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## Slang and Social Commentary in the School Setting

by John P. Edison

As students latch on to new trends and fads, educators regularly face new challenges with respect to issues related to student speech. Freedom of speech issues in the school context pose unique challenges educators must address in real time. To complicate matters, judicial guidance leaves open considerable ambiguity with respect to how novel situations should be handled.

A recent decision from the U.S. Court of Appeals for the Third Circuit illustrates this point. In the case of *B.H. ex rel Hawk v. Easton School District*, the Third Circuit recently decided that a Pennsylvania school district's ban on bracelets containing the phrase "I ♥ boobies! (KEEP A BREAST)" violated students' freedom of speech. While the bracelets are part of a nationally recognized breast cancer awareness campaign, the school district officials determined the use of a slang term for "breast" violated its dress code policy, which prohibited "clothing imprinted with nudity, vulgarity, obscenity, profanity, and double entendre pictures or slogans." The school district had banned clothing bearing the phrase "Save the ta-tas" (another breast cancer awareness slogan) in the past.

The school district disciplined two female middle school students who refused to stop wearing the banned bracelets, which led to litigation focusing on the constitutionality of the ban. Judges supporting the majority opinion determined the ban was an unconstitutional infringement on the students' freedom of speech.

The Court adopted a new three-part framework to analyze regulation of lewd speech in the school setting, which consists of the following:

1. Plainly lewd speech, which offends for the same reasons as obscenity offends, may be categorically restricted regardless of whether it comments on political or social issues;
2. Speech that does not rise to the level of plainly lewd but that a reasonable observer could interpret as lewd may be categorically restricted as long as it cannot plausibly be interpreted as commenting on political or social issues; and
3. Speech that does not rise to the level of plainly lewd and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted.

The Court went on to determine that the "I ♥ boobies! (KEEP A BREAST)" bracelets could not be banned under this

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three-part test. The Court also concluded the bracelets did not disrupt the school environment or invade the rights of others. The Court characterized the matter as an “open-and-shut case” because it determined the bracelets were not plainly lewd and addressed the social issue of breast cancer awareness. It went on to state that it would only defer to the reasonable judgment of school officials in interpreting whether ambiguous speech is lewd, vulgar, profane, or offensive only if the speech could not plausibly be interpreted as commenting on a political or social issue.

Although not binding in Minnesota’s courts, this case will likely raise interesting questions of line-drawing in the future. For example, the Third Circuit majority noted that at least one other slang term for the word “breast” would be considered “patently offensive” and could be restricted if used on the bracelet in place of the word “boobies.” In addition, the dissenting judges questioned whether slang terms for other parts of the reproductive system that are susceptible to cancer would have to be condoned. These questions will most likely need to be clarified in future litigation.

In the meantime, if you would like assistance in dealing with a student speech issue, contact us at (612) 436-4300.

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