

CHALLENGED DRESS CODE
PROHIBITED CLOTHING WITH OFFENSIVE ILLUSTRATIONS

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To what extent can public recreation programs regulate attire which many people might consider offensive? To the extent that one's attire constitutes symbolic speech, it may be protected under the First Amendment. Such constitutional protection, however, is not absolute, particularly where the government program takes place in a controlled educational environment analogous to a public school setting. Under such circumstances, the level of judicial scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed.

The U.S. Supreme Court has found that educators have an essential role in regulating school affairs and establishing appropriate standards of conduct. Moreover, the Supreme Court has held that a school "need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." According to the Court, school boards, not federal courts, have the authority to decide what constitutes appropriate behavior and dress in public schools.

In the case of *Canady v. Bossier Parish School Board*, No. 99-31318 (5th Cir./2001), the federal appeals court found that a school board's rule implementing a mandatory school uniform policy did not violate the First Amendment rights of its students. In reaching this determination, the federal appeals court cited the following general legal principles which courts use to determine "whether a person's choice of attire qualifies as speech protected by the First Amendment" or "choice of clothing is a matter of personal taste or style and is not afforded First Amendment protection";

While a person's choice of clothing may be predicated solely on considerations of style and comfort, an individual's choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter.

The Supreme Court recognizes that conduct coupled with communicative content raises First Amendment concerns. However, the First Amendment does not safeguard a limitless variety of behavior. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we must ask whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be

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In determining whether one's choice of clothing contains an intent to communicate a "particularized message" which is "understood by those who viewed it," courts will "look to the particular activity, combined with the factual context and environment in which it was undertaken":

A person's choice of clothing is infused with intentional expression on many levels. In some instances, clothing functions as pure speech. A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues. Words printed on clothing qualify as pure speech and are protected under the First Amendment.

Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. Individuals regularly use their clothing to express ideas and opinions... The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be understood by those intended to view it.

Finally, students in particular often choose their attire with the intent to signify the social group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment. While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable affect, whether positive or negative, on a young person's social development. Although this sort of expression may not convey a particularized message to warrant First Amendment protection in every instance, we cannot declare that expression of one's identity and affiliation to unique social groups through choice of clothing will never amount to protected speech.

In the *Boroff* opinion described herein, the federal appeals court found no such evidence that the T-shirt at issue was "perceived to express any particular political or religious viewpoint." As a result, the federal appeals court upheld the school's implementation of its dress code prohibiting "clothing with offensive illustrations, drug, alcohol, or tobacco slogans."

PROMOTION OF DISRUPTIVE VALUES?

In the case of *Boroff v. Van Wert City Board of Education*, No. 98-3869 (6th Cir. 2000), Van Wert (Ohio) High School administrators told Nicholas Boroff that he was not allowed to wear "Marilyn Manson" T-shirts to school. In response, Boroff initiated a federal civil rights action, alleging that the administrators' refusal to let him wear the T-shirts violated his rights under the First Amendment. The facts of the case were as follows:

This dispute arises out of a high school student's desire to wear "Marilyn Manson" T-shirts to school, and the school's opposing desire to prohibit those

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T-shirts. Marilyn Manson is the stage name of "goth" rock performer Brian Warner, and also the name of the band in which he is the lead singer.

The Encarta World English Dictionary (2000) defines "goth" as "a style of popular music that combines elements of heavy metal with punk" and also "a style of fashion . . . characterized by black clothes, heavy silver jewelry, black eye make-up and lipstick, and often pale face make-up".

Band members take the first part of their stage names from a famous model or celebrity, such as Marilyn Monroe, Madonna, or Twiggy, and the second part from a notorious serial killer, such as Charles Manson, John Wayne Gacy, or Richard Ramirez. Marilyn Manson (the individual) is popularly regarded as a worshiper of Satan, which he has denied. He is also widely regarded as a user of illegal drugs, which he has not denied. In fact, one of his songs is titled "I Don't Like the Drugs (But the Drugs Like Me)."

On August 29, 1997, Boroff, then a senior at Van Wert High School, went to school wearing a "Marilyn Manson" T-shirt. The front of the T-shirt depicted a three-faced Jesus, accompanied by the words "See No Truth. Hear No Truth. Speak No Truth." On the back of the shirt, the word "BELIEVE" was spelled out in capital letters, with the letters "LIE" highlighted. Marilyn Manson's name (although not his picture) was displayed prominently on the front of the shirt. Though the origin of the T-shirt is unknown, the distorted portrayal of Jesus seems to have been created in an effort to illustrate the band's hit album "AntiChrist Superstar."

At the time, Van Wert High School had in effect a "Dress and Grooming" policy that provided that "clothing with offensive illustrations, drug, alcohol, or tobacco slogans . . . are not acceptable." Chief Principal's Aide David Froelich told Boroff that his shirt was offensive and gave him the choice of turning the shirt inside-out, going home and changing, or leaving and being considered truant. Boroff left school.

On September 4, 1997, which was the next school day, Boroff wore another Marilyn Manson T-shirt to school. Boroff and his mother met that day with Froelich, Principal William Clifton, and Superintendent John Basinger. Basinger told the Boroffs that students would not be permitted to wear Marilyn Manson T-shirts on school grounds. Undaunted, Boroff wore different Marilyn Manson T-shirts on each of the next three school days, September 5, 8, and 9, 1997. The shirts featured pictures of Marilyn Manson, whose appearance can fairly be described as ghoulish and creepy. Each day, Boroff was told that he would not be permitted to attend school while wearing the T-shirts. Boroff did not attend school for the next four days following September 9, 1997.

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In his complaint, Boroff alleged that the administrators' refusal to allow him to wear Marilyn Manson T-shirts in school violated his First Amendment right to free expression. The federal district court rejected Boroff's First Amendment claim and entered summary judgment in favor of the Van Wert City Board of Education and each of the school administrators who were named as defendants.

In rejecting Boroff's claims, the federal district court noted that "[a] school may prohibit a student from wearing a T-shirt that is offensive, but not obscene, on school grounds, even if the T-shirt has not been shown to cause a substantial disruption of the academic program." Applying this principle to the facts of the case, the district court held that "the School did not act in a manifestly unreasonable manner in finding the T-shirts offensive and in enforcing its dress code."

Boroff appealed this decision. On appeal, Boroff claimed that "the administrators' decision that the T-shirts are offensive was manifestly unreasonable and unsupported by the evidence." Specifically, Boroff argued, the School had violated his First Amendment rights because there was "no evidence that a substantial disruption would arise from his wearing the T-shirts."

FIRST AMENDMENT CLAIM

In addressing Boroff's First Amendment claim, the federal appeals court cited the following "precepts" from precedent setting opinions on point by the U.S. Supreme Court:

"It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), the First Amendment rights of students in the public schools must be "applied in light of the special characteristics of the school environment." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

The federal appeals court then applied these controlling "precepts" from "the *Tinker-Fraser-Kuhlmeier* trilogy to the facts of this case." As described by the appeals court, "[t]he standard for reviewing the suppression of vulgar or plainly offensive speech requires a showing of a reasonable forecast of substantial disruption in school activities."

On appeal, Boroff had claimed the T-shirts were not "offensive." In so doing, the appeals court noted that Boroff relied "to a great extent on evidence that similar T-shirts promoting other bands, such as Slayer and Megadeth, were not prohibited, and also on evidence that one other

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student was not prohibited from carrying a backpack that donned three 'Marilyn Manson' patches."

On the other hand, the appeals court noted that the School "found the Marilyn Manson T-shirts to be offensive because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school." In particular, the court referenced the following statements and information submitted by Principal Clifton:

Specifically, Clifton found the "three-headed Jesus" T-shirt to be offensive because of the "See No Truth. Hear No Truth. Speak No Truth." mantra on the front, and because of the obvious implication of the word "BELIEVE" with "LIE" highlighted on the back. The principal specifically stated that the distorted Jesus figure was offensive, because "[m]ocking any religious figure is contrary to our educational mission which is to be respectful of others and others' beliefs."

The other T-shirts were treated with equal disapproval. Clifton went on to explain the reasoning behind the School's prohibition of the T-shirts generally:

Although I do not know if [Boroff] intends to communicate anything when wearing the Marilyn Manson t-shirts, I believe that the Marilyn Manson t-shirts can reasonably be considered a communication agreeing with or approving of the views espoused by Marilyn Manson in its lyrics and those views which have been associated to Marilyn Manson through articles in the press.

I find some of the Marilyn Manson lyrics and some of the views associated with Marilyn Manson as reported in articles in the news and entertainment press offensive to our basic educational mission at Van Wert High School. Therefore, I believe that all of the Marilyn Manson t-shirts . . . are offensive to and inconsistent with our educational mission at Van Wert High School.

Furthermore, Clifton quotes some of the lyrics from Marilyn Manson songs that the School finds offensive, which include (but certainly are not limited to) lines such as, "you can kill yourself now because you're dead in my mind," "let's jump upon the sharp swords/and cut away our smiles/without the threat of death/there's no reason to live at all,"...

The principal attested that those types of lyrics were contrary to the school mission and goal of establishing "a common core of values that include . . . human dignity and worth . . . self respect, and responsibility," and also the goal of instilling "into the students, an understanding and appreciation of the ideals of

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democracy and help them to be diligent and competent in the performance of their obligations as citizens."

Clifton also submitted to the district court magazine articles that portray Marilyn Manson as having a "pro-drug persona" and articles wherein Marilyn Manson himself admits that he is a drug user and promotes drug use. Clifton concludes from his fourteen years of experience that children are genuinely influenced by the rock group and such propaganda.

The appeals court took further note of concurring statements from other school officials which supported "the administration's position that the Marilyn Manson T-shirts, generally speaking, were prohibited because they were 'counter-productive and go against the educational mission of the Van Wert City School District community'."

Based upon this evidence, the federal appeals court concluded that "the district court was correct in finding that the School did not act in a manifestly unreasonable manner in prohibiting the Marilyn Manson T-shirts pursuant to its dress code."

The Supreme Court has held that the school board has the authority to determine what manner of speech in the classroom or in school is inappropriate. The Court has determined that a school need not tolerate student speech that is inconsistent with its 'basic educational mission even though the government could not censor similar speech outside the school.

In this case, where Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts.

In so doing, however, the appeals court was careful to not that "[t]he record is devoid of any evidence that the T-shirts, the 'three-headed Jesus' T-shirt particularly, were perceived to express any particular political or religious viewpoint."

[T]he evidence does not support an inference that the School intended to suppress the expression of Boroff's viewpoint, because of its religious implications. Rather, the record demonstrates that the School prohibited Boroff's Marilyn Manson T-shirts generally because this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education.

As a result, the federal appeals court held that "the School has the authority to prohibit Marilyn Manson T-shirts under these circumstances."

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