Hogan Lovells

MEMORANDUM

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

TO School District Clients and Friends

FROM John W. Borkowski
Joel D. Buckman

DATE December 9, 2013

SUBJECT School District Seeks Supreme Court Review of Ruling that Middle School Students Generally Have Constitutional Right to Use Ambiguously Lewd Speech to Express Political or Social Commentary at School

---

On December 3, 2013, the Easton Area School District in Pennsylvania sought review in the United States Supreme Court of an important appellate court ruling against it. 1/ In August, the United States Court of Appeals for the Third Circuit held that the school district violated the First Amendment by prohibiting middle school students from wearing "I ♥ boobies: (KEEP A BREAST)" bracelets. 2/ The Court of Appeals concluded that school districts may categorically punish ambiguously lewd speech—as opposed to plainly lewd speech—only when such speech cannot plausibly be interpreted as political or social commentary. In short, students generally have a constitutional right to use ambiguously lewd speech to express political or social commentary. In the Third Circuit's view, because "I ♥ boobies: (KEEP A BREAST)" did not rise to the level of plainly lewd speech, and the bracelets were part of a breast cancer awareness campaign, the school district's ban violated the First Amendment. Unless the Supreme Court intervenes, the new test promises practical difficulties for school districts, at least those in Delaware, Pennsylvania, and New Jersey.

I. Legal Background

Students do not shed their free speech rights at the school house gate,3/ but they also do not have the same rights as adults on street corners. 4/ Over a series of cases, the Supreme Court has articulated a unique Constitutional framework for evaluating student speech.

The cornerstone of that framework is the Court's decision in *Tinker*. In that landmark case, a school district had punished students for wearing black armbands protesting the Vietnam war. The Supreme Court ruled the district violated the First Amendment. The Court concluded that school

---

1/ http://articles.mcall.com/2013-12-05/news/mc-easton-boobies-bracelets-supreme-court-filing-20131203_1_easton-area-school-district-student-speech-brianna-hawk.

2/ *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (2013) (3d Cir. 2013) (en banc).

3/ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

4/ *See Morse v. Frederick*, 551 U.S. 393, 406 (2007).

districts may bar student speech protected by the First Amendment only when there is an actual or reasonable forecast of a "substantial disruption" to school activities or "inva[sion] of the rights of others." 5/ When, as in *Tinker*,6/ there is no such disruption, student speech is generally protected. *Tinker* requires case-by-case analysis.

In addition, the Supreme Court has concluded that school districts also may categorically restrict certain categories of speech:

- *School sponsored speech when restrictions relate to legitimate pedagogical concerns.* School districts may limit "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," such as a school newspaper. 7/ Districts may control the "style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 8/

- *Plainly lewd or vulgar speech.* Districts may punish speech a reasonable observer would interpret as lewd, vulgar, or profane speech and conduct, even when it would be protected in other settings. 9/ For example, in nominating a peer for class office, a student used an "'elaborate, graphic, and explicit sexual metaphor.'" 10/ The Supreme Court upheld the student's suspension, concluding the "[d]istrict acted entirely within its permissible authority in imposing sanctions [for the student's] offensively lewd and indecent speech." 11/ It also suggested that, at least when the District is not engaging in viewpoint discrimination, the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." 12/ School districts may not, however, punish any speech that might be characterized as offensive. 13/

- *Speech promoting illegal drug use.* School districts may prohibit speech that they reasonably interpret as promoting illegal drug use. 14/ For example, the Supreme Court upheld a principal's suspension of a student for holding up a banner reading "Bong Hits 4 Jesus." 15/

The Third Circuit's decision purports to clarify when school districts may categorically prohibit speech that is ambiguously lewd.

5/ *Tinker*, 393 U.S. at 513–14.
6/ *Id.*; *see also id.* at 517–18 (Black, J., dissenting) (explaining that the armbands did "cause[] comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone" and that the armbands "practically 'wrecked'" one math class).
7/ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
8/ *Id.* at 273.
9/ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678, 682–84 (1986).
10/ *Id.* at 685–86.
11/ *Id.*
12/ *Id.* at 683, 685.
13/ *Morse* 551 U.S. at 409.
14/ *Id.* at 403.
15/ *Id.*

II. The Third Circuit's Ruling

As part of a breast cancer awareness campaign, three Easton Area School District middle school girls wore bracelets to school proclaiming "I ♥ boobies: (KEEP A BREAST)." After several months, and despite no actual or impending substantial disruption, administrators demanded the girls take them off or face punishment. Citing the First Amendment two of the three refused. The administrators imposed 1.5 days' in-school suspension and prohibited them from attending a dance; the girls filed a federal law suit.

On appeal, the Third Circuit held the district had violated the girls' Constitutional rights. Interpreting the Supreme Court's decisions on vulgar speech and speech promoting illegal drug use, the Court articulated a new rule for ambiguously lewd speech:

1. School districts may categorically restrict "plainly lewd" speech that "offends for the same reasons obscenity offends" regardless of whether it is political or social commentary.

2. School districts may categorically restrict speech not rising to the level of "plainly lewd" but that a "reasonable observer could interpret as lewd" only when the speech cannot "plausibly be interpreted as commenting on a social or political issue." 16/

In applying it, the court will "defer to a school's reasonable judgment that an observer could interpret ambiguous speech as lewd, vulgar, profane, or offensive only if the speech could not plausibly be interpreted as commenting on a political or social issue." 17/

According to the Third Circuit, the bracelets presented "an open-and-shut case." 18/ The Court held the bracelets were not lewd but that a reasonable observer could interpret them as lewd. In reaching this determination, the Court undertook a "highly contextual inquiry." 19/ It disregarded the speaker's subjective intent and evaluated the "plausibility of the school's interpretation in light of competing meanings; the context, content, and form of the speech; and the age and maturity of the students." 20/ The Court counted as significant that:

- The bracelets bore "no resemblance to . . . 'pervasive sexual innuendo'" plainly offensive to teachers and students (teachers had to request guidance about how to handle the bracelets, administrators waited two months to ban them, and the loudspeaker announcement used the term "boobies"); and

- "Boobie" was not "remotely akin to the seven words that are considered obscene to minors on broadcast television" and was just a "sophomoric" synonym for breast. 21/

16/ *Hawk*, 725 F.3d at 319–20.
17/ *Id.* 317.
18/ *Id.* at 320.
19/ *Id.* at 309, 320.
20/ *Id.*
21/ *Id.* at 320.

Because the ambiguously lewd bracelets were part of a national breast cancer awareness campaign, they could be interpreted as political or social commentary, and the district, therefore, could not categorically prohibit them. 22/

III. Legal and Practical Implications

The Third Circuit's new test currently is the law only in Delaware, Pennsylvania, and New Jersey, and even that could change if the Supreme Court decides to consider the case. It also remains to be seen whether other courts will adopt the Third Circuit's approach. At least one federal district court in Indiana has already upheld the ability of school districts to prohibit the "I ♥ boobies: (KEEP A BREAST)" bracelets and expressly rejected the Third Circuit's reasoning. 23/

The key practical difficulty for school districts seeking to apply the Third Circuit's decision will be line drawing. The Court's opinion recognized it would require administrators to make difficult judgments: What line demarcates plainly lewd speech from speech that a reasonably observer might interpret as lewd? When is it plausible to think speech is political or social commentary? The Third Circuit's answers to these questions do not provide much clear guidance to school administrators. The majority suggests looking to the Supreme Court's obscenity-to-minors cases and to cases demarcating when speech involves a matter of public concern. 24/ Under this framework, school districts could not bar "I ♥ boobies: (KEEP A BREAST)" but presumably could bar "I ♥ titties: (KEEP A BREAST)" (because the latter includes one of the seven dirty words held to be obscene to minors). 25/ The majority offered little guidance on how to respond beyond these two examples. As a dissenting judge pointed out, the lack of a "workable parameter unnecessarily handcuffs school districts."

The Third Circuit took comfort that "[o]ver time, the fault lines demarcating plainly lewd speech and political and social speech will settle and become more rule-like as precedent accumulates." 26/ Even if that prediction proves correct, in the meantime, teachers and administrators will face difficult day-to-day decisions.

* * *

If you have questions about this case or other First Amendment issues, feel free to contact John W. Borkowski at 574-239-7010, john.borkowski@hoganlovells.com or Joel Buckman at 202-637-6408, joel.buckman@hoganlovells.com.

22/ *Id.*
23/ *See JA v. Fort Wayne Cmty Sch.*, No. 12-155 (N.D. Ind. Aug. 20, 2013).
24/ *Hawk*, 725 F.3d at 318–19.
25/ *Id.* at 318; *see also id.* at 339 (Greenaway, Jr., dissenting) (pointing out practical flaws in the majority's approach).
26/ *Id.* at 319.