

September 26, 2022

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(Via Email: mmiller@eckertseamans.com)

Re: Misinformation that *Shurtleff* prohibits District from displaying Pride
Flags in classrooms

Dear Mr. Miller:



We write in response to misinformation provided by some board members regarding the above mentioned case. Pennridge directors claimed that a recent U.S. Supreme Court case either prohibits the District from allowing displays inside school buildings and classrooms of Pride flags or other symbols expressing support for LGBTQ+ students or would open the door to requiring the District to also display every message, including potentially hate speech. The board members' proffered case interpretation is inaccurate.

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Shurtleff v. City of Boston, Massachusetts, does not control what schools display in classrooms. 142 S. Ct. 1583, 1584 (2022). That case involves application of First Amendment free-speech principles to "public forums" opened by government for purposes of speech. The opinion's first paragraph sums up the issue:

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When the government encourages diverse expression—say, by creating a forum for debate—the First Amendment prevents it from discriminating against speakers based on their viewpoint. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to "promote a program" or "espouse a policy" in order to function. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015).

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Shurtleff, 142 S. Ct. at 1587.

The inside of a school or classroom is not any type of public governmental forum, as that term is understood in First Amendment jurisprudence -- unlike in the *Shurtleff* case where Boston historically allowed use of one flag pole for the public to display various messages. The District here is not creating a forum for public debate. The buildings belong to the school district for the purpose of educating children. That gives the district much more control over what messages are displayed and how and where they are displayed. School buildings and classrooms are simply not public forums.

Rather, absent a deliberate effort to create a designated public forum, such as a student display bulletin board, what is displayed on the walls is government speech. Accordingly, the school district has substantial control over what messages are displayed. *Shurtleff* explains as follows:

The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. *See Walker*, 576 U.S. at 207–208, 135 S.Ct. 2239. That must be true for government to work.

See Shurtleff, 142 S. Ct. at 1589. The messages displayed inside the school are government speech, like the monuments in front of government buildings in *Summum*, and the license plates in *Walker*. The District, which owns the buildings, has substantial control over what messages are displayed. The forum analysis that required Boston to permit all manner of flags on the third flag pole does not apply inside schools.

Under the First Amendment analysis that applies inside public school buildings, the district can allow messages, such as Pride flags, without opening the door to all other messages, including homophobic ones. *Shurtleff* makes this clear in the passage that immediately follows the one quoted above:

Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans. The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks. *See Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000).

Shurtleff, 142 S. Ct. at 1589. Pride flags and other messages are regularly displayed inside and outside government buildings, without obligating the agency to also display homophobic, racist or other unwanted messages. These are simply not public forums, like the flag pole in *Shurtleff*, which are governed by a different set of First Amendment rules.

Consequently, the District's reliance on *Shurtleff* to argue either that they cannot allow the display of the Pride flag or that if they do it will necessarily open the door to display of every other conceivable message, including homophobic and racist displays, is misplaced. The district undoubtedly still has many other displays in the school that are presumably education related and supported by the District, e.g., American and Pennsylvania flags, support for veterans, maybe support for Ukraine or the local volunteer fire department, etc. That's all government speech and the District decides on that, and can decide on that without opening the door to the required display of messages it doesn't want.

It has become clear that District leadership does not want Pride flags and messages displayed, but that is a policy choice they make, not one forced on them by law. Consequently, the decision to remove Pride flags is strong evidence that the district does not support LGBTQ+ students and further fuels the perception that the District is behaving discriminatorily.

Instead, we urge the District to create an inclusive school environment that affirms the dignity and rights of gay and transgender students. LGBTQ youth who reported having at least one LGBTQ-affirming

space had 35% reduced odds of reporting a suicide attempt in the past year.¹ Conversely, a hostile school climate perpetuates higher rates of truancy, absenteeism, and dropping out for LGBT youth.² A Pride flag in a classroom is a sign that LGBTQ+ students are in a welcoming space and that they can come to the teacher in that classroom for support if needed. It is a message that hateful or discriminatory comments from other students will not be tolerated. Directing the removal of LGBTQ+ Pride flags signals to students that they are not safe to be open about their identity in school and encourages bullying and harassment of LGBTQ+ students who are already at increased risk for depression and self-harm. Moreover, the District's creation of a hostile environment or failure to take action against anti-LGBTQ harassment or discrimination would violate what one court called an "unbroken line of authority" from voluminous federal cases holding that Title IX's nondiscrimination mandate ensures LGBTQ students and others have equitable access to education free from sex discrimination. *See Soule by Stanescu v. Connecticut Association of Schools, Inc.*, No. 3:20-cv-00201, 2021 WL 1617206 at *10 (D. Conn. Apr. 25, 2021).

In sum, the District is not legally bound to prohibit Pride flags. In fact, it better serves the District and *all* students, not just LGBTQ+ students, to encourage the display of pride flags to promote a welcoming and non-discriminatory environment for all students.

Respectfully,



Witold J. Walczak
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¹ See LGBTQ & Gender-Affirming Spaces, The Trevor Project, Dec. 3, 2020, <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>

² See Educational Exclusion (2016), GLSEN, https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.