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"ANTI-HARASSMENT" POLICY TOO IDEALISTIC TO SATISFY FIRST AMENDMENT?

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The *Saxe* opinion described herein illustrates some potential free speech problems associated with well meaning efforts on the part of a public agency to "legislate" civility and require "politically correct"discourse among participants in its programs and facilities, particularly when there is no direct proof of substantial disruption caused by any prohibited communications.

RESPECT FOR "VALUES"

In the case of *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), plaintiffs claimed a public school district's "anti-harassment" policy violated the First Amendment's guarantee of freedom of speech. As described by the federal circuit court of appeals, the "Anti-Harassment Policy ("the Policy") provided, in pertinent part, as follows:

> The Policy [adopted in August, 1999] begins by setting forth its goal--"providing all students with a safe, secure, and nurturing school environment"--and noting that "[d]isrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual." The second paragraph contains what appears to be the Policy's operative definition of harassment:
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> > Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.
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> The Policy continues by providing several examples of "harassment": Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.
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> These examples are followed by a lengthy section captioned "Definitions," which defines

> various types of prohibited harassment, including "Sexual harassment," "Racial and color harassment," "Harassment on the basis of religion," "Harassment based on national origin," "Disability harassment," and "Other harassment" on the basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc."
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> The definitions state that harassment "can include unwelcome verbal, written or physical conduct directed at" the particular characteristic. Examples of specific types of harassment are also provided. For example, "Racial and color harassment" is said to include "nicknames emphasizing stereotypes, racial slurs, comments on manner of speaking, and negative references to racial customs." Religious harassment reaches "derogatory comments regarding surnames, religious tradition, or religious clothing, or religious slurs or graffiti." National origins harassment includes "negative comments regarding surnames, manner of speaking, customs, language, or ethnic slurs." Harassment on the basis of sexual orientation extends to "negative name calling and degrading behavior." Disability harassment encompasses "imitating manner of speech or movement."
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> The Policy provides that "[a]ny harassment of a student by a member of the school community is a violation of this policy." The school community, by the Policy's terms, "includes, but is not limited to, all students, school employees, contractors, unpaid volunteers, school board members, and other visitors." "School employees" include, but are not limited to,"all teachers, support staff, administrators, bus drivers, custodians, cafeteria workers, coaches, volunteers, and agents of the school."
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> The Policy establishes procedures for the reporting, informal mediation, and formal resolution of complaints. In addition, the Policy sets a list of punishments for harassment, "including but not limited to warning, exclusion, suspension, expulsion, transfer, termination, discharge . . ., training, education, or counseling."

The plaintiffs included two students enrolled in State College Area School District (SCASD) schools and their legal guardian, David Saxe, an unpaid volunteer for SCASD. After the Anti-Harassment Policy was adopted, Saxe filed suit in federal district court, alleging that the Policy was unconstitutional under the First Amendment's free speech clause. In his complaint, Saxe alleged that:

> [a]ll Plaintiffs openly and sincerely identify themselves as Christians. They believe, and their religion teaches, that homosexuality is a sin. Plaintiffs further believe that they have a right to speak out about the sinful nature and harmful effects of homosexuality. Plaintiffs also feel compelled by their religion to speak out on other topics, especially

> moral issues.

Saxe further alleged that he and the students feared that they were likely to be punished under the Policy for speaking out about their religious beliefs, engaging in symbolic activities reflecting those beliefs, and distributing religious literature. Accordingly, Saxe sought to have the Policy declared unconstitutionally vague and overbroad and its operation permanently enjoined.

In the opinion of the federal district court, the Policy was not entitled to First Amendment protection because it merely prohibited harassment that was already unlawful under state and federal law. In so doing, the district court rejected the plaintiffs' characterization of the Policy as a "hate speech code":

> Harassment has never been considered to be protected activity under the First Amendment. In fact, the harassment prohibited under the Policy already is unlawful. The Policy is a tool which gives SCASD the ability to take action itself against harassment which may subject it to civil liability.

Accordingly, the federal district court found the Policy was constitutional and granted SCASD's motion to dismiss the lawsuit. Saxe appealed.

DISAGREEABLE VIEWPOINTS PROTECTED?

On appeal, the federal circuit court disagreed with the district court's reasoning. Specifically, the appeals court noted that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."

> There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.
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> When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.
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> Where pure expression is involved," anti-discrimination law "steers into the territory of the First Amendment.... Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create an "hostile environment"--and thus come within the ambit of anti-discrimination laws--precisely

> because of its sensitive subject matter and because of the odious viewpoint it expresses.

In this particular instance, however, the appeals court found that "the SCASD Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law." Under such circumstances, the appeals court acknowledged that "[t]his sort of content- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny."

Further, the court noted First Amendment problems associated with loosely worded "anti-harassment" policies and "hate speech" ordinances which "may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint."

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."

As a result, the appeals court rejected the district court's sweeping assertion that "harassment--at least when it consists of speech targeted solely on the basis of its expressive content--has never been considered to be protected activity under the First Amendment." In the opinion of the appeals court, "[s]uch a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech."

> We do not suggest, of course, that no application of anti-harassment law to expressive speech can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace--and in the schools--is not only a legitimate, but a compelling, government interest. We simply note that we have found no categorical rule that divests "harassing" speech, as defined by federal anti-discrimination statutes, of First Amendment protection.

NEGATIVE COMMENTS ABOUT "VALUES"

Further, the appeals court noted that "the SCASD Policy's reach is considerably broader" than "existing federal anti-discrimination legislation":

> [T]he Policy prohibits harassment based on personal characteristics that are not protected under federal law. Titles VI and IX, taken together with the other relevant federal statutes, cover only harassment based on sex, race, color, national origin, age

and disability.

The Policy, in contrast, is much broader, reaching, at the extreme, a catch-all category of "other personal characteristics" (which, the Policy states, includes things like "clothing," "appearance," "hobbies and values," and "social skills"). Insofar as the policy attempts to prevent students from making negative comments about each others' "appearance," "clothing," and"social skills," it may be brave, futile, or merely silly. But attempting to proscribe negative comments about "values," as that term is commonly used today, is something else altogether .

By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse--the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection:"a principal `function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.

SIGNIFICANT FEAR OF DISRUPTION?

Accordingly, the specific issue on appeal was “whether the Policy may be justified as a permissible regulation of speech within the schools.” To do so, the appeals court cited the following principles enunciated in “the Supreme Court's cases demarcating the scope of a student's right to freedom of expression while in school”:

> [R]egulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students.... [This] requires a specific and significant fear of disruption, not just some remote apprehension of disturbance... [T]he mere desire to avoid "discomfort" or"unpleasantness" is not enough to justify restricting student speech...
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> However, if a school can point to a well-founded expectation of disruption--especially one based on past incidents arising out of similar speech--the restriction may pass constitutional muster...[T]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct... [T]here is no First Amendment protection for "lewd," "vulgar," "indecent," and "plainly offensive" speech in school...

> [This] permits a school to prohibit words that offend for the same reasons that obscenity offends....
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> To summarize... [A] school may categorically prohibit lewd, vulgar or profane language... [A] school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to... [the] general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

As noted by the appeals court, in this particular instance, Saxe had claimed the challenged Policy was "unconstitutionally overbroad." According to the appeals court, "[a] regulation is unconstitutional on its face on overbreadth grounds where there is a likelihood that the statute's very existence will inhibit free expression by inhibiting the speech of third parties who are not before the Court."

Applying this principle to the facts of the case, the appeals court found "the Policy on its face appears both unconstitutionally vague and overbroad." In particular, the appeals court noted that "the Policy contains several separate passages, each of which could be read as embodying its operative definition of banned speech":

> The Policy's second paragraph sets forth one definition: Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or cr eating an intimidating, hostile or offensive environment.
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> This, however, is immediately followed two paragraphs later by a statement that harassment under the Policy "can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above."
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> In addition, in a separate section, the Policy purports to set out "d efinitions" for various categories of harassment that do not always coincide with the above-quoted language. Religious harassment, for example, is defined as "unwelcome verbal, written or physical conduct directed at the characteristics of a person's religion, such as derogatory comments regarding surnames, religious tradition, or religious clothing, or religious slurs, or graffiti."

In the opinion of the appeals court, "some of these purported definitions of harassment" were certainly

"overbroad":

> No one would suggest that a school could constitutionally ban any unwelcome verbal conduct which offends an individual because of some enumerated personal characteristics. Nor could the school constitutionally restrict, without more, any unwelcome verbal conduct directed at the characteristics of a person's religion.

Moreover, the appeals court noted that "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." Similarly, in this case, the appeals court found that "the Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech," including "private student speech that merely happens to occur on the school premises":

> First, the Policy does not confine itself merely to vulgar or lewd speech; rather, it reaches any speech that interferes or is intended to interfere with educational performance or that creates or is intended to create a hostile environment....
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> Second, the Policy does not contain any geographical or contextual limitations; rather, it purports to cover "[a]ny harassment of a student by a member of the school community." Thus, its strictures presumably apply whether the harassment occurs in a school sponsored assembly, in the classroom, in the hall between classes, or in a playground or athletic facility.

Given the broad sweep of the policy, to pass constitutional muster, the appeals court found SCASD had to establish that "the Policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students." In the opinion of the appeals court, the Policy was "substantially overbroad" because it "punishes not only speech that actually causes disruption, but also speech that merely intends to do so."

> [The Policy] covers speech "which has the purpose or effect of " interfering with educational performance or creating a hostile environment. This ignores... [the] requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.

Moreover, the appeals court found that "prohibited 'harassment,' as defined by the Policy" did not necessarily rise "to the level of a substantial disruption." In so doing, the appeals court noted that "it is certainly not enough that the speech is merely offensive to some listener."

> Because the Policy's "hostile environment" prong does not, on its face, require any

> threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone.
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> This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and"values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.

As a result, the appeals court concluded that the Policy covered "substantially more speech than could be prohibited" under the "substantial disruption test." In making this determination, the appeals court rejected that notion that "the 'hostile environment' prohibition is required to maintain an orderly and non-disruptive educational environment."

> [T]he "undifferentiated fear or apprehension of disturbance" is not enough to justify a restriction on student speech. Although SCASD correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.

As a result, the appeals court held that "the Policy is unconstitutionally overbroad." The appeals court, therefore, reversed the judgment of the federal district court, effectively prohibiting any further operation or enforcement of SCASD's "Anti-Harassment" Policy.