to attend school without having to comply with the dress code. The parents, in an amended complaint, challenged the constitutionality of the Act and the Board’s policy. The trial court granted summary judgment to the defendants, dismissed the plaintiff’s summary judgment motion, and the parents appealed.

The parents argued that the Act was unconstitutional because, on its face, it does not mandate that a school board include an opt-out provision as part of its policy. They also argued that the policy imposes an invalid restraint on O.D.’s First Amendment rights, violates their rights of privacy as individuals and participants in the parent-child relationship, and that the policy infringes on O.D.’s right to dress as he pleases.

The court rejected these arguments by noting that while the right of parents to raise their children without undue state (cont’d ➔)

interference is well established, “the right to familial privacy in the upbringing and education of a child is qualified in a school setting.” The right of parents to control the upbringing of their child must, in certain circumstances, take a back seat to a school’s ability to control curriculum and the school environment. The court stated that although there is a fundamental right to decide whether a child goes to public school, “[parents] do not have a fundamental right generally to direct how a public school teaches their child.”

There is no constitutional right to dress as you choose. When no constitutional right is implicated, the Legislature must establish only a rational basis for its actions. The court found that the purpose of the Act, to assist in controlling the environment in public schools, to facilitate and maintain an effective learning environment, and to keep the focus of the classroom on learning, is rationally related to the State’s legitimate interests in protecting and preserving the quality of education. Therefore, “the absence of a mandatory opt-out policy was not unconstitutional.”

The argument that the Act infringed on the students’ First Amendment right of expression was also rejected by the court, which said that the act of dressing as one chooses does not rise to the level of expressive conduct, which is protected under the First Amendment. To qualify as expressive conduct, there must be “[i]ntent to convey a particularized message ... and in

the surrounding circumstances the likelihood must be great that the message would be understood by those who viewed it.” There was nothing in the record to indicate any particularized message by O.D. in the way he dresses. In fact, O.D. testified that he was not attempting to express any message with his choice of clothing. The court stated that another reason why the Act is not a restriction on free speech or expressive conduct is because it is content-neutral.

As a last ditch effort, the parents challenged the dress code policy on the basis that it failed to comply with the Act’s requirements for its adoption. The court noted that the parents presented no evidence to support this contention and that the board presented sufficient, undisputed evidence to show that the policy was adopted in compliance with the requirements of the statute, mainly that there be a public hearing and notice to the community of the policy. The court held that the Board complied with the statutory requirements and that the parents failed to present any evidence to create a genuine issue of material fact.



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