B. H. v. Easton Area School District
2013 WL 3970093 (3rd Circuit Court of Appeals – Pennsylvania)

August 5, 2013

Background

Two middle-school students wore "I ♥ boobies (Keep a Breast)" bracelets during breast-cancer awareness week and were instructed to remove the bracelets. The evidence reflected that the student body generally understood the "I ♥ boobies (Keep a Breast)" bracelet was part of the national breast-cancer awareness campaign. When the students refused, asserting their First Amendment Rights, the school issued each a one and one-half (1½ day) suspension and forbade them from attending an upcoming dance. The school explained to the parents that the students were disciplined for "disrespect", "defiance" and "disruption" despite no evidence that the bracelets created a disruption at the school, other than some intermittent tomfoolery from certain students.

On appeal, the School argued that it banned the bracelets as an exercise of its authority to restrict lewd, vulgar, profane or plainly offensive student speech under the U.S. Supreme Court's decision in *Bethel School District v. Frase,* 478 U.S. 675 (1986) (patently lewd nomination speech by a fellow student). The 3rd Circuit Court of Appeals determined the school violated the students' First Amendment Rights and prevented the school from enforcing its ban on the bracelets because it found that the phrase "I ♥ boobies (Keep a Breast)" was **not** patently offensive and could otherwise could be construed as commenting on a social or political matter.

Holding

As a pretext to its ultimate conclusion, the Appellate Court provided an extensive analysis of the issues confronted by reviewing the major school speech cases decisions by the U.S. Supreme Court:

- Schools may restrict school speech that threatens a specific and substantial disruption in the school environment or that invades the rights of others *Tinker v. Des Moines Ind. CSD*, 393 U.S. 503 (1969) (Vietnam Era, black arm band case);

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However, schools may restrict speech even where there is no threat of a specific and substantial disruption to the school environment or the speech fails to invade the rights of others under three narrow exceptions:

- Schools may ban speech that is patently lewd, vulgar, profane, obscene or offensive, or that could otherwise be considered "fighting words" in the school (even though it may not be offensive outside the school context). *Bethel School District v. Fraser*, 478 U.S. 675 (1986) (patently lewd nomination speech by a fellow student);
- Schools may ban speech that a reasonable observer would interpret as advocating illegal drug use and the speech cannot plausibly be interpreted as commenting on any political or social issue. *Morse v. Frederick*, 551 U.S. 393 (2007) ("bong Hits 4 Jesus" case); and
- Schools may ban speech that is "government sponsored" on grounds that the ban is reasonably related to legitimate pedagogical concerns. *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988) (censorship of school paper).

With this back drop, the Appellate Court analyzed when "lewd speech" may be restricted and established the three general principles:

1) **Schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted as social or political commentary;**

2) **Schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter; and**

3) **Schools may not restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue.**

In reaching this framework, the Appellate Court identified plainly lewd speech as that speech which "offends for the same reasons obscenity offends because it is no essential part of any exposition of ideas and thus carries very slight social value." However, schools must nevertheless be careful when determining "lewd speech" because both the Appellate Court in this case, and the U.S. Supreme Court recognize that although the "precise standard for political speech or plain lewdness when it comes to minors proves elusive", it is still easy enough to identify on which side of the line the potentially offending language falls when it is put forth. *See e.g.*, *Jocobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart on defining pornography: "I shall not today attempt further to define [the term] … but I know it when I see it.")

Nevertheless, courts will generally defer to school boards to make the determination of what is lewd, vulgar, profane or offensive given that the school officials' knowledge of the age, maturity and other characteristics of their students is far better than the judges and

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typically school boards must act quickly based on their experience with the student body when called to do so.

However, this deference is not a "blank check" because courts are still empowered to review such decisions as the "reasonable observer." In this capacity, the courts' deference to schools lasts only as long as the school's interpretation of the speech remains plausible in light of competing meanings of the speech at issue, the context, content and form of the speech and the age and maturity of the student audience. Although courts as the "reasonable observer" will not look to the subjective political or social intent of the speaker because such intent is irrelevant, the courts will also not adopt an "acontextual interpretation". Thus, courts will side with the school if the speech could not plausibly be interpreted as commenting on a political or social issue. However, if the speech implicates a political or social issue, the very thing the First Amendment was created to protect, courts will not support a school's ban on such speech in the absence of any other concern.

Learning Point:

When deciding whether to prohibit student speech, school officials must look at several facts to determine whether their actions will be appropriate under the First Amendment. There will no doubt be easy cases where students engage in patently lewd speech. However, as a student's speech becomes more ambiguously lewd, coupled with potentially social or political commentary, whether a school has the power to regulate such speech becomes less clear.

To successfully rebuff challenges to established speech restrictions, schools should have evidence that the school has analyzed the speech to be restricted in the context of the specific school setting and from the perspective of a reasonable outside observer. This analysis should specifically and reasonably articulate the justification for banning such speech – it is either patently lewd OR it is ambiguously lewd and does not plausibly touch upon a social or political issue. By maintain a record of such analysis, schools can be better prepared to defend their speech restrictions if and when challenges arrive.

The school in this case did not originally rely on the "lewdness" of the speech for the suspension. Instead, school officials cited "disrespect and defiance" without demonstrating any disruption to justify the suspension. Given this initial reaction, the court seriously questioned the school post-hoc rationale for the ban. Finally, the school could not escape the fact that the bracelet touched upon a social concern, speech clearly protected by the First Amendment. Ultimately, the school's conclusion that the "I ♥ boobies (Keep a Breast)" was lewd in the first instance to justify a ban was clearly suspect. Thus, in the absence of a Constitutionally accepted justification, the court found the school could not ban the "I ♥ boobies (Keep a Breast)" bracelets.

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