

Pennsylvania Association of
Elementary and Secondary School
Principals

SCHOOL LAW
UPDATE

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Overview

- Student Rights & Discipline
 - > "I ♥ Boobies" Decision - Freedom of Speech Revisited
 - > Freedom of Speech vs. Harassment
 - > Practical effects and Implications
- Student Drug Testing
- Act 93 Developments
 - > Update: Pension Programs

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Student Rights & Discipline

- Student Free Speech Rights
 - This area of law continues to expand, and change shape as social media and electronic communications create greater opportunity for potentially protected student speech to occur anywhere and be everywhere.
 - "I ♥ Boobies" Decision issued by Third Circuit Court of Appeals on August 5, 2013 narrows the *Fraser* standard for evaluating when student speech is protected and when it may subject students to discipline.

Andrew S. Borzage, Esq.

The "I ♥ Boobies" Decision

- **B.H. v. Easton Area Sch. Dist.**, No. 11-2067 (3d Cir. **Aug. 5, 2013**)
- **FACTS:**
 - Easton Area Middle School students B.H. and K.M. regularly wore bracelets in school that contained the inscription "I ♥ boobies (KEEP A BREAST)," to promote breast cancer awareness. The bracelets were purchased from the Keep a Breast Foundation.
 - Teachers complained about the bracelets, with concerns that they were trivializing breast cancer and/or that they would invite inappropriate comments and touching among students.
 - Anticipating that students would wear the bracelets during October - Breast Cancer Awareness Month the Middle School Principals banned the bracelets on grounds that the term "boobies" is vulgar and inappropriate for use in a school setting, and made students aware of the ban, using the term "boobies", during public announcements, the day before the school was scheduled to observe Breast Cancer Awareness day.

Andrew S. Borzage, Esq.

The "I ♥ Boobies" Decision

- **FACTS:**
- Despite the ban, Students B.H. and K.M. wore the bracelets, and were asked to remove them by school security during a lunch period; when they refused to remove them, they were escorted to the principal's office and continued to refuse to remove them, citing their right to free speech.
- There was no indication of disruption among the students other than a couple of male students making comments/gestures of a sexual nature using the term "boobies" during the lunch period in which the students were asked to remove the bracelets.

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The "I ♥ Boobies" Decision

- **FACTS:**
- Subsequently, the students were placed on in-school suspension for one and a half days and banned from attending a school dance.
- The students filed suit in federal district court against the District (EASD) alleging that the ban on wearing the bracelets in school violates their First Amendment free speech rights, and further seeking a preliminary injunction preventing the District from enforcing the ban until the case was decided.

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The "I ♥ Boobies" Decision

- The U.S. District Court issued the preliminary injunction, concluding that the school could not ban the bracelets because there was no foreseeable substantial disruption and because the bracelet did not meet the lewd or vulgar speech requirement.
- The District appealed this decision to the Third Circuit, which decided to address the matter *en banc* (all 14 active judges presiding)

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The "I ♥ Boobies" Decision

- August 5, 2013: The Third Circuit upheld the District Court order granting the preliminary injunction, and in doing so issued essentially three new standards for evaluating student speech.

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Standards for Regulation of Student Speech

- Predating the 3d Circuit Decision:
- 1) *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (black armbands), substantial disruption standard
 - The government may restrict school speech "that threatens a specific and substantial disruption to the school environment" or "inva[des] ... the rights of others."
- 2) *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), vulgar, lewd, profane, or plainly offensive speech standard.
 - Even without a substantial disruption, lewd, vulgar, indecent, and plainly offensive student speech is categorically unprotected in school, even if it falls short of obscenity and would have been protected outside school

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Standards for Regulation of Student Speech

- Predating the Third Circuit decision (continued):
- 3) *Morse v. Frederick*, 551 U.S. 393 (2007) ("Bonghits for Jesus")
- Student speech that a reasonable observer could interpret as advocating illegal drug use but that cannot plausibly be interpreted as addressing political or social issues is unprotected.
 - This is the Third Circuit's interpretation of the holding in *Morse*, which reflects Justice Alito's concurring opinion which was the crucial 5th vote to upholding the discipline in that case and which was narrower than the rest of the Justices in the majority. Other appellate courts have taken the broader view of *Morse* and have not applied this qualification related to political or social messages

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The 3d Circuit's Holding

- Under the *Tinker* standard, there was no substantial disruption or interference with student's rights
- No substantial disruption where the bracelets had been on campus for 2 weeks without incident; no inappropriate comments about "boobies" until after the ban was imposed and sparked further discussion among students.
- No interference with rights to be free of harassment, where there is no explanation as to how the bracelets would breed an environment of harassment.
 - Note: Counsel for the District argued that the District administrators and principals are better equipped to make this determination than the federal appellate courts.

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The 3d Circuit's Holding

- The *Fraser* standard allowing school administrators to discipline students for lewd speech, as modified by *Morse*, is now narrower, and limited to speech that is "plainly" or "ambiguously" lewd and cannot plausibly be interpreted as commenting on political or social issues.
- Conversely, speech that is ambiguously lewd, but can plausibly be interpreted as commenting on political or social issues, cannot be restricted.

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The 3d Circuit's Holding

- *B.H. v. Easton Area School District*:
 - The term "boobies" is not plainly lewd but rather ambiguously lewd, as was the speech permitted to be regulated in *Fraser*
 - At the same time, the phrase "I ♥ boobies" could plausibly be interpreted by a reasonable observer as commenting on a social issue, i.e., the national campaign to increase breast cancer awareness.
 - Consequently, the District's grant of a preliminary injunction was upheld, and the ban of the bracelets was held violate students' free speech rights

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The 3d Circuit's Holding

- But what about the context among Middle School Students?
 - School officials' interpretation of the bracelets was that they presented a double entendre—i.e., expressing sexual attraction to breasts.
 - The *Easton* Dissent agreed, and found that in the middle school context, the phrase can mean both "I support breast-cancer-awareness measures" and "I am attracted to female breasts." It concluded that the school's ban was reasonable and constitutional under *Fraser*.

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An Alternate Federal Court Decision

- *J.A. v. Fort Wayne Cmty. Sch.*, No. 12-155 (N.D. Ind. Aug. 20, 2013)
- In a nearly identical case, an Indiana school district banned the "I ♥ Boobies" bracelets and later confiscated a bracelet from a teenage girl whose mother, a breast cancer survivor, had given it to her to wear. The student sued the District alleging the ban was encroaching on her freedom of speech.
- The District Court rejected the Third Circuit's holding in *Easton* and its interpretation of *Morse*, concluding, as have 8 other appellate courts, that potential commentary on social or political issues does not provide it with additional First Amendment protection.

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An Alternate Federal Court Decision

- J.A. v. Fort Wayne Cmty. Sch., No. 12-155 (N.D. Ind. Aug. 20, 2013)
- Consequently, the Court held that the District could reasonably conclude that the bracelet contained sexual innuendo that was vulgar in the context of a middle school, where there is a lower maturity level.
- The court further held that "School officials, who know the age, maturity, and other characteristics of their students better than federal judges, are in a better position to decide whether to allow these products into their schools. Issuing an injunction (against the ban on the bracelets) would take away the deference courts owe to schools and make their job that much harder."

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Resulting Standards for Regulation of Student Speech, in the Third Circuit

- Under *Tinker*:
 - Student speech may be restricted, and can subject the student to discipline, if it creates or if it is reasonably foreseeable that it will create a substantial disruption in the school environment and/or invade the rights of others

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Resulting Standards for Regulation of Student Speech, in the Third Circuit

- > Student speech may be restricted, and can subject the student to discipline, only if
 - > 1) under *Tinker*, it is reasonably foreseeable that it will create a substantial disruption in the school environment and/or invade the rights of others, or
 - > 2) under *Fraser*, the speech is plainly lewd, offensive, or otherwise illegal.

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Resulting Standards for Regulation of Student Speech, in the Third Circuit

- What about ambiguously lewd speech?
- Under *Fraser* and *Morse*, as interpreted by the 3d Circuit in *Easton*:
 - > 1. Schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter.
 - > 2. Schools may not restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue.
 - > However: Schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted as social or political commentary.

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U.S. Supreme Court and Student Speech

- Decline of review in off-campus, online student speech cases
- *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*
 - Third Circuit cases in which the Court held that the Districts violated students' free speech rights when they disciplined the students for creating inappropriate profiles of their Principals on MySpace, because the profiles were created off campus and resulted in minimal disruption within the school

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U.S. Supreme Court and Student Speech

- *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*
 - The Third Circuit court concluded it was not reasonably foreseeable that J.S.'s speech would create a material and substantial disruption in school. Therefore, the district lacked the authority to discipline J.S. under the First Amendment under *Tinker*.
 - With respect to the district's argument that J.S.'s speech could be prohibited because the speech was lewd, vulgar and offensive, the court concluded the *Fraser* standard does not apply to speech outside of school.

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Student Speech: Harassment vs. Free Expression

- Where to Draw the Line?
 - Where a communication arises within social media, there must be a sufficient nexus to the school, and potential for disruption in order for the School District to take disciplinary action.
 - Current caselaw suggests there will be continuing obstacles to punishing off-campus speech due to the question of a sufficient nexus and potential disruption.

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Student Speech, Harassment, and Free Expression

- Where to Draw the Line?
 - However, true threats of physical harm or targeted, continuing harassment may outweigh an insufficient nexus in order to merit and even require disciplinary action by the school in conjunction with those educators who are made aware of it, and have a corresponding obligation arising under Title IX to prevent and correct sexual harassment once they become aware of it.

Student Speech, Harassment, and Free Expression

- Where to Draw the Line?
- *Kowalski v. v. Berkeley County Schools*
- School administrators suspended student from school for five days for creating and posting to a MySpace.com webpage called "S.A.S.H.," which the Student claimed stood for "Students Against Sluts Herpes" and which was largely dedicated to ridiculing a fellow student, Shay N.
- The student created the page at home but it was joined by a large number of fellow classmates, some of whom posted on the page from school computers, during after-school hours.

Student Speech, Harassment, and Free Expression

- *Kowalski v. v. Berkeley County Schools*
 - Given the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created "actual or nascent" substantial disorder and disruption in the school.
 - First, the creation of the "S.A.S.H." group forced Shay N. to miss school in order to avoid further abuse.
 - Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. existed.

Student Speech, Harassment, and Free Expression

- *Kowalski v. Berkeley County Schools*
 - 4th Circuit Court, in 2011 held:
 - Although the conduct occurred off-campus on student's home computer, it was foreseeable that the expression would reach the school, and student's conduct involved substantial disruption of and interference with the work and the discipline of the school.
 - *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011) cert. denied, 132 S. Ct. 1095, 181 L. Ed. 2d 1009 (U.S. 2012)

Harassment and Bullying

- *Morrow v. Balaski*, 2013 WL 2466892 (3d Cir. 2013)
- Students complained of bullying in the form of threats, assaults, and racial intimidation; the student doing the bullying was suspended and adjudicated delinquent with a no-contact order
- Upon return to school, student continued to bully the other students and school officials advised the parents of the bullied students to send their children to another school
- The students sued the school district asserting that the Assistant Principal and other officials violated their substantive due process rights by not doing more to protect them against the bullying
- Third Circuit affirmed the District Court's dismissal of the students' complaint

Harassment and Bullying

- *Morrow v. Balaski*, 2013 WL 2466892 (3d Cir. 2013)
- But what about the next time something happens?
 - As the District's knowledge/awareness of incidents and a prolonged course of conduct continues, the risk of being deemed deliberately indifferent to a known environment of harassment increases.
 - Do not shy away from disciplining bullies.

Student Speech and Expressions of Violence

- *Cuff v. Valley Cent. Sch. District*, 677 F.3d 109 (2d Cir. 2012)
- School District did not violate a student's freedom of speech when he was suspended for drawing a picture in class expressing the desire to commit violence against the school and teachers
- Court agreed that the School District officials are in best place to reasonably forecast whether the picture was likely to cause a substantial disruption, particularly where the speech at issue promotes violent conduct.

Mandatory Drug Testing in Extracurricular Activities

- *McDougall v. Solanco School District*, No. CI-12-3731 (Lancaster Ct. Cm. Pl. 20120)
- 11 year old student suing school district after being ruled ineligible to participate in middle school orchestra; student's parents refused to consent to drug testing
- School later altered policy to exclude band members; Plaintiff discontinued the action

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Mandatory Drug Testing in Extracurricular Activities

- *McDougall v. Solanco School District*, No. CI-12-3731 (Lancaster Ct. Cm. Pl. 20120)
- Scrutiny continues: Under *Theodore v. Delaware Valley School District*, the District must have state a special need or justification for the policy in order to survive the greater protections from bodily searches afforded by the PA Constitution

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Mandatory Drug Testing in Extracurricular Activities

- Special need or justification for drug testing students in extracurriculars, or who hold parking permits, etc.:
 - Proof that an actual drug problem exists within the school and particularly among the group of students targeted:
 - Anonymous student surveys, certified reports of experiences with students using drugs, principals' personal knowledge, employees concerns, school counselors reporting on referrals related to drug use, drug use, deaths, or injuries in the surrounding community

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Harassment and Bullying

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Split Custody and Transportation Rights

- *Wyland v. West Shore School District*, 2012 WL 4054130
- Commonwealth Court holding that a resident parent is entitled to transportation services from his home to children's private school (within the District) even though ex-wife's residence in another school district was considered the primary residence.

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Split Custody and Transportation Rights

- *Wyland v. West Shore School District*, 2012 WL 4054130
- Mom and Dad had joint 50/50 legal & physical custody, and children attended private school within Dad's district.
- Children stayed with Mom 3 nights a week and Dad 2 nights a week, such that under PDE's Single Residency Rule for enrollment and transportation, Mom's District was the Primary District of Residence
- On this basis, Dad's District argued it does not have to transport the kids to private school because it is not the District of Residence under PDE's Rule

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Split Custody and Transportation Rights

- Commonwealth Court disagreed.
- "A student need only live in the school district to trigger a district's duty to transport the student."
- Here the Court determined that the children actually had two factual districts because their parents had true 50/50 custody.

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Split Custody and Transportation Rights

- In so holding the Commonwealth Court effectively differentiated between the residency for purposes of enrollment and residency for purposes of transportation
 - PDE Single Residence Rule apparently will apply for purposes of enrollment, under Section 1302 of the PA Public School Code
 - But this Rule is too narrow, and does not necessarily apply relative to transportation under Section 1361, which does not restrict transportation eligibility to students with a primary residence in the District.

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Act 82 Update

- New Educator Effective Rating Tools, PDE 82-1 published in PA Bulletin, 22 Pa. Code, Chapter 19, for classroom teachers
- Rating Tool for professional employees serving as Principals and Assistant Principals to begin in the 2014-2015 school year
 - Tool will consider planning and preparation, school environment, delivery of service, professional development, and student performance
 - Student performance, as measured for classroom teachers, will comprise 50% of principals' overall ratings
 - 15% building level data; 15% correlation data based on teacher-level measures, and 20% elective data, including locally developed measures of student achievement selected by the school district from a list to be published in the PA bulletin by June 30 of each year.

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High School Graduation Requirements

- PDE adopted new regulation in March 2013 requiring, most notably, completion of the Keystone Exams
- Students graduating in 2017 required to show proficiency in Algebra I, biology, and literature
- 2019 – must also show proficiency in composition
- 2020 – proficiency in civics and government exams
- Further development of voluntary exams in geometry, chemistry, algebra II, and U.S. and world history

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Matthew S. Reed, Law Offices

Pension Reform

- All Pension Programs across the state are experiencing difficulty with funding; increasing of pension obligations of already-financially hurting Districts
- Pension Reform continues to be seriously considered:
 - Representative Grell (R-Cumberland)'s "Three Buckets Plan" promoted by PSBA"

Pension Reform

- "Three Buckets Plan"
 - › Cash Balance Plan for future employees starting after June 30 2015 (PSERS), relies on a guaranteed 4% interest rate with a fixed employee contribution rate of 7% and employer contributions of 4% that increases to 5% after 15 years of services.
 - › General borrowing of up to 9 billion through a bond to make up for past underfunding
 - › Voluntary modifications for current members – can opt in to minor changes in exchange of a lower contribution rate

Pension Reform

- Promoted by PSBA as bringing an infusion of new state dollars into the mix, unlike other proposals, "with same dual purposes of reducing projected employer contribution rate increases and projected costs to school districts and taxpayers, while maintaining an appropriate benefit for school employees"

Act 93 Update

- Trends and Recent Developments in Act 93 Plans
 - Medical for Retirees continuing to be dropped for Act 93 employees across the state as concerns and costs of healthcare rise
 - Contributions towards health insurance continuing to become more common now
 - Wages also more often being tied to Performance Ratings
- Notwithstanding the changes, the benefits of accomplishing an Act 93 plan together, vs. an individual contract, remain tangible
 - Individual contracts often being focused on as relatively easy starting point for implementation of changes such as premium share, etc.

Questions?

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