LOS ANGELES & SAN FRANCISCO

Daily Journal

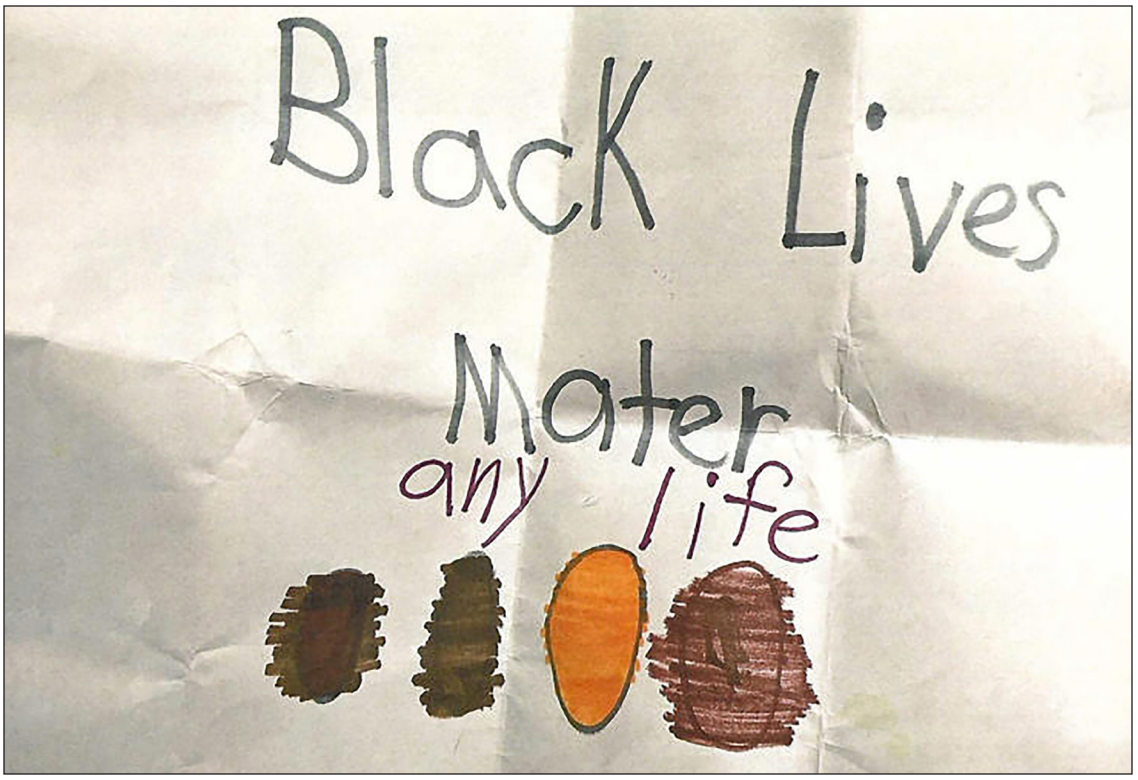
www.dailyjournal.com

WEDNESDAY, JULY 24, 2024

GUEST COLUMN

Do first graders have free speech rights? Why it matters.

By Krista L. Baughman



B.B. v. Capistrano Unified School District, et al.

A California federal district court has upheld discipline imposed on a 7-year-old by her school district in connection with a picture she drew for a friend that the principal deemed inappropriate. Although the court downplayed the case as a "schoolyard dispute," it sets a dangerous precedent that could embolden educators to suppress the First Amendment rights of all minors who have not yet reached high school age.

After a school lesson about Martin Luther King, Jr., plaintiff "B.B." wrote the words "Black Lives Mater [sic]" on a piece of paper, under which she added "any life." At the bottom, she drew four colored-in ovals, representing her "diverse set of friends." B.B. gave her drawing to her classmate, M.C., who went home and showed it to her mother.

Believing her daughter was being singled out due to her race, M.C.'s mother complained to the school. In response, the school told B.B. that her drawing was "inappropriate" and "racist," and forced B.B. to apologize to M.C. and to sit out at recess for two weeks.

B.B.'s mother filed a First Amendment lawsuit in federal court against Capistrano Unified School District in Orange County, where the incident occurred, arguing that the discipline violated her child's free speech rights. The district court disagreed, holding that the first grader was too young to have First Amendment rights. The district court characterized the case as a "schoolyard dispute" that is "not of constitutional proportions," and quoted the Seventh Circuit in holding that elementary schools "are more about learning to sit still and be polite, rather than robust debate."

This is wrong: There simply is no age of maturity at which First Amendment rights kick in. As the Supreme Court famously held in *Tinker v. Des Moines*, a case about high school students protesting the Vietnam war, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The district court attempted to distinguish Tinker by reasoning that an elementary school is "not a marketplace of ideas," and the "downsides of regulating speech there is not as significant as it is in high schools, where students are approaching voting age and controversial speech could spark conducive conversation." But where is the line? If first graders do not have speech rights worthy of protecting - what about fifth graders? Middle schoolers?

The district court's order highlighted another slippery slope in the realm of student speech. Tinker announced two balancing principles: While a school may properly regulate speech that "involves substantial disorder or invasion of the rights of others," it may not censor speech based on "the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." But when does speech cross the line from being unpleasant (but protected) to being "invasive" of classmates' rights (and therefore unprotected) - and who gets to decide?

According to the district court, which held that B.B.'s drawing was unprotected speech because the principal said so, this decision should be left to the State via school administrators. In reaching its conclusion, the district court cited the 9th Circuit case of *Harper v. Poway Unified School District* for the prop-

osition that "denigrations based on protected characteristics do more than just offend - they can inflict lasting psychological harm and interfere with the target student's opportunity to learn." The district court then expressed wholesale deference to school officials to decide whether speech "interferes" with classmates' rights, stating that "such deference to schoolteachers is especially appropriate today, where, increasingly, what is harmful or innocent speech is in the eye of the beholder."

The district court's reasoning is incredibly troubling, as it represents an abdication of the court's role in First Amendment cases. It is the judiciary, not schools, that are tasked with examining the facts of a case and determining whether they give rise to a constitutional violation. And never is this truer than in times of political unrest, when State actors may be more inclined to quell uncomfortable speech to avoid escalating a controversy.

In B.B.'s case, it was undisputed that that B.B. had innocent intentions, that the drawing did not strain the friendship between B.B. and M.C., that M.C.'s parents didn't want B.B. to be punished, and that neither student understood why B.B. was apologizing. Yet the principal still concluded that the drawing - "although well-intentioned" - had crossed the line "from harmless schoolyard banter to impermissible harassment." And the district court accepted that conclusion without meaningfully questioning it.

B.B.'s case can be seen as posing two competing ideologies. One side believes that the State should be given "significant latitude to discipline student speech" in the name of "educat[ing] students about habits and manners of civility or the fundamental values necessary to the maintenance of a democratic political system," as the district court put it.

The other side, including this author, is deeply concerned that when we allow the government to "define civic responsibility and then ban opposing points of view," as the Harper dissent explained, we jeopardize a First Amendment that has allowed our democratic political system to exist in the first place. The problematic aspect of B.B.'s case has less to do with suppressing the views of a first grader, and more to do with establishing precedent that grants the State, through public school administrators, to act as judge, jury and executioner concerning student speech.

B.B. has appealed the case to the 9th Circuit, where the court can clarify the distinct roles of the judiciary and the State when it comes to deciding First Amendment rights and violations - and hopefully, unwind the harm posed by this decision.

Krista L. Baughman *is a First Amend-ment and Civil Rights trial lawyer and partner of Dhillon Law Group, Inc.*