

“I ♥ Boobies! (Keep A Breast)” Bracelets: What’s your policy? The United States Supreme Court has been asked to decide.

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Abstract

The United States Supreme Court has been asked to review a 2013 Third Circuit Court of Appeals ruling against a Pennsylvania school district that disciplined students for wearing “I love Boobies! (Keep A Breast)” bracelets. This article reviews litigation related to the effort by schools to regulate bracelets and associated student freedom of expression concerns. School administrators concerned with regulating the bracelets are offered policy suggestions.

Introduction

While conducting a presentation on current school law issues at the United School Administrators of Kansas 2014 Annual Convention, I raised the issue of increased sightings of students wearing “I ♥ Boobies! (Keep A Breast)” bracelets. This was met with some grins and slight chuckles, and it became very apparent that the educators present were familiar with the not only the bracelets, but their potential as a discipline issue in their schools.

Some volunteered that the bracelets were not a problem, while others stated that students were wearing multiple bracelets covering their entire arm, creating a distraction in class. Others said that they had been asked directly by teachers who were offended by the bracelets that action should be taken against students who possessed them. In one school students were allowed to wear them but during the day must turn the message to the inside. At another school students were requested not to wear them, and students complied.

Unfortunately such compliance is not as easily gained in all schools, and the issue of “I ♥ Boobies! (Keep A Breast)” bracelets raises important school discipline and student free speech issues. For some, the bracelets are viewed as a distraction and disruptive to the school environment. Additionally, they are also viewed as lewd and out of place at school. But to others, they are seen as social commentary, not only serving

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to raise awareness of a leading cause of cancer deaths, but purchased to raise money for a cause and in some cases honor victims of breast cancer.

The original bracelets were designed in 2004 to raise awareness of breast cancer and to raise funds for education and research (Keep A Breast, 2014). In 2011, the sales of the official “I ♥ Boobies! (Keep A Breast)” bracelets reached nearly \$3 million (Keep A Breast, 2014). The Keep A Breast Foundation considers the “I ♥ Boobies! (Keep A Breast)” slogan their signature breast cancer outreach and awareness program. Their website states “We want to remove the shame associated with breasts and breast health, and this message represents our positive approach to breast cancer dialogue. The program resonates with young people, and encourages them to be open and active about breast cancer prevention (Keep A Breast, 2013).”

Schools districts across the nation have faced controversy with the bracelets as they determine what action to take against students who choose to wear them. Cases have arisen in California, Colorado, Florida, Idaho, Indiana, Michigan, Oregon, Pennsylvania, South Dakota, Wisconsin, and Wyoming (Garnick, 2013; Mandell, 2011; Martin, 2010). The controversies appear to have a nationwide reach and because they touch upon school discipline and student freedom of speech, it should not be surprising that courts have not reached a consensus in litigation when school action is taken against students.

The central arguments raised by school districts center around their ability to regulate student conduct and speech that could threaten to cause a substantial disruption, invade the rights of others, (taken from *Tinker v. Des Moines Independent School District*, 1969), or speech that is considered lewd or vulgar (*Bethel School District No. 403 v. Fraser*, 1986). For schools that choose to ban bracelets, the position being staked is one that holds the bracelets are either disruptive to the educational environment; that they are offensive to some people; or that they can be regulated because administrators can limit lewd speech in school that may be permissible outside of school. School districts have also argued that allowing the “I ♥ Boobies! (Keep A Breast)” bracelets would open the door to other slogans that may contain graphic sexual innuendo (*B.H. v. Easton Area Sch. District*, 2013).

Students who have been disciplined for wearing or possessing the bracelets claim that their bracelets are social commentary that is protected speech in the same manner as the black armbands worn to protest the War in Viet Nam in *Tinker*. They have further argued that their bracelets were neither disruptive nor vulgar. The students believe that school dress codes that specifically ban the bracelets are not enforceable.

Courts have been split and have been persuaded by both arguments. In an Indiana case, (*J.A. v Fort Wayne* 2013), a federal district court sided with the school by denying a permanent injunction that would have allowed a student to wear a bracelet given to her by her mother. The court found that school officials were reasonable to

conclude that the bracelets could be considered lewd, vulgar, obscene, or plainly offensive, and that any commentary on a social or political issue was not protected speech (*J.A. v. Fort Wayne*, 2013). The court felt that school officials should be given deference in determining what is considered lewd or vulgar. In another recent case, a Wisconsin federal district court refused to issue an injunction that would have prevented the enforcement of a ban on bracelets (*K.J. v Sauk Prairie School District*, 2012). The judge noted that other courts had held that sexual innuendo could be banned in schools, such as “Drugs Suck” (*Broussard v. School Board of Norfolk*, 1992) and “See Dick Drink. See Dick Drive. See Dick Die. Don’t be a Dick.” (*Pyle v. South Haldey School Community*, 1993).

The issue is far from settled, however. In *B.H. v. Easton Area Sch. District*, the Third Circuit Court of Appeals upheld a lower court ruling in favor two Pennsylvania middle school students who were disciplined for wearing the bracelets on their schools’ Breast Cancer Awareness Day. The court did not find the wearing of the bracelets to have caused a disruption or any threat of a foreseeable disruption. Also lacking was any evidence that there was a violation of the rights of others.

An important aspect of *B.H. v. Easton* rests with the conclusion of the court relative to both *Fraser* and the 2007 *Morse v. Frederick* “Bong Hits 4 Jesus” decision. In the *Morse* case, the United States Supreme Court upheld the discipline against students who held up a sign that stated “Bong Hits 4 Jesus” at an outside parade during school time. While the student speech at issue was not considered disruptive or lewd, the court narrowly ruled that schools could restrict student speech that could be reasonably interpreted as advocating illegal drug usage.

The Third Circuit held that *Morse* had modified the standard set in *Fraser*, and that prohibiting all lewd and vulgar speech might be overbroad. The court distinguished *B.H. v. Easton* from *Fraser* and *Morse*, concluding that the “I ♥ Boobies! (Keep A Breast)” bracelets commented on a social issue, while *Fraser* and *Morse* did not.

The court determined the following test should be used regarding student expression:

1. Use the *Tinker* standard and determine if the speech creates or reasonably could create a substantial disruption; if not proceed to step 2.
2. Use the *Fraser* standard and determine if the speech was “plainly lewd”, meaning is there no other possible way the speech could be interpreted; if not proceed to step 3.
3. Could the speech “plausibly” be interpreted as commentary on a social or political issue? If not, the speech could be banned if it could be reasonably be regarded as lewd or vulgar, even if the interpretation is ambiguous.

The school district also argued that the allowance of the bracelets opened

the door to similar and arguably more graphic language, such as “I ♥ Balls!” raising testicular cancer awareness. This argument was rejected by the court, stating that protected speech cannot be suppressed simply because speech deemed worse might follow. Speech of a “genuine social value” cannot be suppressed just because “... letting in one idea might invite even more difficult judgment calls...” (*B.H. v. Easton.*, p. 83).

In the aftermath of the Third Circuit decision in *B.H. v. Easton*, in December 2013 the school district filed a writ of certiorari to the United States Supreme Court seeking a review of the case (Scotusblog.com, 2014). Groups such as the National School Boards Association and the National Association of Secondary School Principals have supported the school district in their appeal.

A decision from the United States Supreme Court whether to accept or deny the writ of certiorari will be announced in the spring or early summer of 2014.

Commentary

Should the United States Supreme Court agree in 2014 to review *B.H. v. Easton*, there will then be more guidance for all schools respective to school policy regarding “I ♥ Boobies! (Keep A Breast)” bracelets and possibly similar related speech questions.

Such a ruling would have precedence nationwide. In the meantime, or should the United State Supreme Court deny certiorari, school districts should follow the trends in their own federal circuits as well as remain mindful of the requirements under *Tinker* and *Fraser*.

While most school administrators and teachers would rejoice at the prospect of full compliance with school policy, realistically each school day there is a chance that actions taken by administrators and teachers will subject them to controversy and possible litigation. When creating school policy that touches on student speech issues, being mindful of school and community values is an important consideration. To what degree does the school wish to allow students to participate in social commentary before the potential for school disruption is reached? Care must be taken to define what constitutes a disruption of the school. While it may seem simplistic, if the school is claiming action was taken against a student due to a behavior that caused a disruption of the school, the school must be prepared to prove the nature of the actual disruption.

Where is the line drawn where the rights of others may be violated? This can be very difficult to define, because while schools are obligated to protect all students, speech cannot be suppressed merely because there may be a party that finds the speech objectionable. It would also likely be difficult to prove that somehow the bracelets violated the rights of others.

If the decision to ban bracelets were based on the determination that they are lewd, putting the ban in student policy handbooks would be advised. Courts will consider the age and maturity level of students in this regard. Educators must be mindful, however, that inclusion in a student handbook does not in itself guarantee a shield against a student's speech rights violation. In *B.H. v. Easton*, the bracelets were specifically prohibited.

Finally, even while well intended, school administrators and teachers should exercise caution whenever making policy that concerns social commentary, particularly a sensitive public health concern that affects millions of people, as the "I ♥ Boobies! (Keep A Breast)" bracelets do. Some of the students involved in the school litigation wore the bracelets to honor loved ones who were victims of breast cancer. Rather than risk becoming involved in a public controversy or litigation, viewing the bracelets as a teaching moment would better serve the entire school or community.

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