School Law Year-in-Review 2012
presented by
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Editor's note: Special thanks to the ***National School Boards Association*** **(NSBA)** for their thorough case summaries contained in these materials, and their generous policy of allowing these resources to be used for instructional purposes. Excellent school law materials are available for free from NSBA at www.nsba.org.

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STUDENT FREE SPEECH CASES

Federal appellate court rules that West Virginia school district that disciplined student for off-campus online speech did not violate student's free speech rights

Kowalski v. Berkeley County Schools (4th Circuit July 27, 2011)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit (MD, NC, SC, VA, WV) has held that a school district, which disciplined a student for off-campus Internet activity, did not violate the student's First Amendment free speech rights. The panel also rejected the student's claims that her procedural due process rights were violated.

The panel concluded that the school district had authority under the substantial disruption standard established in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), to discipline the student for speech that originated off-campus because, given the reach of the Internet, it was reasonably foreseeable that the speech would reach the school.

Facts/Issues: Kara Kowalski created a *MySpace* page, which the federal district court characterized as a chat group, using her home computer. Kowalski named the chat group page S.A.S.H. (Students Against Sluts Herpes) and invited approximately 100 individuals, some of whom attended Mussellman High School (MHS), to join. Group members were free to post comments and other items. It became apparent quickly that the purpose of the group was to target a specific individual, S.N., who also attended MHS. Several members of S.A.S.H. posted false and derogatory comments about S.N. that were vulgar and offensive. One member posted an altered photo of S.N., making it appear as though she had herpes. Although Kowalski did not post any comments or photos aimed directly at S.N., she commented approvingly of many of the derogatory postings.

When S.N. and her parents learned of the chat group, they reported it to MHS officials, asking that the officials close down the site and punish those students involved in creating and posting comments on it. MHS officials conducted an investigation during which they interviewed Kowalski and the other students involved, and provided them with an opportunity to present their side of the story. Upon completion of the investigation, Kowalski was given a 10-day school suspension and a 90-day social suspension, during which she was barred from participating in cheerleading and "Charm Review." Kowalski was found in violation of Berkeley County Schools' (BCS)"Bullying, Harassment and/or Intimidation" policy (BHIP). Although the policy provided an appeals process, Kowalski's parents instead successfully petitioned the school board to reduce her punishment by half (to a 5-day school suspension and 45-day social suspension).

Kowalski subsequently filed suit, alleging a number of federal constitutional claims. In October 2008, the district court granted in part and denied in part the defendants' motion to dismiss. It granted the motion with respect to Kowalski's First Amendment free speech claim on the ground that she lacked standing to bring the claim. Despite this ruling, the district court revisited the merits of Kowalski's free speech claim when it denied her subsequent motion for

reconsideration and again when it considered BCS' motion for summary judgment on Kowalski's remaining claims.

The court granted in part and denied in part the defendants' motion to dismiss the due process claim. It found that the claim contained three allegations: (1) Kowalski's due process rights were violated because the BHIP failed to provide her with sufficient notice that her off-campus, nonschool related activity was prohibited under the policy; (2) BCS failed to follow its own appeals process or the appeals process was insufficient; and (3) Kowalski was barred from participating in cheerleading and "Charm Review" without notice or hearing.

The court granted the motion to dismiss Kowalski's claim regarding extracurricular activities on the ground it is well-settled law that students do not enjoy a protected liberty or property interest in participating in extracurricular activities. The court denied the motion in regard to the second allegation that BCS failed to follow its own appeals process or the appeals process was insufficient, concluding that the allegation was facially viable for purposes of a motion to dismiss and would be more properly subjected to a motion for summary judgment following additional discovery. The court denied the motion as to the allegation that BCS failed to provide sufficient notice that the ABHP applied to off-campus student activity unrelated to school. It found the allegation raised a valid question of whether application to off-campus nonschool related activity is a custom or policy.

In December 2009, the district court ruled on the defendants' motion for summary judgment. In regard to the two due process allegations that survived the motion to dismiss, the court granted summary judgment in favor of the defendants on both.

Ruling/Rationale: Treating Kowalski's appeal as one on the district court's ruling on summary judgment, rather than the motion to dismiss, the Fourth Circuit panel affirmed the district court's decision as to both the free speech and due process claims. It began its analysis of the free speech claim by restating Kowalski's contention that MHS officials violated her free speech rights under the First Amendment by punishing her for speech that occurred outside the school.

She argued that because this case involved "off-campus, nonschool related speech," school administrators had no power to discipline her. Kowalski maintained, "no Supreme Court case addressing student speech has held that a school may punish students for speech away from school—indeed every Supreme Court case addressing student speech has taken pains to emphasize that, were the speech in question to occur away from school, it would be protected."

The panel framed the issue as:" [W]hether Kowalski's activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students." While acknowledging that the U.S. Supreme Court "has not dealt specifically with a factual circumstance where student speech targeted classmates for verbal abuse," it pointed out that the standard enunciated in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), recognizes "the need for regulation of speech that interfered with the school's work and discipline, describing that interference as

speech that 'disrupts classwork,' creates substantial disorder,' or 'collid[es] with' or 'inva[des]' 'the rights of others.'"

The panel found that *Tinker's* language supports the conclusion that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying. All branches of the federal government have recognized that student-on-student harassment and bullying is a major concern, noted the panel, and that school officials have a duty to protect their students from it.

The panel concluded that Kowalski's speech was disruptive and caused interference within the meaning of *Tinker* and, therefore, did not enjoy First Amendment protection. The conduct and speech displayed on the S.A.S.H. web page was not the type that"our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system.'"

Noting that Kowalski admitted to the harassing nature of the speech on the webpage, the panel addressed her argument that the speech was, nonetheless, protected speech because it took place at home and after school hours. This argument, stated the panel, ignored the reality of Internet activity, which allows the speech created to be published beyond Kowalski's home and "could reasonably be expected to reach the school or impact the school environment."

While accepting that there are limits on the scope of school's interest in protecting students from speech that originates off-campus, the panel concluded that it need not"fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."

The panel conceded that it is unresolved whether the standard established in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), for regulating vulgar student speech is applicable to speech that originates off-campus, given the recent Third Circuit *en banc* ruling in *Layshock v. Hermitage Sch. Dist.* , No. 07-4465, ___ F.3d ___, 2011 WL 2305970 (3d Cir. 2011). In *Layshoc*k, the Third Circuit held that a school could not punish a student for online speech merely because the speech was vulgar and reached the school. However, it concluded that the issue need not be resolved because *Tinker* provided BCS with all the authorization it need to discipline Kowalski, regardless of where her speech originated.

The panel found additional support for regulating Kowalski's speech in other court decisions, such as *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). It stated:"Other courts have similarly concluded that school administrators' authority to regulate student speech extends, in the appropriate circumstances, to speech that does not originate at the school itself, so long as the speech eventually makes its way to the school in a meaningful way." It pointed out that even though Kowalski was not physically at school when she created the S.A.S.H. website, "other circuits have applied *Tinker* to such circumstances."

As had the district court, the panel concluded that the BHIP provided Kowalski with sufficient notice and hearing to satisfy due process. Lastly, it found her argument that school officials had failed to follow their own policies unsupported by the record and without legal merit.

Federal appellate court rules Missouri school district did not violate student's free speech rights by disciplining for off-campus online true threats

D.J.M. v. Hannibal Public School District (8th Circuit August 1, 2011)

Abstract: The U.S. Court of Appeals for the Eighth Circuit, in a three-judge panel decision, has ruled that a school district that suspended a student for off-campus instant message communications with a classmate did not violate the student's free speech rights because the student's speech constituted unprotected true threats. The panel also concluded that the school district was justified in disciplining the student under the substantial disruption standard established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), based on *Tinker's* language that school officials may discipline students for speech that occurs"in class *or out of it*," which "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities."

Facts/Issues: D.J.M., a student at Hannibal High School (HHS), sent an instant message (IM) on his home computer to a classmate, C.M., on her home computer saying that he was going to get a gun and kill certain students. C.M. notified school authorities, who informed local law enforcement. D.J.M. was briefly detained and subsequently referred by the juvenile court to a hospital for psychiatric treatment. Hannibal Public Schools (HPS) then suspended him for the remainder of the school year. D.J.M. filed suit against HPS, alleging violation of his First Amendment free speech rights.

A federal district court ruled that D.J.M.'s speech was not protected by the First Amendment because it was a "true threat." The court also held that even if his speech enjoyed First amendment protection, HPS was justified in disciplining the student under *Tinker's* substantial disruption standard. It found there had been a substantial disruption in the school because many concerned parents called in and threatened to remove their children. It also pointed out that HHS significantly increased its security. Regarding school officials' authority to regulate off-campus speech, the court stated, "Several courts of appeal, including this circuit, have applied 'school speech' law to cases where the communications occurred off of school grounds but their effects reverberated to the classroom."

Ruling/Rationale: The Eighth Circuit panel affirmed the lower court's decision. The panel first acknowledged that none of U.S. Supreme Court's four decisions addressing student speech, *Tinker*, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393, 397 (2007), occurred in the context of student threats of violence, or conduct outside of school or a school sanctioned event. The Eighth Circuit, however had addressed the issue of a student threat that occurred off-campus in *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (*en banc*).

Doe defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." The speaker must have intended to communicate his statement to another, a requirement which is satisfied if the "speaker communicates the statement to the object of the purported threat *or to a third party*."

The panel rejected D.J.M.'s contention that *Doe's* language regarding a third party was merely dicta, not part of the Eighth Circuit's holding, pointing out that it was a third party that relayed the threat to the potential victim and brought it to the attention of a school official. It found D.J.M.'s reliance on the decision in *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004), cert. denied, 544 U.S. 1062 (2005), misplaced because the facts in the present case were dissimilar to those in *Porter*. Specifically, the alleged perpetrator in *Porter* had no intent of communicating a threat to anyone at school, as his sketch depicting violence remained at home for two years and was brought "unwittingly" to school by his brother.

The panel, instead, found the Eighth Circuit's decision in *Riehm v. Engelking*, 538 F.3d 952, 962 (8th Cir. 2008), a closer fit because of the specificity of detail and the graphic description of violence. As a result, it concluded that there was "no genuine dispute of material fact regarding whether [D.J.M.'s] speech could be reasonably understood as a true threat." The panel, likewise, dismissed his argument that there was a genuine issue of material fact as to whether his statements were sufficiently serious to be perceived as a true threat. It, therefore, held that HPS officials "did not violate the First Amendment by notifying the police of D.J.M.'s threatening messages and later suspending him."

Turning to the question of whether DPS could justify its decision to suspend D.J.M. based on *Tinker's* substantial disruption standard, the panel cited *Wisniewski v. Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007), a case that also involved the use of instant messaging technology off-campus to convey threats of violence in the school. It noted that the technology allows students both inside school and out to communicate rapidly and widely. It also acknowledged, however, that "[s]chool officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech."

The panel cited *Tinker's* language justifying the restricting of student speech that occurs "in class *or out of it*," if school officials "… might reasonably forecast substantial disruption of or material interference with school activities." It then found that, like *Wisniewski*, where the Second Circuit panel found the "message had in fact reached the school," it was reasonably foreseeable that the instant message communications would come to the attention of school officials and create a risk of substantial disruption within the school environment.

The panel concluded: "The [Supreme] Court has not yet had occasion to deal with a school case involving student threats or one requiring it to decide what degree of foreseeability or disruption to the school environment must be shown to limit speech by students. These cases present difficult issues for courts required to protect First Amendment values while they must also be sensitive to the need for a safe school environment."

Federal appellate court holds principal did not retaliate in violation of student's free speech rights by temporarily removing from class or reporting parents after learning of essay depicting violent suicide

Cox v. Warwick Valley Central School District (2d Circuit August 17, 2011)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Second Circuit (NY, VT, CT) has ruled that a middle school principal did not retaliate against a student in violation of his First Amendment free speech rights when, after learning that the student had composed an essay in class depicting the student's violent suicide, he temporarily removed the student from class and reported the student's parents to the state Department of Child and Family Services (CFS) for suspected child abuse. It also ruled that the principal had not violated the parents' Fourteenth Amendment substantive due process rights.

Without reaching the question of whether the student's speech was protected by the First Amendment, the panel concluded that the retaliation claim failed. The principal's decision to temporarily remove the student from class, the panel explained, did not constitute an adverse action because it was protective in nature, not disciplinary. It likewise found that the decision to make the report to CFS was for protective, not disciplinary, reasons and, therefore, did not amount to an adverse action. Finally, the panel ruled that the parents' substantive due process claim failed because the report did not result in any loss of custody by the parents, and "[w]here there is no actual loss of custody, no substantive due process claim can lie."

Facts/Issues: Raphael Cox attended Warwick Valley Middle School (WVMS), where he had a lengthy and consistent history of misconduct that often involved violent behavior. The incident that led to the lawsuit began in English when Cox's teacher assigned the class to write an essay on what they would do if they only 24 hours to live. Cox's essay described using alcohol and drugs, breaking the law, and then committing suicide by taking cyanide and shooting himself in the head in front of friends. The teacher showed the essay to WVMS Principal John Kolesar. Kolesar immediately removed Cox from class and placed him in the in-school suspension room for the remainder of the school day while Kolesar assessed whether Cox posed a threat to himself or others, and to determine if he should be disciplined for the essay. After concluding that Cox posed no immediate threat and that discipline was not warranted, Kolesar sent him home.

After meeting with Warwick Valley Central School District's (WVCSD) superintendent the next day, Kolesar contacted CFS to report that he suspected that Cox was being neglected by his parents because they were ignoring the potential danger reflected in Cox's behavior and entries in his journal. CFS ordered the parents to have Cox undergo a psychiatric evaluation or potentially lose custody of their son. After they complied, CFS' investigation concluded that Kolesar's concerns were unfounded.

The parents subsequently filed suit in federal district court against MVCSD and Kolesar. They alleged that Kolesar had violated Cox's free speech rights by disciplining him for the essay. The parents also claimed that their substantive due process right to custody of their son was

violated by Kolesar making an exaggerated or false report to CFS. The district court granted summary judgment in favor of MVCSD and Kolesar on both claims.

***Ruling/Rationale*:** The Second Circuit panel affirmed the district court's decision. Because Kolesar had conceded that he was acting under color of state law for purposes of § 1983 liability when took the actions at issue, the sole issue was whether Kolesar's actions violated Cox's or his parents' constitutional rights. With respect to Cox, the parents argued that Kolesar had retaliated against him for his essay in violation of his First Amendment speech rights. With respect to them, the parents claimed that by reporting them to CFS, Kolesar had violated their Fourteenth Amendment substantive due process right to custody of their son.

Addressing the First Amendment retaliation claim, the panel stated that a plaintiff must show: (1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech. Noting that the district court had concluded that the retaliation claim failed because the essay was not protected speech, the panel affirmed the summary judgment on the claim on different grounds. It found that it was not necessary to reach the question of whether the essay constituted protected First Amendment speech because Kolesar's action in temporarily removing Cox from class did not amount to an adverse action, negating the retaliation claim.

Noting that case law provides no clear definition of "adverse action," in the school context, the panel employed the general definition of an adverse action, i.e., "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights," adapting it to take into account the "special characteristics of the school environment." Based on those parameters, the panel found "a school administrator must be able to react to ambiguous student speech by temporarily removing the student from potential danger (to himself and others) until it can be determined whether the speech represents a real threat to school safety and student learning. "Such acts deserve 'unusual deference' from the judiciary."

Giving such deference to Kolesar's actions, the panel concluded: "Without more, the temporary removal of a student from regular school activities in response to speech exhibiting violent, disruptive, lewd, or otherwise harmful ideations is not an adverse action for purposes of the First Amendment absent a clear showing of intent to chill speech or punish it." The principal's action was objectively protective, rather than retaliatory or disciplinary, because the removal from class gave time to assess whether there was any danger and how to properly respond. The panel stated: "Under this standard, Kolesar's decision to remove Raphael from class for an afternoon cannot support a First Amendment retaliation claim, regardless of how Raphael or his parents may have perceived Kolesar's actions."

The panel, likewise, concluded that Kolesar's decision to report the parents to CFS could not constitute an adverse action as a matter of law in the absence of "any evidence of retaliatory or punitive intent as to the child." It emphasized that if reports to CFS based on student speech and conduct, which many are, could result in § 1983 liability, school administrators would be exposed to civil liability no matter what they did. Taking into account Kolesar's legal obligation

to report suspected child neglect, it said, "Allowing such reports to generally constitute retaliation against the *children* would seriously undermine school administrators' ability to protect the children entrusted to them." Because the panel affirmed the district court's grant of summary judgment in Kolesar's favor on the First Amendment claim, the panel determined it was unnecessary to address whether Kolesar was entitled to qualified immunity.

Lastly, the panel found that there were a number of problems with the parents' substantive due process claim. First, in the absence of "truly extraordinary circumstances," a brief deprivation of custody is insufficient to state such a claim. "Such temporary deprivations do 'not result in the parents' wholesale relinquishment of their right to rear their children,' so they are not constitutionally outrageous or conscience-shocking." The panel found that Kolesar's call to CFS and CFS' subsequent demand that their son undergo psychiatric evaluation did not result in even a temporary loss of custody and, therefore, "[w]here there is no actual loss of custody, no substantive due process claim can lie."

Second, no reasonable jury could conclude that Kolesar's report CFS and CFS' subsequent actions were "outrageous" or "conscience-shocking," as required to maintain a substantive due process claim, the panel determined. It rejected the parents' attempt to elevate Kolesar's action beyond alleged "common negligence" to malice in order to support their claim. It pointed out that even taking the parents' allegation that Kolesar's report to CFS was exaggerated and misleading in a light most favorable to the parents, there was nothing materially false in the report. Stressing that Kolesar had acted to protect Cox and comply with his statutory obligation to report suspected child neglect, the panel concluded there was "no evidence that Kolesar acted with the type of malice needed to shock the conscience."

Federal appellate court rules New York district did not violate student's free speech rights by suspending him for violent drawing

Cuff v. Valley Central School District (2d Circuit March 22, 2012)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Second Circuit (NY, VT, CT) has ruled 2-1 that a school district did not violate a student's free speech rights when it imposed a six day suspension on him for drawing a picture in class expressing the desire to commit violence against the school and teachers. The majority concluded that school officials reasonably forecast that the student's picture would result in substantial disruption to school operations. The test should be an objective one, it found, focusing on the reasonableness of school officials' response, rather than the student's intentions.

As it applied the substantial disruption standard established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the majority looked to Second Circuit precedent articulating the test as "whether 'the record . . . demonstrate[s] . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." When the student speech promotes violent conduct, it added, courts should not substitute their judgment for that of school officials in determining how to respond.

Facts/Issues: B.C., a student at Berea Elementary School (BES), produced a crayon drawing in response to his fifth grade teacher's in-class assignment. The teacher asked her students to fill in a picture of an astronaut by writing certain things in sections of the astronaut. The students were instructed to write a "wish" in the left leg of the astronaut. According B.C., the teacher told the students, "you can write, like, anything you want . . . you can involve a missile . . . [y]ou can write about missiles." B.C.'s drawing depicted an astronaut and expressed a desire to "[b]low up the school with the teachers in it."

Eight months earlier, B.C. had drawn a picture depicting gun violence and, shortly thereafter, had written a story involving destruction of the school by natural causes. He also had a disciplinary history and altercations during recess and in the hallways. One of B.C.'s classmates reported the astronaut drawing to the teacher, who perceived that student as "very worried." The teacher then looked at drawing herself and asked B.C. what it meant. When she received no response, the teacher sent B.C. to the principal's office.

The principal and assistant principal asked B.C. if he meant what had written on the drawing. B.C. replied that he did not. The principal then contacted Central Valley School District (CVSD) Superintendent Richard Hooley for advice on disciplining B.C. Hooley advised that a suspension was appropriate. The principal met with B.C. and his parents, during which B.C. said he did not mean what he had written in the astronaut drawing and that he was only kidding.

Following the meeting with B.C.'s parents, the principal confirmed in writing that B.C. was to be suspended for five days out of school and one day in school based on the "wish." The parents appealed the suspension to CVSD's school board, which upheld the suspension.

Foregoing an appeal to New York State Commissioner of Education, the parents filed suit on behalf of B.C. against CVSD in federal district court. The suit alleged that by suspending B.C., CVSD and the principal violated B.C.'s First Amendment right to freedom of expression. The suit also alleged that the defendants imposed an excessive punishment in disciplining B.C. as a result of the astronaut drawing. After completion of discovery, the district court granted CVSD's motion for summary judgment.

Ruling/Rationale: The panel majority affirmed the lower court's decision. Addressing the First Amendment speech claim, the majority applied *Tinker's* substantial disruption standard, noting the Second Circuit's test: "The relevant inquiry is whether 'the record . . . demonstrate[s] . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'"

The standard as applied in the Second Circuit, noted the majority, does not require that there be actual disruption before school officials may act to regulate student speech. Citing *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007), it stated: "The test is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student." It also stressed that when the student speech/expression promotes violence, courts will not impose their viewpoint as to how school officials should respond.

Applying these principles to the facts at hand, the majority upheld B.C.'s suspension. The record demonstrated, it explained, "that it was reasonably foreseeable that the astronaut drawing could create a substantial disruption at the school." It pointed to the following facts to support this finding:

1. When B.C. was, he had a history of disciplinary issues, and his other earlier drawings and writings had also embraced violence.

2. Prior to the astronaut drawing incident, both the assistant principal and the school psychologist had discussed B.C.'s other drawings and writings with the principal. The former had expressed a "concern" for the student.

3. The astronaut drawing was seen by other students in the class, and caused one, who observed B.C. with the drawing, to leave her seat and bring it to the teacher's attention. The teacher perceived this student to be "very worried" about the drawing.

Citing *Wisniewski* again, the panel's majority concluded that B.C.'s intentions and capabilities were irrelevant. It did not matter that B.C. intended his "wish" as a joke, or never intended to carry out the threat, or that he lacked the capacity to carry out the threat expressed in the drawing. It also noted:

[I]n the context of student speech favoring violent
conduct, it is not for courts to determine how school officials
should respond. School administrators are in the best position to assess the potential for harm and act accordingly.
. . .
Courts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence.

The majority cited a number of "true threat" cases in support of allowing such leeway.

The majority did find relevant the real concerns of school officials with respect to other students' reactions to the drawing. The fact that B.C. had shared his drawing with classmates "aggravated" the threat of substantial disruption. School officials might reasonably fear copycats, which then could compromise school operations if they did not discipline B.C. Also, school officials "have to be concerned about the confidence of parents in a school system's ability to shield their children from frightening behavior and to provide for the safety of their children while in school. "

Finally, the majority summarily dismissed the parents' argument that B.C.'s punishment was excessive under the First Amendment. Stating that the "appropriate degree of punishment is of course a matter in which we show the greatest deference to school authorities," it found the argument without merit.

Dissent

The dissent took issue with the majority's determination that the facts clearly indicated a reasonable forecast of substantial disruption. It argued that the fact-finder should be allowed to make that determination. "I believe that a jury could conclude that this young child's stab at humor barely had the potential to cause a stir at school, let alone a substantial disruption."

According to the dissent, "The question under *Tinker* is whether a reasonable jury, drawing every inference in favor of the plaintiffs, could conclude that the school did not reasonably believe that B.C.'s drawing could itself cause a 'substantial disruption' at school." It asserted that the majority, rather than decided whether there were issues of disputed fact to be resolved, had resolved them. Among these was the fact that many of B.C.'s classmates laughed at the caption in drawing, finding it amusing. The dissent went on, "a jury might readily conclude that C.P. reported B.C. not because she took his threat seriously or was even slightly scared, but rather because she resented him for pushing the boundaries of acceptable conduct in class and getting away with it."

Countering the Second Circuit precedent cited by the majority, the dissent noted "that the minor disruption at issue in this case is a far cry from the one we faced in *Wisniewski*, in which an image that could have been interpreted as a violent threat against a teacher circulated for three weeks among students before it came to the attention of school officials."

B.C.'s teacher explicitly suggested that her students consider writing about missiles. While the concept of irony may seem well beyond the ken of an average ten-year-old, young children routinely experiment with the seeds of satire. They learn by fumbling their way to finding the boundaries between socially permissible, and even encouraged, forms of expression that employ exaggeration for rhetorical effect, and impermissible and offensive remarks that merely threaten and alienate those around them.

This young boy's drawing was clearly not some subtle, ironic jab at his school or broader commentary about education. It was a crude joke. But the First Amendment should make us hesitate before silencing students who experiment with hyperbole for comic effect, however unknowing and unskillful that experimentation may be.

RELIGION CASES

Federal appellate court rules Delaware school board's policy of opening meetings with a prayer violates Establishment Clause

Doe v. Indian River School District (3d Circuit August 5, 2011)

Abstract: A U.S. Court of Appeals for the Third Circuit (PA, NJ, DE, VI) three-judge panel has unanimously ruled that a Delaware school board's policy of opening meetings with a prayer violates the First Amendment's Establishment Clause. The panel concluded that the

constitutional exception established in *Marsh v. Chambers*, 463 U.S. 783 (1983), for legislative bodies does not apply to school boards. Instead, it determined that "the traditional Establishment Clause principles governing prayer in public schools" as spelled out in *Lee v. Weisman*, 505 U.S. 577 (1992), governed.

Applying those principles via the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the "endorsement test" advocated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the panel concluded that the school board's prayer policy "rises above the level of interaction between church and state that the Establishment Clause permits." It, therefore, reversed the federal district court's holding that the board's actions pursuant to the policy were constitutional under *Marsh*.

Facts/Issues: The suit began when two families sued Indian River School District (IRSD) over the inclusion of prayer at school board meetings, athletic events, banquets, and graduation ceremonies. The Dobrich family, who are Jewish, and another family identified only as the "Does" alleged that IRSD's practice of permitting prayer at school functions created "an environment of religious exclusion." The families also alleged that the district promotes Christianity in the classroom. The families contended that middle school students who participate in the Bible club receive preferential treatment and that at least two teachers openly espouse their religious beliefs in the classroom.

In 2005, the federal district court dismissed the individual school board members from the suit, holding that they enjoyed absolute legislative immunity from a lawsuit brought by parents alleging that the board had developed, adopted, or implemented policies, practices, and customs permitting religious worship and prayer in the district's schools in violation of U.S. Constitution's Establishment and Free Exercise of Religion Clauses. In January 2008, the parties entered into a settlement agreement on all claims, except those related to the board's prayer policy. In March 2008, the Dobriches voluntarily dismissed their claims after they moved outside the school district.

In February 2010, the district court granted summary judgment in favor of IRSD, holding that the school board's policy of opening meetings with a prayer did not violate the First Amendment's Establishment Clause. The court concluded that the U.S. Supreme Court's decision in *Marsh* was controlling on the issue of whether legislative and other deliberative bodies may open their sessions with prayer. Finding that the school board is a statutorily-created, popularly-elected deliberative body that conducts the business of IRSD, the court had little trouble concluding that the school district qualifies as the type of "deliberative body" contemplated by *Marsh*. It also pointed out that there is nothing in *Marsh* that suggests that the Supreme Court intended to limit its approval of prayer in "legislative and other deliberative bodies" to those that were in existence when the First Amendment was adopted.

Ruling/Rationale: The Third Circuit panel reversed the lower court's decision. After a thorough analysis of the case law governing school prayer and the legislative prayer exception established in *Marsh*, the panel concluded that the line of school prayer cases commencing with *Lee* was controlling because it found that the "type of potentially coercive atmosphere the

Supreme Court" instructed courts to guard against is present in the instant case given the "nature of the relationship between the Board and Indian River students and schools."

Specifically, the panel found the level of student participation in school board meetings akin to student participation in graduation ceremonies (*Lee*) and football games (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)), creating the same type of coercive environment that the Supreme Court determined made prayer at those events unconstitutional.

At the same time, the panel concluded that *Marsh's* "narrow historical context" made it inapplicable to school boards. It pointed to the Supreme Court's warning in *Edwards v. Aguillard*, 482 U.S. 578 (1987), a case involving Louisiana's "Creationism Act," which the Court held violated the Establishment Clause, that *Marsh's* historical approach "is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." It also pointed out that the Supreme Court "has consistently emphasized the narrow, historical underpinnings of Marsh and has proven reluctant to extend Marsh outside of its narrow historical context."

Turning to the core issue of whether IRSD's prayer policy passed constitutional muster based on principles laid out in the school prayer cases, the panel applied both the *Lemon* and "endorsement" tests. While expressing doubt as to whether the policy satisfied *Lemon's* secular purpose prong, it determined that, even if it did, the policy would not survive the primary effect or the excessive entanglement prongs of the test.

Regarding the primary effect prong, the panel stated: "Given that the prayers recited are nearly exclusively Christian in nature, including explicit references to God or Jesus Christ or the Lord, we find it difficult to accept the proposition that a "reasonable person" would not find that the primary effect of the Prayer Policy was to advance religion." It, likewise, found that the history and context of prayer at board meetings revealed an atmosphere in which the board sought to craft a policy to continue the practice of prayer endorsing Christianity.

As to the excessive entanglement prong, the panel found "[s]everal institutional aspects of the recitation of the prayer … troubling." First, the policy resulted "from, and was sanctioned by, the Board's institutional authority in that it was enacted through a vote." Second, "prayers are recited in official meetings that are completely controlled by the state." Third, the Board recites the prayer. The panel concluded that the school board's complete control over the policy, "combined with its explicit sectarian content, rises above the level of interaction between church and state that the Establishment Clause permits."

Noting that the "endorsement test" is essentially the same as *Lemon's* primary effect prong, the panel concluded that the policy, just as it failed that prong, failed the endorsement test.

Federal appellate court rules North Carolina county board's opening prayers at meetings violate Establishment Clause

Joyner v. Forsyth County (4th Cir. July 29, 2011)

Abstract: In a 2-1 split, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit has ruled that a North Carolina county's policy allowing opening prayers at its board of commissioners meetings violates the Establishment Clause as implemented because the content of the prayers advances or endorses a particular religion, namely Christianity. While the panel's majority agreed that the policy as written was neutral on its face, it found that in practice the prayers offered to open the board's meetings were Christian, rather than nondenominational. It concluded that "… whatever the Board's intentions, its policy, as implemented, has led to exactly the kind of 'divisiveness the Establishment Clause seeks rightly to avoid.'"

Facts/Issues: For years Forsyth County had a practice of opening its Board of Commissioners meetings with a prayer. Although the county did not have a written policy prior to 2007, its practice was to ask local clergy to offer a invocation at the beginning of meetings. The clergy were selected from a list of churches culled from the Yellow Pages. Although the board tool a hands-off approach to the content of the prayers, the record established that there were frequent references to Jesus Christ.

After three residents filed suit against Forsyth County in federal district court over the prayer practice, the county adopted a written policy which for the most part codified its past practice. The policy stated in part that the prayers were "not intended, and shall not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination." The policy's stated goal was to "acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth County."

Even though the policy was couched in the language of neutrality, the prayers offered at meetings "repeatedly continued to reference specific tenets of Christianity." The district court issued a declaratory judgment that the "invocation Policy, as implemented, violates the Establishment Clause of the Constitution" and an injunction against the Board "continuing the Policy as it is now implemented."

Ruling/Rationale: The Fourth Circuit panel's majority affirmed the district court's decision. It framed the issue as the constitutional validity of legislative prayer as it coexists with the Establishment Clause's principles of disestablishment and religious freedom. The majority pointed out that in *Marsh v. Chambers*, 463 U.S. 783 (1983), the only U.S. Supreme Court case to directly address the constitutionality of legislative prayer, the Supreme Court affirmed the legitimacy of legislative prayer. It cited two Fourth Circuit decisions, *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), and *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), which were consistent with *Marsh's* holding.

The majority stressed that in order to avoid potential sectarian strife generated by the offering of a prayer at a public meeting, *Wynne* and *Simpson* sought "to minimize these risks by requiring legislative prayers to embrace a non-sectarian ideal." It quoted approvingly from the Baptist Joint Committee for Religious Liberty's amicus brief, which stated that the Fourth Circuit's "legislative prayer decisions have recognized that the exception created by *Marsh* is limited to the sort of nonsectarian legislative prayer that solemnizes the proceedings of legislative bodies without advancing or disparaging a particular faith."

Based on the Supreme Court's decision in *Marsh* and the Fourth Circuit's decisions in *Wynne* and *Simpson,* the majority concluded that the board's policy, as implemented, "cannot withstand scrutiny." It noted the frequency of occasions, documented in the record, where Christian prayers were offered. The panel concluded: "Taken as a whole, it is clear that the prayers offered under the Board's policy did not 'evoke common and inclusive themes and forswear . . . the forbidding character of sectarian invocations.'"

The majority rejected the board's argument that neither *Wynne* nor *Simpson* is controlling in the present case on the ground that in those cases the legislative body held a degree of content control of the prayers not present in the instant case, where the speakers were outside clergy. It stressed that in both cases, like the present one, the crucial factor was the non-sectarian nature of the prayers, not identity of the particular speaker.

The majority also rejected the board's argument that the district court misinterpreted *Marsh*, *Wynne*, and *Simpson* in deciding to "parse[ ] the *content* of particular prayers," and "impose a blanket censor upon prayer content." It, likewise, dismissed the dissent's claim that the majority's holding requires "judicial bodies to evaluate and parse particular religious prayers."

Conceding that *Marsh* warned courts not to "parse the content of a particular prayer," the majority countered that "the *Marsh* Court only endorsed such a hands-off approach in situations where 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" It pointed out that the Fourth Circuit had used that very approach in *Wynne*.

In addition, the majority noted other circuits had adopted that approach, citing in *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006), in which the Seventh Circuit declined to stay the district court's ruling that the Indiana House of Representatives' legislative prayer policy was unconstitutional. It found the board's contention that the Eleventh Circuit's opinion in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) compels a different result flawed because "the *Pelphrey* court adopted the same approach we did in *Wynne* and *Simpson*: it determined as a threshold matter whether the invocations exploited the opportunity for legislative prayer."

Lastly, the majority found that the fact that the policy was neutral was not dispositive of its constitutionality because it was the board's implementation of the policy that was in question. It stated: "It is not enough to contend, as the dissent does, that the policy was neutral and proactively inclusive, when the County was not in any way proactive in discouraging sectarian prayer in public settings." The majority concluded that dissent's defense of the policy on the ground it is a "[t]ake-all-comers" policy, "exposed the constitutional flaw because policies "that

do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein."

The dissent, which was roughly equal to the majority opinion in breath and length, would have reversed the district court on the ground that "Forsyth County had established a completely neutral policy of allowing all and any religious leaders to deliver invocational prayers of their own composition before Board meetings and has sought proactively to be inclusive." According to the dissent: "The Establishment Clause does not require the County to forbid invocational speakers from making sectarian references in their prayers. Rather, the County's policy of pluralistic inclusion complies with the Establishment Clause and more particularly the Supreme Court's opinion in *Marsh*, which approved legislative prayers as constitutional so long as the government does not proselytize, advance one religion or faith over another, or disparage any other religion or faith."

The dissent took issue with the majority on whether the evidence showed that the policy as implemented resulted in the advancement of one religion. It concluded: "Because the only evidence of the government advancing one religion was the fact that a majority of the prayers offered under the neutral and inclusive policy were Christian, I would find the evidence insufficient to support the conclusion that Forsyth County was advancing Christianity."

Federal appellate court rules school district did not violate teacher's constitutional rights by ordering removal of classroom banners with religious references

Johnson v. Poway Unified School District (9th Circuit September 13, 2011)

Abstract: In a unanimous decision, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit has ruled that a California school district did not violate a high school teacher's free speech or equal protection rights, or the Establishment Clause when the school's principal ordered the teacher to remove banners displayed in his classroom that contained religious references. The panel reversed the federal district court's grant of summary judgment in favor of the teacher on all claims. In regard to the free speech claim, it concluded that the lower court had erred by applying forum analysis. The panel found that the speech issue should be analyzed in accordance with the multi-prong test established by *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205,* 391 U.S. 563 (1968) and its progeny.

The panel concluded that under the *Pickering* analysis, the teacher's speech was not protected by the First Amendment, but was government speech that the school district was justified in regulating. It rejected the teacher's argument that his speech should be analyzed under the substantial disruption standard established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), rather than *Pickering*. Because the speech was religious in nature, the panel also analyzed the principal's order to remove the banners to determine if it violated the Establishment Clause. Applying the three-prong test established in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), it concluded that the principal had acted within Establishment Clause parameters. Lastly, the panel rejected the equal protection claim based on its conclusion that the speech at issue here was government speech: "Because Johnson had no individual right to speak for the government, he could not have suffered an equal protection violation."

Facts/Issues: Bradley Johnson, a math teacher in the Poway Unified School District (PUSD), had for roughly twenty years displayed two banners in his classroom, one with the phrases "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee," and the other with the phrase "All Men Are Created Equal, They Are Endowed By Their CREATOR." Under PUSD's long-standing policy allowing teachers to display personal messages on classroom walls, the district had allowed materials such as rock band posters, posters of professional athletes, posters with Buddhist and Islamic messages, and Tibetan prayer flags.

Although the district had received no complaints about Johnson's banners prior to this time, in January 2007, his principal ordered him to remove them after an inquiry from a fellow teacher and a decision by the school board to direct their removal. Johnson sued PUSD, asserting both federal constitutional and state claims, and seeking a court order requiring PUSD to allow him to re-hang the banners, plus nominal damages. Both parties filed motions for summary judgment.

The district court granted Johnson summary judgment on each of his claims. It concluded that Poway had created a limited public forum for teacher speech in its classrooms and had impermissibly limited Johnson's speech based upon his viewpoint. It granted Johnson declaratory relief and ordered Poway not to interfere with Johnson's future display. It also found that the school officials were not entitled to qualified immunity and ordered each to pay nominal damages. Johnson later moved for attorney's fees in the amount of $240,563.15. That motion was stayed pending the outcome of PUSD's appeal.

Ruling/Rationale: The Ninth Circuit panel reversed the lower court's decision, vacating the district court's grant of injunctive and declaratory relief, as well as its award of damages. It remanded the case with instructions to the district court to enter summary judgment in favor of PUSD on all claims. The panel also ordered Johnson to pay all costs.

Addressing the free speech claim, the panel declared that the district court had erred when it applied forum analysis to the issue. Instead, it held that "*Pickering*'s employee-speech analysis controls." It pointed to U.S. Supreme Court precedent ruling "where the government acts as both sovereign *and employer*, this general forum-based analysis does not apply." It declined Johnson's invitation to forgo *Pickering* and analyze his speech claim under *Tinker*, as had the district court. While acknowledging that *Pickering* and Tinker are not mutually exclusive, it stressed "[t]he very basis for undertaking a *Pickering*-based analysis of teacher speech, whether in-class or out, is the … recognition that teachers do not 'relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.'"

The panel, therefore, concluded that the *Pickering* analysis was the appropriate approach regardless of the reason an employee believes his or her speech is constitutionally protected, noting that the other federal appellate circuits that have addressed the issue agree. Applying *Pickering's* five step analysis, the panel concluded that when Johnson displayed the banners, he spoke as an employee rather than as a private citizen. Making a factual determination as to the "scope and content" of Johnson's job responsibilities, the panel found that "as a practical

matter , we think it beyond possibility for fairminded dispute that the 'scope and content of [Johnson's] job responsibilities' did not include speaking to his class in his classroom during class hours."

Turning to the second inquiry which involved determining the "ultimate constitutional significance" of those facts, the panel concluded that Johnson's speech owed its existence to his position as a teacher. "[B]ecause of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official." In the panel's words: "Johnson took advantage of his position to press his particular views upon the impressionable and 'captive' minds before him."

The panel stressed that even though PUSD allowed teachers to decorate their classrooms, as in *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003 (9th Cir. 2000), the speech attributable to the display was government speech. Johnson was free to expound on his religious beliefs at a place and time outside the context of his duties and responsibilities. When speaking as an employee, however, such speech is the government's — not his own.

Even though the panel had determined that the speech at issue, i.e., Johnson's banners, was government speech, it found it necessary to conduct an Establishment Clause inquiry because the speech was religious in nature. The panel applied the *Lemon* test to the principal's order to remove the banners, concluding that the principal had not run afoul of the Clause.

First, it determined that the principal had acted to avoid an Establishment Clause violation created by the religious content of the banners. It determined "that [g]overnmental actions taken to avoid potential Establishment Clause violations have a valid secular purpose under*Lemon*."

The panel also concluded "action taken to avoid conflict with the Establishment Clause and maintain the very neutrality the Clause requires neither has a primary effect of advancing or inhibiting religion nor excessively entangles government with religion." As to the other teachers' displays that Johnson challenged, it found no Establishment Clause violations. Finally, the panel disposed of the equal protection claim, finding that because the speech at issue was government speech and not his own, Johnson's equal protection rights were not implicated.

Federal appellate court rules Tennessee district did not violate student's right to participate in student-led Bible study during recess

Whitson v. Knox County Board of Education (6th Circuit March 20, 2012)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Sixth Circuit (KY, MI, OH, TN) has ruled that a school district did not violate a student's First Amendment free speech right to participate in student-led Bible study during recess. The panel upheld the district court jury's verdict that the school district had not violated the student's constitutional rights. While it agreed that the district court had erred in failing to grant the plaintiff's motion for a bench trial,

allowing admission of hearsay evidence, and denying the plaintiff's request for a jury instruction on exhaustion of administrative remedies, it found that these errors were harmless and did not warrant overturning the jury's verdict.

The panel concluded that the district court had not erred in denying the plaintiff's motion for judgment as a matter of law because the jury's verdict was supported by the record. Specifically, the trial testimony established that students were free to engage in any activity they desired on the playground.

***Facts/Issues*:** L.W. attended Karns Elementary School (KES). During the 2004–2005 school year, L.W. began meeting with other fourth graders during recess to read and discuss the Bible. After a parent called L.W.'s teacher complaining about the meetings, the teacher instructed the leader of the meetings, a student identified as D.S., not to have the meeting that day. The teacher wanted Principal Cathy Summa to determine whether the meetings were permissible. Principal Summa told the teacher that "organized Bible study" during recess was not permitted.

The teacher then told D.S. that the Bible study had to stop. D.S. testified that, in a later conversation with D.S. and two other students, Principal Summa gave D.S. the impression that they could no longer have the Bible study during recess. The teacher testified that, despite this, students continued to read and discuss the Bible during recess. There was also testimony at trial that, after this suit was initiated, the Knox County Board of Education (KCBOE) promulgated a policy stating that "students and employees can engage in expression of personal religious views or beliefs within the parameters of current law."

At some point the story drew increasing attention from the news media, during which Summa's actions were allegedly mischaracterized.

KCBOE then issued a press release to manage the media blitz. The press release was approved by Superintendent Lindsey, the President of the School Board, and Principal Summa. The press release attributes the following quote to Principal Summa:

"I indicated to the students and the parents that I did not feel that an organized activity of this type was appropriate during the school day. . . . While we do not discourage students from reading at recess, I think that a daily planned activity that is stationary or physically static in nature defeats the real purpose of recess. The purpose is to give students an opportunity to have some physical activity during the school day."

L.W. subsequently brought suit in the district court seeking injunctive and declaratory relief as well as unspecified damages against the Board, Superintendent Lindsey in his official capacity, and Principal Summa in both her individual and official capacities. After the district court denied a number of L.W.'s motions, the case went to trial.

The jury returned a verdict that the defendants had not violated L.W.'s constitutional rights. L.W.'s attorney then filed a motion for judgment notwithstanding the verdict and for a new trial., which the district court denied.

Ruling/Rationale: The Sixth Circuit panel upheld the jury's verdict, and affirmed the district court's order denying L.W.'s motion for judgment notwithstanding the verdict and for a new trial. Although it agreed that the district court had erred in rejecting L.W.'s motion for a bench trial, allowing admission of hearsay evidence, and denying his request for a jury instruction on exhaustion of administrative remedies, the panel explained that each error was harmless, and did not justify overturning the jury's verdict.

The panel then took up the substantive issue of whether school officials had violated L.W.'s rights, in order to determine whether the district court had erred in denying L.W.'s motion for judgment notwithstanding the verdict. It concluded that the jury's verdict that L.W.'s constitutional rights had not been violated was supported by the record.

Like the district court, the panel found that because "testimony at trial established that during recess, children were free to engage in any activity they desired on the playground, the jury could reasonably determine that no constitutional violation had taken place." "Without a constitutional violation, the evidence regarding Defendants' policies was inapposite."

While the panel agreed with L.W. that the existence of a policy, practice, custom, or procedure allows a municipal entity to be sued under § 1983, there must be a deprivation of a federal right for a § 1983 action to go forward. Without such a deprivation, the court could not reach the issue of whether the school district's policy, practice, custom or procedure caused it.

The panel found, in the present case, even though there was some confusion on the principal's part regarding whether the students could conduct their student led Bible study during recess, there was ample evidence on the record that students continuing to do so, and were allowed to do so. This evidence "likely prompted the jury to find that Plaintiff's constitutional rights had not been violated. Therefore, there was a factual issue for the jury, and judgment as a matter of law would have been inappropriate."

Federal appellate court rules elementary school students enjoy First Amendment free speech rights, but school principals are entitled to qualified immunity for banning distribution of religious materials

Morgan v. Swanson (5th Circuit September 27, 2011) (en banc)

Abstract: A divided U.S. Court of Appeals for the Fifth Circuit, sitting en banc (all active judges participating in consideration and decision of the case), has reversed a lower court's decision denying two elementary school principals qualified immunity from a free speech suit brought by two students. A majority of the appellate court agreed that the law was not "clearly established" at the time the principals banned the students from distributing religious materials on school grounds. A separate majority, rejecting the principals' argument that elementary school students do not enjoy First Amendment free speech rights, held that such rights do extend to elementary school students under *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

Some of the judges making up the qualified immunity majority filed separate concurring opinions in which they criticized the "two majority opinions" for tackling the merits of the students' free speech claims, as the facts had not yet been fully developed in the district court. Other judges in that majority, on the other hand, filed concurrences applauding both majority opinions for addressing the question of whether elementary students have free speech rights and whether viewpoint discrimination is ever permissible when regulating student speech.

***Facts/Issues*:** Lynn Swanson and Jackie Bomchill are the principals of Thomas Elementary School and Rasor Elementary School, respectively, in Plano Independent School District (PISD). Both principals became involved in disputes with parents over their children handing out "goodie bags" during winter break or birthday parties that contained items with religious messages, e.g., pencils referencing Jesus. The principals enforced an outright ban on distributing any items or materials containing a religious message. The parents filed suit in federal district court against Swanson and Bomchill alleging that banning the distribution of any items with a religious message constituted impermissible viewpoint discrimination in violation of their children's First Amendment right to freedom of speech.

The principals filed a motion to dismiss the suit based on qualified immunity. The principals argued that: (1) the First Amendment does not prohibit viewpoint discrimination against religious speech in elementary schools; and (2) the parents failed to allege any conduct on the part of the principals that constituted a violation of the children's clearly established constitutional rights. The district court denied the motion, finding that "a child's right to freedom of expression is not forfeited simply because of her age," and that this right is clearly established.

After a three-judge panel of the Fifth Circuit withdrew its June 30, 2010 opinion, it issued a new opinion affirming the district court's denial of qualified immunity to the two principals. The most recent opinion found that based on the facts as alleged at the pleadings stage, the school had engaged in unconstitutional viewpoint discrimination against the elementary school students based on the religious viewpoint of their speech. The panel also noted the principals' acknowledgement that the speech in question was non-disruptive student-to-student speech. Relying on the Supreme Court's holdings in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the panel emphasized that the First Amendment covers all public school students.

The panel also rejected the principals' argument that the law in this regard was not clearly established. *Barnette* and *Tinker*, as well as Fifth Circuit precedent, federal regulatory guidance and Plano Independent School District (PISD) policy, all favor the conclusion that the law is clearly established that viewpoint discrimination against religious speech in elementary schools is unconstitutional. The principals subsequently filed a motion for rehearing en banc, which was granted.

Ruling/Rationale: As noted above, there were two so-called majority opinions: Judge Benavides wrote for the majority holding that principals Swanson and Bomchill are entitled to qualified immunity from the students' suit alleging that the principals' ban on the distribution

of religious materials by the students violated their free speech rights; those rights were not "clearly established" at the time the bans were put in place. Judge Elrod wrote the other majority opinion, which also dissents in part. Her opinion held: "that the First Amendment protects all students from viewpoint discrimination against private, non-disruptive, student-to-student speech [and] [t]herefore, the principals' alleged conduct—discriminating against student speech solely on the basis of religious viewpoint—is unconstitutional under the First Amendment."

Majority 1: *Qualified Immunity*

Judge Benavides began with a discussion of the level of specificity required to determine when the law is "clearly established." He pointed out that the U.S. Supreme court has rejected the notion that clearly established law can be based on generalizations or abstract propositions. At the same time, the judge stressed that "a case directly on point" was not required. Instead, he found the standard to be whether "existing precedent [places] the statutory or constitutional question beyond debate," i.e., provides "fair warning."

Noting that there was "no specific and factually analogous precedent" providing guidance in the present case, Judge Benavides looked to *Tinker* and its progeny. Because of the nature speech, i.e., not lewd (*Frasier*) or drug-related (*Morse*), he found that the question was whether *Tinker (*private student speech) or *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (curricular or school sponsored speech) applied here.

The judge wrote, "neither the Supreme Court nor this Court has explained whether *Tinker* or *Hazelwood* governs students' dissemination of written religious materials in public elementary schools, whether at official parties, after school on the "lawn and sidewalk," or at unspecified times and in unspecified places during the school day." He added that the facts of *Tinker* and *Hazelwood* offered little guidance. In addition he found that "*Tinker*'s application in the elementary-school context has never been clearly established," and that two federal circuits have expressed doubt regarding whether or to what extent *Tinker* applies to student speech in elementary schools.

Majority 2: *First Amendment Speech Rights of Elementary Students*

Judge Elrod wrote the second opinion, a portion of which was agreed to by a majority of the judges. That portion held that the principals, by banning the materials based on their religious viewpoint, had engaged in impermissible viewpoint discrimination in violation of the students' rights. Judge Elrod echoed Judge Benavides' conclusion that the weight of precedent extended First Amendment protection to elementary school students. A majority of the judges also agreed that viewpoint discrimination against private, non-disruptive student speech is constitutionally impermissible.

The remaining portions of Judge Elrod's opinion were in dissent. She concluded that the sole issue properly before the appellate court was the only one raised by the principals before the Fifth Circuit panel: "Is it clearly established that elementary school students have First Amendment rights?" She contended that the new arguments raised subsequently to the en

banc court were waived because of the well-established rule that "arguments not raised before the district court are waived and will not be considered on appeal."

Judge Elrod also opined in dissent that based on Supreme Court and Fifth Circuit precedent, the principals had fair warning that students enjoy the right to be free from viewpoint discrimination and, thus, the principals' subsequent actions are not entitled to qualified immunity because the law was clearly established at the time they acted. She concluded her opinion by emphasizing the importance of religious liberty and free speech saying:

Fifth Circuit precedent, federal regulatory guidance and Plano Independent School District (PISD) policy, all favor the conclusion that the law is clearly established that viewpoint discrimination against religious speech in elementary schools is unconstitutional.

Federal appellate court holds Wisconsin school district did not violate Establishment Clause by conducting graduation ceremonies at local church

Doe v. Elmbrook School District (7th Circuit September 9, 2011)

Abstract: In a 2-1 split, a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit has ruled that a school district did not violate the Establishment Clause when it held graduation ceremonies at a local Christian church. The panel's majority affirmed the federal district court's granting of summary judgment in favor of the school district. Although the district court had relied on the coercion test and the primary effect prong of the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the majority determined that the coercion test was not an appropriate analysis here because the challenged activity is not a religious exercise. Instead, it analyzed the school district's actions under the *Lemon* test.

The panel focused on the primary effect and excessive entanglement prongs of the *Lemon* test, concluding that the school district's decision to hold graduation ceremonies at the church led to neither endorsement of religion nor excessive entanglement with it. The majority rejected the plaintiffs' assertion that it should determine whether the holding of such ceremonies in a place of worship, in and of itself, conveys a message of endorsement. It stressed that the analysis under *Lemon* is fact driven, and found that the facts in this case did not support an Establishment Clause violation. "The record before us therefore does not permit a conclusion that the District's choice of venue has the effect of conveying a message of endorsement of the Church or its views or results in an enduring and tangled relationship between the District and the Church."

Facts/Issues: In April 2009, Elmbrook School District (ESD) announced that it intended to hold 2009 graduation ceremonies for two of the school district's high schools at Elmbrook Church. The plaintiffs, a group of parents, students, and taxpayers, filed suit in a Wisconsin federal district court against ESD seeking to enjoin it from holding the ceremonies at the church. The suit also challenged the practice of one of the high school's holding its senior honors night at the church. In June 2009, the court denied the plaintiffs' motion for a preliminary injunction regarding the impending graduation ceremonies. The plaintiffs amended their complaint to request a permanent injunction barring ESD from holding school events at any religious venue

or, alternatively, requiring religious symbols to be covered. The plaintiff also sought a declaratory judgment that the proposed actions are unconstitutional, monetary damages, and attorneys' fees.

The district court granted ESD's motion for summary judgment, denied the plaintiffs' motion, and dismissed the suit. It concluded that conducting the ceremonies at the church did not violate the First Amendment's Establishment Clause, as the practice was not coercive, did not have the primary effect of endorsing religion, and did not lead to excessive entanglement with religion. The court also rejected the argument that the use of government funds to lease the church's facilities constituted an Establishment Clause violation.

Ruling/Rationale: The Seventh Circuit panel affirmed the lower court's decision, with one judge dissenting. The majority rejected the plaintiffs' arguments that ESD's decision to rent the church facilities for the purpose of holding public high school graduation ceremonies violated the Establishment Clause because it coercively imposes religion on graduates, sends a message of ESD's endorsement of religion, and leads to excessive entanglement between government and church.

The panel first addressed the contention that graduates and attendees are coerced into participating in religion on two grounds: (1) they are compelled to enter a "sacred space'"; and (2) attendees are coerced into "view[ing] prominent religious iconography within [the Church], including a cross that continually looms above the dais where the ceremonies take place." The majority conceded, "coerced engagement with religious iconography and messages might take on the nature of a religious exercise or forced inculcation of religion;" but it countered, "the Establishment Clause does not shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe." The majority, based on the record, found "graduates are not forced—even subtly—to participate in any religious exercise . . . or in any other way to subscribe to a particular religion or even to religion in general." The record did not show that graduates "would appear to be, or would feel themselves to be, participating in a religious exercise or subscribing to the beliefs of the Church."

As a result, it concluded that the impressionability of students that is crucial to a coercion test analysis was not relevant to the present case. The majority, therefore, determined that the more appropriate analysis in the present case was the *Lemon* test.

After noting that the plaintiffs had raised a challenge under *Lemon's* secular purpose prong, the majority nevertheless began its analysis with the primary effect prong, which asks whether ESD's actions had the primary effect of endorsing religion. "With respect to the effect prong, we ask, in the context of this case, 'irrespective of government's actual purpose, whether the practice under review in fact conveys a message of endorsement or disapproval.'" The majority rejected the plaintiffs' contention that the court should "approach this case with an eye to determining whether *all* graduation ceremonies held in places of worship *necessarily* convey a message of endorsement."

Instead, it stressed that Establishment Clause jurisprudence requires fact-driven analysis. Citing a number of Seventh Circuit Establishment Clause decisions, the majority made it clear that it

would not and could not frame a *per se* rule because the underlying principles of the First Amendment's religion clauses require the challenged government practice to be "judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." According to the majority, "This fact-specific approach is necessary not only to ensure that permissible church-state relationships are permitted to exist, but also to ensure that we remain vigilant and sensitive to those encounters that do convey a message of state endorsement."

Turning to the evidence, the majority noted the plaintiffs had demonstrated the religious and sectarian nature of the setting. It found no evidence to suggest, however, that ESD had "in any way associated itself with these symbols or with the beliefs expressed by the Church or [...] any of the religious messages." It also noted that a reasonable "observer also might be aware of efforts taken by [ESD] to minimize the religious nature of the setting by securing the removal of non-permanent displays from the dais of the sanctuary, efforts that further distance [ESD] from the Church's message." In addition, the majority emphasized that the Establishment Clause does not require ESD to refrain from establishing a business relationship with a church because some observers are offended by the church's beliefs or religion in general.

The majority concluded that ESD had not sponsored a religious ceremony or display simply by renting the church, stating that "[t]here is no realistic endorsement of religion by the mere act of renting a building belonging to a religious group." After finding that the remainder of the plaintiffs' evidence failed to show that the ESD's actions had the primary effect of endorsing religion, it turned its analysis to the *Lemon's* excessive entanglement prong.

The majority rejected the plaintiffs' argument that ESD's "use of the Church excessively entangles the state with religion by allowing the Church to control the setting and atmosphere of a school ceremony, by embroiling the District in discussions about removing religious symbols from the sanctuary, by using government funds to support the Church and by fostering divisiveness within the school community." It found no evidence that the church or its members attempted to control or influence the setting or the content of the ceremony. It also determined that there was no evidence that ESD used graduation events as a way to promulgate the church's message, concluding any "interaction between the Church and [ESD] regarding the setting is too de minimis to cause any real concern."

The majority agreed with the district court conclusion that "the use of taxpayer funds to rent the Church was not impermissible because it was a standard fee-for-use arrangement." Lastly, it rejected the plaintiffs' "contention that submitting the choice of venue for graduation to an advisory student vote provides an impermissible occasion for creating division along religious lines." It viewed the election as confined to the choice of venue for a secular public high school academic ceremony, and that at no time was the content of the ceremony anything other than secular.

The dissent agreed with the majority that the *Lemon* test was the proper analysis for resolving Establishment Clause cases and that the resolution under that analysis is fact-driven. From there, the dissent took issue with the majority's interpretation of the facts. It stated: "I believe

that conducting a public school graduation ceremony at a church — one that among other things featured staffed information booths laden with religious literature and banners with appeals for children to join 'school ministries'" violates the Establishment Clause.

The dissent repudiated the majority's dismissal of the coercion test, charging that "the Supreme Court's 'coercion cases,' … cannot be meaningfully distinguished—both because endorsement is intrinsically coercive and because there was coerced activity in this case." It argued that the impressionability of students at issue in the graduation prayer cases was also front and center in the present case, concluding "[t]he same problem attends pervasive displays of iconography and proselytizing material at a public secondary school graduation."

Where the majority had found the church environment highly religious and sectarian, the dissent characterized the environment as "pervasively Christian, obviously aimed at nurturing Christian beliefs and gaining new adherents among those who set foot inside the church." As a result, the dissent found, "Regardless of the purpose of school administrators in choosing the location, the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state."

"I conclude," explained the dissent, "that the practice of holding high school graduation ceremonies at Elmbrook Church conveys an impermissible message of endorsement. Such endorsement is inherently coercive, and the practice has had the unfortunate side effect of fostering the very divisiveness that the establishment clause was designed to avoid."

CIVIL AND CONSTITUTIONAL RIGHTS CASES

Federal appellate court rejects former teacher's federal disability claims; she was not "otherwise qualified" for school district jobs

Johnson v. Cleveland City School District (6th Circuit November 15, 2011)

Abstract: A U.S. Court of Appeals for the Sixth Circuit (KY, OH, MI, TN) three-judge panel has ruled, in an unpublished opinion, that a former school district employee failed to prove that the school district did not accommodate her disability in violation of the Americans with Disabilities Act (ADA). The panel also rejected her discriminatory discharge claim. The panel agreed with the lower court that, because the former employee was unable to verbally control "restive" students, she was unable to fulfill an "essential function" of any of the contemplated jobs within the District and therefore was not "otherwise qualified" for the positions. Finding, as had the district court, that this was an element of both claims, the appellate panel affirmed the district court's decision.

Facts/Issues: Sha'Ron Johnson was employed by Cleveland City School District (CCSD). After suffering a spinal cord injury in a car accident Johnson received negligent medical treatment. Johnson developed permanent damage to her spinal cord, causing Cervical Myelopathy. As her condition worsened, CCSD commissioned a "fit for duty examination."

The doctor who conducted the evaluation concluded that Johnson had a disability within the meaning of the ADA and recommended a number of accommodations: (1) No standing for more than one hour per day; (2) No continuous speaking; (3) Alternate sitting, standing, and walking; (4) Minimal stairs; and (5) Use of ambulatory aids such as a cane, and under extreme circumstances, an electrical scooter as needed. In an effort to find a position in which CCSD could provide the accommodations, the school district created the position of "academic interventionist."

After Sharon McDonald was hired as CCSD's a new deputy chief, McDonald determined that Johnson was allocated as teacher at the school where she was assigned. McDonald instructed the principal to assign Johnson to a classroom. Johnson encountered a number of difficulties in fulfilling the assignment and a number accommodations were discussed. When McDonald visited Johnson's classroom, she questioned why Johnson was not teaching. At that point Johnson informed McDonald she was sick, and left. Johnson did not return for the remainder of the semester.

She subsequently filed an administrative complaint with the Ohio Civil Rights Commission (OCRC), charging that CCSD was no longer honoring the ADA classroom restrictions that had been established. OORC rejected the claim, finding Johnson was not disabled, and even if she was, she had not been denied reasonable accommodations.

Over the next several months of discussion over requested accommodations, during which Johnson took a leave of absence, she filed suit in federal district court against CCSD alleging violation of the ADA and several state law claims. CCSD later offered Johnson a number of positions, but informed her that she would have to submit medical clearance because she was returning from a leave of absence. When Johnson failed to provide such clearance, CCSD terminated her employment.

Johnson continued to pursue her lawsuit and also filed an EEOC/OCRC charge for retaliatory discharge. Her federal court complaint was later amended to include the ADA retaliatory discharge claim. The district court granted CCSD summary judgment on the ADA accommodation and discriminatory discharge claims. It found that Johnson had not shown that CCSD had failed to accommodate based on the accommodations initially recommended. The court also found there was no causation evidence to support a retaliatory discharge claim.

The Sixth Circuit affirmed in part and reversed in the part, remanding the case to the district court. On remand, the district court granted CCSD's motion for summary judgment. It held that Johnson's legal complaint failed to raise the retaliatory failure to accommodate claim. Moreover, on the failure to accommodate claim, the court concluded, she had failed to establish that she had requested an objectively reasonable accommodation that CCSD had refused.

Addressing Johnson's requested accommodation that she be excused from a position where she would need to "verbally control resistive students," the district court found it was not a reasonable accommodation for a teacher or counselor at an elementary or middle school. The court stated that all teachers and counselors must deal with students even when misbehaving,

and therefore must be "physically, mentally, and emotionally capable of managing and controlling students in those circumstances." As a result, it held that the ability to control, manage, and discipline students is an "essential function" of a teacher, tutor, or counselor.

Finally, the district court found that Johnson's discriminatory discharge claim failed because her ability to control students was an essential function of her job as a teacher, and if she was unable to fulfill that function she was not "otherwise qualified" for the position as required by the ADA. The court therefore found that Johnson had proposed no reasonable accommodation that would allow her to perform the essential element of discipline, and thus failed to satisfy the qualification element of the claim.

Ruling/Rationale: The Sixth Circuit panel affirmed the district court's grant of summary judgment to CCSD. It briefly disposed of the retaliatory failure to accommodate claim, holding that the content of the amended complaint was "wholly insufficient to put the Defendants on notice of a retaliatory failure to accommodate claim, and we therefore affirm summary judgment on that claim." It then turned to the claim of failure to accommodate.

The panel determined that Johnson's claim stumbled on the second required element of an ADA failure to accommodate claim, i.e., that the plaintiff "is otherwise qualified for the position, with or without reasonable accommodation." It pointed out that, in order to prove this element, the plaintiff has the burden of proving that she can perform the "essential functions" of the job, with or without accommodations.

After reviewing the evidence, the panel concluded that "the new restrictions provided by her doctors—specifically the one preventing her from verbally controlling students—make her no longer qualified to fill a position as a teacher or counselor in the District . . . [b]ecause no set of reasonable accommodations could allow Johnson to perform a job instructing students."

Lastly, the panel concluded that the discriminatory discharge claim failed on the same ground as the failure to accommodate claim: Johnson was unable to satisfy the "otherwise qualified" element because she cannot perform an essential function of the job of teacher, tutor or counselor to control students.

Federal appellate court holds Iowa school district did not violate noncustodial parent's constitutional rights by denying access to children and records

Schmidt v. Des Moines Public Schools (8th Circuit September 14, 2011)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Eighth Circuit has ruled that a school district did not violate a noncustodial parent's substantive due process, procedural due process, or equal protection rights when school officials denied her access to her children during school hours and denied her access to their educational records. The panel concluded that it was not clear that a parent's liberty interest in a child's care, custody and management includes unfettered access to the child during the school day. Further, the scope of that liberty interest can be, as it was here, substantially reduced by a divorce decree, restricting her visitation to a specific schedule and requiring the custodial parent's permission for visitation

outside the schedule. As a result, it ruled that the parent had no fundamental liberty interest to contact her children at school.

The panel also concluded that the procedural due process claim failed because the state court remedies available under the divorce decree were sufficient to address the limited nature of the infringement on her protected liberty interest. Lastly, it rejected the equal protection claim because her rights as the noncustodial parent significantly differed from those of a custodial or married parent.

Facts/Issues: When Lisa and Michael Schmidt divorced, the state court granting the dissolution of marriage decree awarded both joint legal custody of their three children, and gave primary physical custody and care to Michael subject to Lisa's visitation rights. The order provided a general schedule of visitation specifying times when Lisa could exercise her visitation rights during select holidays and school breaks. The order provided for additional visitation only "as mutually agreed to by and between the parties so as not to interfere with the health, education, and welfare of the parties' minor children."

At the time, all three children were students of Des Moines Public Schools (DMPS). DMPS policy allowed parents access to their students during school hours or activities "only so long as this access does not cause or threaten to cause material and substantial disruption to school or school-related activities."

The DMPS policy addressing rights of custodial and non-custodial parents states, "The District will obey all court orders relating to custody issues and parental rights. Therefore, the rights afforded parents under the policy may be limited in any individual situation." Regarding releasing students from school to a noncustodial parent, the policy provides: "it shall be the custodial parent's responsibility to provide the school district with documentation regarding any restrictions applicable to the non-custodial parent." It defines a non-custodial parent as "a natural parent . . . who does not presently have primary responsibility for the day-to-day care and control of the student."

On several occasions, Lisa attempted to visit the students at school and was denied. On one occasion, she was denied information when she asked why one child was absent from school. A swim coach told her to talk to Michael about her child's swimming activities. After these instances, DMPS General Counsel Elizabeth Nigut advised school officials that, under the divorce decree, any visitation beyond that agreed to in the decree would have to be approved beforehand by Michael. Nigut also advise that, as Lisa was "is prone to become demonstrative in a negative way if she cannot see the kids," officials could advise her that the police would be called if she did not leave the school and continued to behave inappropriately.

Lisa was informed of the schools' policy to require Michael's consent to any visitation sought by plaintiff during school hours. She and Michael were also encouraged to "determine what are mutually agreeable visitation periods" and to "advise the school to the extent the visitation is to occur during the school day."

Lisa subsequently filed suit in federal district court against DMPS. Both parties sought summary judgment. The district court granted DMPS summary judgment, holding that DMPS did not violate the non-custodial parent's substantive due process, procedural due process, and equal protection rights under either the federal or state constitutions by refusing to allow her access to her children during school hours.

Ruling/Rationale: The Eighth Circuit panel unanimously affirmed the district court's decision. Analyzing Schmidt's substantive due process claim first, the panel rejected her assertion that school officials violated her fundamental liberty interest in the care, custody, and management of her children when they denied her access to the children during school hours on two grounds. First, citing a number of federal court decisions, including *Meadows v. Lake Travis Ind. Sch. Dist.*, 397 F. App'x 1 (5th Cir. 2010) (*per curiam*), it pointed out that it is unclear whether a parent's fundamental liberty interest in the care, custody, and management of her children entitles a parent to "unfettered access to the children during a school day." Second, regardless of the scope of that liberty interest, it was substantially reduced by the divorce decree, which limited her visitation with the children to a specific schedule and allowed her to exercise visitation outside that schedule only with her ex-husband's assent. The panel, therefore, concluded that Schmidt had no fundamental liberty interest in contacting her children at their schools.

The panel also rejected Schmidt's contention that school officials violated her substantive due process rights because they misconstrued the divorce decree, the restrictions of which did not apply to visitation while the children are at school. The panel found that even if she was correct, the school officials' conduct was not the sort arbitrary action that would give rise to a substantive due process claim. Instead, it found that school officials had construed the court orders in regard to the divorce in a reasonable manner as prohibiting her from interrupting the children's school day without her ex-husband's permission. The panel stated: "The doctrine of substantive due process is reserved for truly extraordinary and egregious cases; it does not forbid 'reasonable, though possibly erroneous, legal interpretation.'" The panel then concluded that the additional deprivations alleged in Schmidt's substantive due process claim — that the school failed to provide her with schoolwork and information about her children's attendance and athletic activities — were so minor as to not rise to level of a substantive due process violation.

As to the procedural due process claim, the panel found that the remedies available in state court to modify the divorce decree provisions regarding visitation were adequate to satisfy procedural due process. Lastly, it rejected the equal protection claim because as the noncustodial parent she was not in a similar position to that of a custodial parent or a married one: "Schmidt's rights under state law and her role in the children's lives thus vary significantly from the rights and role afforded to Michael Schmidt or to a typical married parent."

Federal appellate court rules female basketball players' Title IX disparity claims may go forward

Parker v. Franklin County Community School Corporation (7th Circuit January 31, 2012)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Seventh Circuit has ruled unanimously that two female basketball players have presented sufficient evidence for trial on their Title IX claim of denial of equal athletic opportunity against several Indiana school districts based on disparity in scheduling boys' and girls' basketball games. The panel also found that the school districts were not entitled to Eleventh Amendment sovereign immunity from the players' equal protection claim based on the scheduling disparity.

The appellate panel concluded that the athletic conference schedule, which resulted in a disproportionate number of girls' games being scheduled for week nights placed female student-athletes at a significant academic disadvantage, and resulted in lower school and community support at games, as well as feelings of inferiority and "second class status." In regard to the equal protection claim, the panel rejected the school districts' argument that they are arms of the state and, therefore, entitled to sovereign immunity from the claim under the Eleventh Amendment.

***Facts/Issues*:** The mothers of two female basketball players filed suit in federal district court against 14 Indiana school districts, including their own district, Franklin County Community School Corporation ("Franklin"), alleging that boys' basketball teams were disproportionately scheduled to play on the preferred dates of Friday and Saturday nights – "primetime." They claimed that the defendants' action in creating such a schedule violated female players' rights under Title IX and the Fourteenth Amendment's Equal Protection Clause.

Of the fourteen school defendants named as defendants, six comprise the schools within the Eastern Indiana Athletic Conference (EIAC). The other eight schools are nonconference opponents. During the 2009-2010 basketball season, nearly 95% of the Franklin boys' varsity basketball games, but less than 53% percent of the Franklin girls' games, were played in primetime. During the 2007-2009 seasons, the disparity was 95% to 47%, respectively.

In April 2007, one of the plaintiffs asked Franklin Athletic Director Beth Foster to allow the girls' basketball team to play games in primetime on an equal basis with the boys' team. Foster responded that the dates, times, and locations of the basketball games were all governed by contracts for either a two- or four-year period, and once defendants' athletic directors agreed to a schedule and signed a contract, the schools generally would maintain those same game days and times in subsequent years. Foster testified that she has attempted to increase the number of girls' basketball games played in the primetime spots, but athletic directors in the EIAC have refused. Foster was met with resistance from the other school athletic directors in the EIAC when she attempted to address gender equity.

The district court granted the school districts' motion for summary judgment on the Section 1983 claims on the basis that the defendants were arms of the state and entitled to sovereign immunity under the Eleventh Amendment. Subsequently, the court granted the defendants'

summary judgment motion on the plaintiffs' Title IX claims, finding as a matter of law that their treatment did not result in a disparity so substantial that it denied them equality of athletic opportunity.

Ruling/Rationale: The Seventh Circuit panel vacated the district court's grant of summary judgment in favor of the defendants on the Title IX and equal protection claims, and remanded the case to the district court for further proceedings consistent with the panel's opinion.

Addressing the Title IX claim first, the panel determined that the plaintiffs had brought an equal treatment claim based on the disparity of girls' games being scheduled on "primetime nights," versus boys' games. It cited federal regulations and a long-standing policy interpretation, which the parties had agreed was entitled to deference. That policy interpretation is divided into three sections: (1) compliance in financial assistance (scholarships) based on athletic ability; (2) equivalence in other athletic benefits and opportunities (equal treatment); and (3) effective accommodation of student interest and abilities (accommodation). The panel found that the defendants had focused their defense on the "safe harbors" of accommodation, which are irrelevant to the equal treatment claim: "The defendants' only response to the disparity in scheduling is that it's not substantial enough to establish a Title IX violation."

While the panel agreed with the defendants that Title IX "requires a systemic, substantial disparity that amounts to a denial of equal opportunity before finding a violation of the statute," it noted that at least two federal appellate circuits and a number of federal district courts have determined that plaintiffs have made successful equal treatment claims. The panel stressed that its analysis of the plaintiffs' claim focused on whether the difference in scheduling had a negative impact on the female student-athletes, and whether that disparity was substantial enough to deny females equality of athletic opportunity.

While taking into account that disadvantaging one sex in one part of a school's athletic program can be offset by a comparable advantage to that sex in another area, the panel found the defendants had not pointed to any areas in which female athletes receive comparably better treatment than male athletes at their schools to offset any disadvantage resulting from the defendants' basketball scheduling practices. As a result, it considered whether the sport-specific disparity is substantial enough to deny equal athletic opportunity, "which [the panel] believe[s] includes equivalent opportunity to compete before audiences."

The panel noted that the scheduling disparity was systemic, with the evidence showing that Franklin County had maintained it for several years despite its receipt of an OCR sent to IHSAA in 1997 indicating that the OCR viewed the difference in boys' and girls' basketball schedules as substantial. In that letter, OCR had warned that schools "could be found by OCR to be out of compliance with the scheduling of games and practice times component of the athletic provisions of Title IX if they reserve Friday nights for boys basketball games and schedule girls basketball games on other nights."

While acknowledging that Franklin had taken steps to remedy the disparity, the panel found, "despite Franklin's efforts, a trier of fact could determine that the present disparity in scheduling has the cyclical effect that stifles community support, prevents the development of

a fan base, and discourages females from participating in a traditionally male-dominated sport." It added, "The disparity in scheduling and resulting conflict that the girls face between basketball and academics may discourage them from participating in basketball altogether."

Based on these harms suffered by the Franklin girls' basketball team because of the obvious disparity in scheduling, the panel concluded that the plaintiffs had presented sufficient evidence for trial to determine whether the disparity and resulting harm in this case are substantial enough to deny equal athletic opportunity.

The panel rejected the defendants' argument that with the exception of Franklin County, the other school district defendants should be dismissed from the suit "because neither plaintiff attended those schools and thus, they were not the direct beneficiaries of the federal funds flowing to those schools." It found the defendants had waived this argument by failing developing it on appeal. Instead, it found the non-Franklin defendants were necessary parties in the scheduling of games, point out that the "defendants jointly agree on the schedules and Franklin cannot unilaterally change the schedules."

However, the panel concluded that the plaintiffs could not seek "monetary damages against the non-Franklin schools because their argument focuses on the harm suffered as a result of *Franklin's* overall disparate scheduling practices." It found that while the "non-Franklin schools may have contributed to the plaintiffs' harm in scheduling the one or two games those defendants played against Franklin, Title IX requires examination of the overall scheduling practices of a school and the resulting harm from any disparity; that examination is missing here as to the non-Franklin defendants."

Turning to the equal protection claim, the panel concluded that the district court had erred in finding that the defendant school districts were entitled to Eleventh Amendment sovereign immunity. It rejected the defendants' argument "that they are 'arms of the state,' not independent political subdivisions, and as such, are not 'persons' for the purpose of § 1983 and not subject to suit."

Citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989), the panel found that "as local governmental units, the school corporations are clearly 'persons' within the ambit of § 1983," and subject to suit. Because the district court had determined that the defendants were entitled to sovereign immunity, it did not address whether any genuine issue of material fact existed as to the plaintiffs' equal protection claims. The panel remanded the claims to the district court to consider this issue.

Federal appellate court rules Wisconsin district did not violate former student's due process rights by banning him from school property

Hannemann v. Southern Door County School District (7th Circuit March 15, 2012)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Seventh Circuit has ruled that a school district did not violate a former student's procedural due process by indefinitely banning him from school property. The panel concluded that the former student, as member of

the public, did not have a protected liberty interest in accessing school grounds and, therefore, the school district had no duty to provide him with due process related to imposing the ban.

The panel found that the ban did not violate a protected liberty interest based on damage to his "good name, reputation, honor, or integrity," plus loss of a previously held right under state law. It also found that the ban did not interfere with his right to intrastate travel, violating a liberty interest arising out of the Fourteenth Amendment's Due Process Clause. Lastly, it noted that while qualified immunity does not applied to an action for injunctive relief, all defendants, including the individual ones, prevailed on the merits of the suit.

During the 2005-2006 school year, Derek Hannemann was expelled until his 21st birthday from Southern Door County High School (SDCHS) for violation of Southern Door County School District's (SDCSD) weapons policy. He was reinstated for the 2006-2007 school year on the condition there were no further "incidents of gross misconduct described in the student handbook."

After an incident April 2007, another in May 2007, and a third involving punching a student, Hannemann was suspended and then permanently expelled. Although the Wisconsin Department of Public Instruction (WDPI) overturned the expulsion, Hannemann never returned to SDCHS, in part because of his enrollment in a private school and because SDCSD had indicated it would appeal WDPI's decision.

Even though Hannemann was no longer a student at SDCHS, he continued to enter the campus to pick up friends and use the weight room. In May 2008, a teacher observed him using the weight room. Hannemann subsequently received a letter from school officials that he was "no longer to enter upon the property of the Southern Door County School district for any purpose effective immediately." The letter explained that any entry would be considered a trespass. Hannemann was not provided with notice or opportunity to be heard concerning this ban.

Hannemann filed suit against SDCSD and various school officials alleging claims dating backing to the first expulsion, reinstatement and subsequent expulsion. Before the Seventh Circuit, Hannemann only appealed the district court's grant of summary judgment on his procedural due process claim for equitable relief from the ban from school property.

The district court held that a school is permitted to ban indefinitely a non-student from its property because members of the public have no constitutional right to access public schools. The court also held that the right to intrastate travel is not unlimited and does not provide a right to access school property. Finally, the court held that the individual defendants are entitled to qualified immunity as an alternative basis for granting summary judgment as to them because even if the court erred by failing to find a constitutional violation, the law was not clearly established.

Ruling/Rationale: The Seventh Circuit panel affirmed the lower court's decision. It rejected Hannemann's contention that school officials had violated his right to procedural due process by banning him from school property without notice and an opportunity to be heard. Noting that in the lower court he had asserted his status as a student, the panel made it clear he had

lost such status when he was expelled. It acknowledged that Hannemann had abandoned the "student status" portion of his argument on appeal, instead arguing the violation of due process right as a member of the public.

The panel agreed with the district court's framing of the issue "as whether a school district can constitutionally ban a non-student from its property until further notice without a hearing." It stated that when a party asserts a procedural due process claim, the court engages in a two-fold analysis: (1) the court determines whether the individual was deprived of a protected interest, either in liberty or property; and (2) if the individual has established a protected interest, the court must determine what type of process is due.

Before determining if Hannemann had established that he has a protected interest, the panel, like the district court, concluded that that the ban from school property was indefinite but not permanent. It then examined his claim that the ban resulted in a deprivation of a protected liberty interest because it damaged his "good name, reputation, honor, or integrity," known as the "stigma plus" framework. It concluded that Hannemann had waived the stigma plus argument because he failed to raise it in the district court based on his status as a member of the general public and only raised it on appeal for the first time.

In addition, the panel found that even if he had not waived the argument, Hannemann's claim would fail on its merits because he would be unable to prove either the "stigma" or "plus" prongs. Regarding stigma, Hannemann "had not identified any statements made by the school district that would constitute defamatory statements if false." Regarding the plus element, he had not shown "any defamatory statements have caused an alteration in his legal status." The panel emphasized that because SDCSD retained the discretion to bar members of the public from school property, "Hannemann is unable to establish the loss of a previously recognized right." It also found "[c]ase law … supports our holding that members of the public do not have a constitutional right to access school property."

The panel then turned to Hannemann's contention that a liberty interest arose from the Due Process Clause itself based on his right to intrastate travel. "We agree," stated the panel, "with the district court's well-reasoned analysis, and we hold that Hannemann's ban from school property does not violate his right to intrastate travel." It concluded that Hannemann had failed to demonstrate that "the ban actually violates his right to intrastate travel" because there was no allegation the ban "inhibits his ability to move from place to place within Door County." The panel pointed out that while Hannemann argued the ban prevented him from entering school property to participate in certain activities, he had argued that the ban prevented him from travelling through parts of the county to participate in those activities.

The panel also determined, "[e]ven if we construe Hannemann's intrastate travel claim as arguing that he has the right to enter public facilities and remain there, his claim fares no better. . . The right to intrastate travel protects the right to move from place to place, not the right to access certain public places."

The panel rejected Hannemann's argument based on the U.S. Supreme Court's decision in *City of Chicago v. Morales* 527 U.S. 41(1999), stating "the freedom to loiter for innocent purposes is

part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." The panel did not view this "dicta as compelling our recognition of a liberty interest in unfettered access to school grounds." It also noted that even if the panel "recognized some liberty interest in the right to loiter, it would not follow that this right confers unfettered access to all public places." The panel, therefore, concluded it was "not prepared to recognize a right for members of the public to loiter on school grounds based on the broad language in *Morales."*

Finally, while acknowledging that qualified immunity was not available to individual defendants where a plaintiff seeks injunctive relief, the panel found that the defendants all prevailed on the merits. "Hannemann has failed to establish that defendants' imposition of an indefinite ban from school grounds deprived him of any constitutionally protected interests," the court explained.

Federal appellate court finds name calling and teasing did not constitute peer sexual harassment under Title IX

Sanches v. Carrollton-Farmers Branch Independent School District (5th Circuit July 13, 2011)

Abstract: A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit (LA, TX, MS) has affirmed a Texas federal district court's grant of summary judgment in favor of a school district on a student's claims of Title IX peer sexual harassment and retaliation, and violation of her equal protection rights based on peer sexual harassment. The panel characterized the suit as "… nothing more than a dispute, fueled by a disgruntled cheerleader mom, over whether her daughter should have made the squad," and "… a petty squabble, masquerading as a civil rights matter, that has no place in federal court or any other court."

Facts/Issues: The suit centers around a dispute between Samantha Sanches and J.H., both students and cheerleaders at Creekview High School (CHS), and a dispute between Sanches' mother, Liz Laningham, and CHS officials over J.H.'s treatment of Sanches and her failure to make the varsity cheerleading squad. J.H. believed that Langingham had reported her to CHS officials for posting inappropriate photos on *Facebook* and was upset that Sanches had begun dating J.H.'s ex-boyfriend. Teasing, behavior bordering on bullying, and name calling by J.H., including the term "ho," ensued.

During this, Sanches tried out for the varsity cheerleading squad of which J.H. was a member. Laningham became involved in the tryout. Her attorney sent a six page letter to the Carrollton-Farmers Branch Independent School District's (CFBISD) superintendent that included a litany of complaints about CHS's administration. The superintendent, through the school district's attorney, responded to the letter before the tryouts began. The letter informed Laningham that the tryouts would proceed as scheduled and that CFBISD believed the process was fair and unbiased. However, CHS officials made changes on their own to create as level a playing field as possible.

Sanches failed to make the varsity cheerleading squad. At that point, Laningham intensified her complaints against J.H. She alleged Sanches was the victim of sexual harassment on three occasions. CHS's principal investigated those incidents, finding no grounds for any action.

Laningham continued her barrage of accusations against J.H. After unsuccessfully exhausting CFBISD's administrative process to obtain a spot for Sanches on the varsity cheerleading squad, Sanches eventually filed suit in federal district court against CFBISD.

The suit raised four claims: (1) violation of Title IX based on peer sexual harassment; (2) violation of Sanches' equal protection rights based on peer sexual harassment; (3) retaliation for exercising Title IX rights; and (4) retaliation for complaining about the harassment. The district court granted summary judgment in favor of CFBISD on all four claims.

Ruling/Rationale: The Fifth Circuit panel affirmed the lower court's decision. In regard to the Title IX peer harassment claim, the panel concluded: "As a matter of law, J.H.'s conduct was not sexual harassment, it was not severe, pervasive, or objectively unreasonable, and the school district was not deliberately indifferent." It found that none of J.H.'s conduct appeared to be based on sex, but was motivated by personal animus, apparently resulting from Sanches dating J.H.'s ex-boyfriend.

The panel found that even if J.H.'s conduct was based on sex it was not severe, pervasive, or objectively unreasonable. For conduct to be actionable under Title IX, "the harassment must be more than the sort of teasing and bullying that generally takes place in schools," explained the panel. Because the standard was an objective, not a subjective one, the fact that Sanches was sincerely upset was not relevant. "J.H.'s conduct may have been inappropriate and immature and may have hurt Sanches's feelings and embarrassed her, but it was not severe, pervasive, and objectively unreasonable."

The panel also concluded that CFBISD was not deliberately indifferent to the alleged harassment. It rejected Sanches' arguments asserting that the school district's response was unreasonable: (1) the administration conducted sham investigations that did not remedy the harassment; and (2) CHS did not follow the CFBISD's procedures for reporting sexual harassment. The panel said, "We emphatically decline to say that the district's decision not to place Sanches on the cheerleading squad—the very source of her troubles—constitutes deliberate indifference to any harassment."

The panel determined that CFBISD's failure to follow its own procedures regarding sexual harassment complaints does not establish the requisite deliberate indifference under Title IX. Citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), the panel explained that the U.S. Supreme Court has never held "that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements."

The panel found that the equal protection claim based on sexual harassment failed for the same reasons that the Title IX claim did. Lastly, it disposed of the retaliation claims saying, "Because Sanches has failed to point to any evidence that the district retaliated against her, we affirm summary judgment on this claim."

RECENT KENTUCKY CASES ON EDUCATION

Carter v. Smith **(2010-SC-000295-DG; May 2012) Kentucky Supreme Court**

A school board met in executive session under one of the exceptions to Kentucky's Open Meetings Law to discuss the resignation of the superintendent and his subsequent employment under a consulting contract. A citizen sued, claiming the meeting was illegal and that the contract was thus void.

Held: The exception to the Open Meeting Law allowing for discussion of some individual personnel matters in closed session is to be narrowly construed, and does not apply to discussions of a resignation or of the employment of an independent contractor.

Drummond v. Todd County Board of Education **349 S.W.3d 316 (Ky.App. 2011)**

A teacher was acquitted on criminal charges of having an inappropriate sexual relationship with a student. At the conclusion of his criminal trial he was fired by the superintendent. He challenged his dismissal.

Held: The standard of proof differs between the evidence necessary to support a conviction criminal charge and an action to support termination of a tenured teacher. The facts that need to be proven in each case may differ as well. It was legally permissible to dismiss Drummond as a teacher even after his acquittal on criminal charges involving the same incident.

Patton v Pollard **(2010-CA-001404-MR; December, 2011) Kentucky Court of Appeals**

A tenured teacher had her contract of employment suspended pursuant to a reduction in force. She claimed the action was in retaliation for her written response to a reprimand she had received, and was thus in violation of the Kentucky "Whistleblower Act". The trial court entered summary judgment in favor of the school district.

Held: The claim of retaliation was improperly dismissed as part of a summary judgment entered by the trial court. The teacher was entitled to present evidence to a jury in support the claim of retaliation.

Turner v. Nelson **342 S.W.3d 866 (Ky. 2011)**

The parent of an elementary school student sued the child's teacher, claiming that the teacher was aware of sexual abuse of her child by another student and failed to report the abuse to the state social services agency as required by law.

Held: The statute requiring the reporting of abuse by public school teachers covers only allegations of abuse by adults, and does not mandate reporting of allegations child-to-child abuse, when the teacher has no reasonable basis to believe the abuse has occurred.

CASE OF THE YEAR – Runner-up

Arkansas district sued after student is cut from high school basketball team

The mother of a student cut from the boys' basketball team at Maumelle High School (MHS) has filed suit against MHS, the Pulaski County Special School District (PCSSD), and the state. The suit charges that the student made the team after two tryouts in August 2011, but after three months of practice, he and eight other players were replaced when the coaches held a third tryout for football players transitioning to basketball.

The suit states: "…the deprivation of the right to a full and complete education which includes competition in sports and consequently athletic scholarships impairs [her son] of a property right guaranteed under both the U.S. and State Constitutions." The parent contends that holding a third tryout violated her student's equal protection right, because it is not the same method used by girls' teams when they pick their squads.

The suit also alleges that the basketball coaches are not certified or qualified to coach, and therefore not competent to decide who makes the team. In addition, it claims the student was not given the opportunity to appeal his dismissal from the team, which amounts to a due process violation.

Attorney Jay Bequette, who is representing PCSSD, counters that the U.S. Court of Appeals for the Eighth Circuit has never recognized a student's due process right to participate in extra-curricular activities. "The simple issue here is whether or not a student has a right to participate in extra-curricular activities; be it band, choir or whatever," Bequette said.

PCCSD's legal response to the suit points out that a prior Eighth Circuit ruling says: "There is no clearly established right of parents to have their children compete in interscholastic athletics." Bequette also contends that the claim that Maumelle's coaches are not qualified is a matter for the Arkansas Department of Education, not the district, and there was no equal rights amendment violation because the student is male.

Editor's note: The mother is an attorney; the child's father is an attorney. The mother has state tax collection litigation pending against her, along with a repossession action seeking to repossess a pair of 6.5 carat diamond earrings. (I just found this to be interesting!)

CASE OF THE YEAR

Federal appellate court hears arguments in suit over Pennsylvania district's ban on "I ♥ Boobies!" bracelets

The Morning Call reports that Attorney John E. Freund, representing Easton Area School District (EASD), told a three-judge panel of the U.S. Court of Appeals for the Third Circuit (DE, NJ, PA, VI) during oral argument that school officials and not a federal judge are in the best position to decide whether slogans like "I ♥ Boobies!" should be banned in the classroom. Freund argued to the panel that by stripping Easton Area Middle School Principal Angela DiVietro of the ability to make that decision, a federal district judge "opened the school gate to a flood of sexual double entendres."

The attorney for the students disciplined for defying the ban, on the other hand, told the panel that the intent of the message and the context in which it is received are key considerations best made by the courts. Mary Catherine Roper, an attorney for the American Civil Liberties Union, arguing on behalf of the students said because the slogan "I ♥ Boobies!" is part of a popular nationwide campaign to increase awareness of breast cancer among young people, it should not be dismissed as lewd and vulgar even if middle school boys find it titillating.

EASD is asking the Third Circuit panel to reverse a lower court's April 2011 decision ordering the district not to enforce the ban. The case has attracted national attention as other schools grapple with similar questions over the bracelets. In February, a federal judge in Wisconsin reached a decision that administrators had properly banned the bracelets, opposite to U.S. District Judge Mary A. McLaughlin's finding in the Easton Area case.

Central to the decision before the panel is how two landmark U.S. Supreme Court decisions outlining exceptions to the First Amendment in schools apply to the EASD case. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that school officials violated the First Amendment by suspending students who wore black armbands to protest the Vietnam War.

The Supreme Court held that school officials may restrict student speech only when they can show a constitutionally valid reason aside from a desire to avoid conflict over an unpopular point of view. One such reason, it held, was the danger of a substantial disruption, and Easton school officials argued they had seen evidence the "I ♥ Boobies!" bracelets were encouraging boys to sexually harass girls.

Freund argued that while there had been no widespread disruption, the denial of educational opportunities to a single student is enough to warrant restrictions. He added that the court's decision allows school officials to predict disruptions as justification to restrict student speech. "School officials are not required to wait until the horse leaves the barn before closing the door," Freund said.

Freund conceded that the high court's decision in *Bethel School District v. Fraser* better fits the facts of the EASD case. In *Fraser*, the Supreme Court found school officials were justified in suspending a high school student for a student government campaign speech rife with sexual metaphors. It held that school officials may make restrictions on student speech regardless of the viewpoint being expressed when the words are lewd or vulgar.

Freund argued that under *Tinker*, the lower court judge should have deferred to EASD officials' judgment, instead of reaching "the incredible conclusion that there was no sexual meaning" in the slogan "I ♥ Boobies!"

Roper countered that the Supreme Court in *Fraser* found that a speaker's intent is key to understanding the context of a message. The student at the heart of the *Fraser* case admitted he intended to be offensive in an attempt to build a rapport with schoolmates, Roper said. "The question is what does 'I ♥ Boobies!' mean when it is seen on a breast cancer awareness bracelet?" she asked.

Judge Joseph A. Greenaway, one the three panel members that also included Judge Thomas M. Hardiman, and Judge Morton I. Greenberg, noted that the same message can have different meanings to different people. "Eleven-, 12-, 13-year-old boys might have a different understanding of what it means," he said. Under an objective analysis, Roper responded, the slogan cannot be seen as offensive. "Boobies," she said, is a child's term for breasts. "It's not a sexual term. It's a step above 'wee-wee,'" she said.

Greenaway and Hardiman asked Roper how the schools and courts should regard bracelets designed to raise awareness of testicular cancer and other diseases that refer to parts of the male anatomy. Roper replied that in the context of cancer awareness, she did not have any indication the slogans were intended to be sexual. The ♥ symbol is not intended to convey sexual attraction to breasts, Roper said. "If these girls had been wearing T-shirts that said 'Feel my boobies,' we would have a very different case."