

Students & Their First Amendment Rights: The "I ♥ Boobies" Case



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What's the Issue?

- ▶ Does a school district rule prohibiting the breast cancer awareness bracelets with the "I [heart] Boobies" message violate students' First Amendment rights to freedom of speech?
- ▶ And **yes**...that is a serious question.
- ▶ **B.H. et al v. Easton Area School District**, was recently argued before the 3rd Circuit Court of Appeals

Case Background

- ▶ B.H. and K.M., two minor, female middle school students wore bracelets to school which said "I ♥ Boobies! (Keep a Breast)."
- ▶ Not surprisingly, the bracelets quickly became popular throughout the school.
- ▶ B.H. and K.M. claim that they both independently researched breast cancer and used the bracelets as a way of raising awareness about breast cancer.

Case Background

- ▶ In September, the school announced that its dress code had been modified to ensure students would not wear bracelets containing the word “boobies.”
- ▶ Before Breast Cancer Awareness Day, the Principal read the new rule over the loudspeaker, telling students that they could show their support for breast cancer research by wearing pink shirts instead of the bracelets.
 - *My heart goes out to this principal...*
- ▶ B.H. and K.M. continued to wear their bracelets and were given 1.5 days of in school suspension for their violation of the dress code.

Procedural History

- ▶ The students brought suit with the ACLU seeking an injunction on the bracelet ban.
- ▶ The U.S. District Court for the Eastern District of Pennsylvania granted an injunction suspending the enforcement of the ban.
- ▶ The Easton Area School District appealed the injunction to the 3rd Circuit Court of Appeals
- ▶ The 3rd Circuit heard oral argument *en banc* (i.e., with all justices present rather than a select panel) in February 2013.

Relevant Case Law

Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969)

- ▶ Landmark Supreme Court case protecting students’ rights to wear black arm bands in protest of the Vietnam War.
- ▶ Restriction of speech “must be something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular point of view.”
- ▶ **Creation of the Tinker Test:** The School District must demonstrate facts which might reasonably lead school authorities to forecast *substantial disruption of, or material interference with school activities, or that actual disturbances or disorders already occurred on school premises.*

Relevant Case Law

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)

- ▶ Student's suspension for delivering a speech full of sexual innuendo was not a violation of the student's First Amendment rights.
- ▶ Vulgar or obscene speech is not protected by the First Amendment and can be regulated or prohibited.

Relevant Case Law

Morse v. Frederick, 551 U.S. 393 (2007)

- ▶ You know this one...**Bong Hits 4 Jesus!!**
- ▶ The Supreme Court held 5-4 that the First Amendment does not prevent educators or schools from suppressing student speech that is reasonably viewed as promoting illegal drug use.
- ▶ This case is additional support for the authority of public schools to regulate student speech based on concerns of disruption or the appropriateness of the content for the educational environment.

Special Issues in this Case

- ▶ Were the girls' "I ♥ Boobies!" bracelets lewd speech as outlined in *Fraser*? Does the students' intent matter?
- ▶ These were middle school students. Would it make a difference if they were elementary students?
- ▶ Does it matter that the speech took the form of bracelets? What if the girls wore the message on tight t-shirts?
- ▶ What if the bracelets had used other words to support the cause besides "boobies"?

Oral Argument - *For the School*

- ▶ **Fraser controls:** The school should be allowed discretion in determining whether the students' bracelets were lewd, vulgar, and offensive
 - ▶ *The girls here were wearing the bracelets as a double entendre, attempting to make a sexually motivated joke.*
- ▶ The intent of the students to speak or express an opinion doesn't matter; the importance is the impact the conduct had on the other students.
- ▶ The school did not disagree with the students' viewpoints on breast cancer awareness, just the manner they chose to express it (i.e., we're not discriminating based on the viewpoint, just the way they are communicating that viewpoint).

Oral Argument - *For the Student*

- ▶ The School's policy against the bracelets was a *post-hoc* policy (i.e., students had been wearing these bracelets for months with no concern).
 - ▶ There was no basis for belief that school would be disrupted.
- ▶ Students did not intend lewd meaning to bracelets, but only wore them to raise awareness.
- ▶ Even if the court finds lewd meaning in the bracelets, it has to look to the context, form, and content of the statement before deciding if the school's actions were legitimate:
 - ▶ The fact that they used bracelets instead of t-shirts or posters is important in making the determination.

So, what's the fate of I ♥ Boobies?

- ▶ The Third Circuit has not announced its decision on the matter.
- ▶ When it does announce its decision, it will be possible for either party to appeal to the Supreme Court and continue the fight.
- ▶ The Supreme Court would have to agree to listen to the case, if it did not, whatever the Third Circuit decides would be binding, but only for states in the Third Circuit.

What this means for Texas school administrators...

- ▶ Right now, nothing. The 3rd Circuit's decision will not be binding on Texas schools.
- ▶ The 5th Circuit has not spoken on these bracelets, but it has considered similar cases and has historically sided with the school's authority to enforce clearly written rules with the purpose of avoiding disruption as long as the rule is not unnecessarily burdensome and is fairly applied.
- ▶ **Practice Tip:** Check your Student Code of Conduct for language addressing clothing or jewelry with writing or messages. Consider amendments during the summer months.

What this means for Texas school administrators...

- ▶ **Practice Tip:** It's best to begin enforcement at the beginning of the school year, rather than after permitting students to wear the item for several months.
- ▶ **Practice Tip:** Disruptions or complaints about the speech should be documented. If there is a particular item or trend that you are looking to prohibit, begin collecting data from the campuses about the effect on the educational environment, disciplinary incidents, parent complaints, classroom issues, etc.

What this means for Texas school administrators...

- ▶ **Practice Tip:** Don't use the phrases "substantial disruption" or "material interference" loosely.
 - If you are considering restrictions on protected student speech, you need more than an inkling, or a gut feeling, or a suspicion, that the speech will cause disruption to the school's operation and to student education.
- ▶ **Final Note:** Here's hoping that other cancer awareness campaigns steer clear of the I ♥ _____ [fill in the blank] fundraiser model!

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