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BASTROP ISD V. TOUNGATE

SCHULTZ: May name is Eric Schultz. I am here representing the Bastrop school district. The case before this court once again involves the school district hair length rule; and once again the hair length rule is challenged as constituting discrimination because of sex, because the hair length rule only applies to male students and not to female students.

We've raised 3 points of error before this court. And briefly those three points are the following. The first point is the state judiciary should not intervene in these types of hair length disputes. That's the lesson of the court in Barber v. Colorado ISD. The court said the judiciary is not to micro-manage the schools of the state with these types of claims, indeed intervention is not appropriate.

PHILLIPS: If the legislature passed a statute saying that no school district shall make grooming rules that differentiates between males and females with regard to hair, would that be unconstitutional?

SCHULTZ: No, I believe the legislature could pass such a statute.

PHILLIPS: If they could do that, then we have to look and see if they have done that do we not regardless of what the constitution may mandate?

SCHULTZ: However, in this case there's really no viable distinctions between the constitutional claim and the statutory claim in this case. They both are premised on the same language that prohibits discrimination because of sex.

PHILLIPS: But we do have to look at those statutes?

SCHULTZ: Yes.

CORNYN: So Barber is not dispositive?

SCHULTZ: In my view Barber certainly governs this claim, the rationale, the holding of Barber applies equally to the constitutional and the statutory claim. I think Justice Powers in his dissenting opinion in the CA hit the nail on the head. He said: Indeed the Barber decision was founded upon important and fundamental decisions regarding judicial policy.

OWEN: Have you found any cases across the country that deal with statutory as opposed

to constitutional issues in this area?

SCHULTZ: The analogous federal statute is Title 9. It also talks about educational institutions may not discriminate because of sex in the programs and the benefits they provide. In my brief to this court certainly I cite the case of Trent v. Parish. It's a court decision in which they looked at the Title 9 statutory provisions that are very similar to the statutory provisions under state law and said; No, this is not sex discrimination in this case. The Dept. Of Education which enforces Title 9 says: No, these are matters of local control through the school districts. Even though we are charged with enforcing Title 9, we don't intervene in these kinds of hair length disputes.

CORNYN: It's a statewide statute though isn't it?

SCHULTZ: Yes, it's a statewide statute.

CORNYN: And doesn't it specifically say that each school district can choose its own criteria for implementing the statute?

SCHULTZ: No, but it's a statewide statute that prohibits discrimination because of sex under _____ circumstances. And I might remind the court the statute carries criminal penalties, not just civil penalties.

CORNYN: Are you arguing that it could be a different standard say in the Dallas ISD and Bastrop ISD, Austin ISD, and Eanes ISD?

SCHULTZ: I'm saying that the courts shouldn't intervene just like the didn't intervene under Barber, that indeed this is a matter for local control for the school board to decide.

CORNYN: Where do you get that out of the statute? If a statewide statute applies to everybody in the state, every governmental entity in the state of Texas, where do you get out of it that each school district can choose to do what it wants to do?

SCHULTZ: Based on the same policy reasons that underlaid the court's decision in Barber. Students at school their rights are not coextensive with the rights of adults in other setting.

CORNYN: So your argument does not come from the statute?

SCHULTZ: No, my first argument certainly is the nonintervention argument. The ERA provides the maximum constitutional protection, but nevertheless the court didn't intervene in Barber under the ERA. How could this statute provide more than the maximum protection? It provides the same civil remedies against the same state actors as the constitutional provision. The statute should be interpreted in accord with the constitutional provision in this case.

PHILLIPS: There are a lot more words in this statute than there are in the ERA. Do those words mean nothing? Words like benefit, unreasonable burden, there is no way that that could provide a remedy or place a burden on the state that does not exist in the broad parameters of the ERA? _____ say they could pass a statute that was specific to hair, and you would have to honor it?

SCHULTZ: Yes.

PHILLIPS: Now is there nothing in these words that we need to look at that raises the question of whether or not this puts some burden on a school district apart from the constitutional requirements?

SCHULTZ: No, because the hair length dispute just as in Barber doesn't rise to the level to implicate...

CORNYN: The legislature didn't exempt hair disputes did it in the statute?

SCHULTZ: No, the legislature did not.

CORNYN: So where do you conclude that the legislature has exempted in the antidiscrimination statute hair disputes? Where does that come from?

SCHULTZ: It comes from the judicial policy reason of Barber.

CORNYN: So judges ought to decide whether to enforce the statute or not; is that your conclusion?

SCHULTZ: My conclusion just like this court concluded in Barber less than 2 years ago, that there are certain matters in which the state judiciary is less competent to deal with than the parent, the teacher, the school board, the school administrators.

PHILLIPS: That may be our decision, but how do we tell that's to the legislature's decision?

SCHULTZ: Because the statute and the constitutional provision were passed within 3 weeks of each other at the time of the 62nd legislature. If you look at the amicus brief that was filed in this case, you will find that indeed the decision, the rationale of the CA that this has an independent pedigree from the constitutional provision that's based on the Civil Rights Act of 1964, that that analysis simply fails as a matter of course. Indeed these two statutes were passed, the constitutional provision was passed within 3 weeks of the statute, they both contain the same language for _____ discrimination because of sex. Indeed they should be read in harmony together. The constitutional provision wasn't enacted until over 1 year later because it had to be voted on by the people in order to have the constitutional amendment.

HECHT: Is there any evidence in the legislative history that the legislature intended anything different by the two provisions?

SCHULTZ: No. I have found no legislative history that would ever indicate that. These were passed within 3 weeks of each other using the same language.

OWEN: Is there anything that a school district can do...would sex discrimination at some level by a school district as applied to students fall under the statute be prohibited by the statute? Is there a line that can be drawn here or shall we just say sex discrimination as applies to high school students or junior high students is not covered by the statute?

SCHULTZ: No, that is not at all the position that I am arguing. My position before this court is that we have a very narrow category of hair length disputes before the court that is not appropriate. I am not saying in other context that no sex discrimination statutes do not apply to school districts or the ERA doesn't apply to school districts. I am not making that position. This is a very narrow holding simply following the court's decision in Barber that is my position.

HECHT: So you don't argue that the district could pass a rule that said female students couldn't take math courses because they don't need to clutter up their minds with that sort of thing?

SCHULTZ: No, I would not _____ that.

HECHT: You're arguing about the dress code?

SCHULTZ: Exactly. It's a very narrow area which the 5th circuit, obviously this court relied on the 5th circuits guidelines, and established a bright line rule that yeah hair codes are permissible when you're talking about the elementary/secondary educational setting. However they are not permissible in the college setting.

PHILLIPS: Let's suppose that a justice of this court thought this statute by its terms applied to a governmental decision, interschool district involving hair, if there was a difference between sexist or racist. I know you disagree with that, but just suppose a judge were to think that, how would you suggest that a court should go about deciding what level of scrutiny to apply to any classifications that a school district made?

SCHULTZ: Well I think the lower courts are going to have to realize indeed this is a narrow holding simply dealing with hair length disputes. Indeed the federal courts have had no problems in differentiating between the hair length cases that are not heard in federal courts as opposed to other claims against school districts. I mean certainly a court by analogy could say well if a boy wants to wear a dress to school and the school officials say no, you should not be wearing a dress to school perhaps the...

PHILLIPS: The level of scrutiny that you say a court should apply if this statute applies is a total exemption for hair length?

SCHULTZ: Yes.

PHILLIPS: There doesn't have to be any reasonable relationship, no rational relation, you don't have to put it through any of the normal equal protection tests that courts have devised?

SCHULTZ: That is the position for exempting for not intervening. But certainly at trial if you want to move on to the second point of error, indeed the school certainly proved the rational compelling reasons for this hair length rule.

SPECTOR: What was that?

SCHULTZ: We had 5 bases. For example, one of the reasons for the hair length rule was to teach the students to be able to function in society and realize that they are going to be encountering rules in the future. I mean testimony is replete in this record that Zachary Toungate when he grew up he wanted to join the Air Force and fly jet planes. I mean don't you think it's an appropriate function of the school to teach the student at an early age that Zach if you want to join the Air Force you are going to have to cut your hair in order to do that. There are rules out there with which you have to comply.

SPECTOR: Are women allowed to join the Air Force?

SCHULTZ: Certainly women are allowed to join the Air Force. But I do believe the Air Force has different rules for men and women as far as their hair length is concerned. But that's not the only basis for this rule that was proved at trial.

ENOCH: It has been suggested that the statute disclares(?) certain conduct to be discriminatory that perhaps is not declared discriminatory by the constitution. Can you think of a circumstance where the statute would apply declaring a particular conduct to be discriminatory where the constitution would not have been implicated?

SCHULTZ: I cannot think of that kind of an example. Because indeed the constitution affords the maximum protection against sex discrimination.

PHILLIPS: You said twice in answer to me that the legislature despite our ruling in Barber could pass a statute specific to this situation which would not change the constitution?

SCHULTZ: Yes.

PHILLIPS: Now you're saying the opposite to Judge Enoch. So I remain confused.

ENOCH: I'm just looking at the wording in the statute, and I'm just saying is there anything in this statute that declares being conduct unconstitutional, that the conduct would not implicate a constitution. I understood your answer. You don't understand how this statute is any broader than what the constitution is.

SCHULTZ: Exactly.

ENOCH: Now I suppose if the statute said we declare any rules dealing with hair length to be discriminatory, then that would be a different situation?

SCHULTZ: Yes it would.

CORNYN: On point of error No. 2, on some of the procedural matters, would you explain to us what the jury found and on what basis the TC set those findings aside and entered findings of facts contrary to what the jury found and rendered judgment on that basis?

SCHULTZ: In this case we had a 5 day trial. We had numerous school officials, child psychologists, numerous witnesses testifying...

CORNYN: And the jury made findings in your favor?

SCHULTZ: The jury made findings of fact in our favor. And there was the evidence to support those jury findings. Nevertheless, despite that, the TC granted judgment notwithstanding the verdict, took away from the jury its role as a fact finder in this case, waived the credibility of the testimony, took conflicting evidence and decided one way, completely improperly under the rules of when a court may grant judgment notwithstanding a verdict.

CORNYN: And made findings of fact inconsistent with what the jury found?

SCHULTZ: Absolutely.

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RESPONDENT

KNISELY: I am here representing the respondent in this case, September Toungate, in her capacity as next friend of her minor son, Zachari Toungate. I guess it should be obvious why I am here, because hair is very important to me. I am here because this case does present issues of law and fact, and issues of basic fairness and issues of equality under the law that really are very important. And they are particularly important to my clients in this case, the Toungate family, who chose to have their son have a little wispy ponytail when he was in the 3rd grade. And the testimony in this case shows that he wanted to have a ponytail because his father had a ponytail. And that was the lifestyle and the style of hair dress that they chose.

When he was in the 2nd grade it was not a problem even though the pictures in evidence showed that he had the same little ponytail in the second grade throughout the school year.

BAKER: Did they have that same policy then?

KNISELY: Yes they did.

BAKER: But did not enforce it?

KNISELY: Apparently did not enforce it at least in any way that we are aware of. A few days into the school year he was told that he could not have the ponytail; his parents were called and he was sent home - suspended from school for a few days; and then they recalled him for in-school suspension, which as the record shows and the briefs show lasted for 4 months. In basically solitary confinement in a room by himself where he was not allowed to go to recess with the other children, not allowed to go to lunch with the other children, not allowed to participate in any of the other activities that the other children had other than basic instruction that he received from highschool educated substitute teachers in that room by himself.

GONZALEZ: You make those claims, but the jury found all those facts against you?

KNISELY: The jury made specific findings but they were based on initial determination by the jury in the first two questions that this was not sex discrimination. That was absolutely, completely by all parties _____ contrary to the reality and the evidence, and once they made the findings that this is not sex discrimination, the subsequent findings that there was not discrimination to the opposed burden of that discrimination that denied benefit it was not discrimination that denied participation of program made no sense.

PHILLIPS: Were those predicated findings?

KNISELY: I have to say I don't recall frankly. I don't know that they were.

CORNYN: Are you saying you proved those as a matter of law?

KNISELY: I think the TC to answer the question that was asked a moment ago, disregarded the findings for 2 reasons: One, and the court made this clear to us throughout the trial frankly that he was concerned that on remand from the CA this was a legal and judicial issue that the way the case was framed on the first appeal and remanded was a balancing test that the court was to apply based on balancing the interest of the individual to be frequent gender discrimination and the interest of the school district in promoting its educational policies.

The court said at the very beginning, told us several times through the trial, I don't know that there's a jury issue here. I think I'm instructed to make this determination. And all of us

said: well let's submit the issues at least if we have to appeal, if either side has to appeal we won't have to go back because they weren't submitted. But the court also set aside the findings on the basis that they were contrary to conclusive evidence in the case, that the school district did not demonstrate any compelling interest in enforcing this discrimination.

BAKER: The answer to the first question submitted to the jury was that the hair policy didn't violate the statute; and then all the rest of the findings evidentiary and not really relevant to that issue which as I understand is the focus of this appeal?

KNISELY: The first two issues together really said that the rule did not discriminate on the basis of sex. And that's just makes no sense frankly. The subsequent questions all are based on did it discriminate on the basis of sex in some way in imposing unreasonable burden and so forth.

BAKER: So the first two questions are the key to the whole case?

KNISELY: As a practical matter they really are.

BAKER: It's your position then that it is a question of law that the court would be required to construe the statute? I was just looking at what it said in deciding whether it was or wasn't and all the rest of it is superfluous?

KNISELY: Well again I think that there may be circumstances where some rule that has ...

BAKER: It's this case?

KNISELY: Exactly. That's the point, that this rule did not find...there was no justification that would allow this kind of intrusion into the denial of equal rights under the law.

PHILLIPS: Are you saying that these are legal questions, or that these findings should be subjected to a no evidence review?

KNISELY: I think...it's a little bit unclear. This court in Barber indicated there's a mixed questions of fact and law in this area. At least as far as any constitutional issues are concerned. And I think in this circumstance with respect to the statutory issues as well because ultimately you are doing...if the law of the case that was established in the first appeal is to apply at least, then as a balancing test, which I think is almost by its definition a court's cut type of analysis to make, and that is you're balancing interest to make a legal determination whether this...

CORNYN: The 3rd CA reversed the summary judgment in favor of the school district on the basis of factual dispute did they not?

KNISELY: This is why the TC had some difficulty because it was sent back to do this

balancing and it said the court shall then make a determination whether this violates the constitution.

OWEN: What's your position on that balancing? Is this a balancing test or does the statute prohibit discrimination period?

KNISELY: Well the statute prohibits period. Obviously, there is no rule that can be applied absolutely to every circumstance. I think that there are circumstances where boys and girls can be treated differently.

HECHT: For example, could they have a dress code that the boys can't wear dresses?

KNISELY: I think a challenge could be made that that's a denial of equal rights. It's certainly a discrimination on the basis of sex. This is why the balancing test I think does enter into it. It does not intrude upon as fundamental an interest as requiring one to change one's body in essence by cutting hair.

HECHT: A boy wants to wear a Kilt because his ancestry is Scottish, but you say the school district arguably could not prohibit that?

KNISELY: I think one could argue that. But I think that that's a different issue because really you're just telling the child we have a certain dress requirement or attire requirement during the school day, but we are not going to affect the rest of your life. If you want to wear your Kilt when you're at home, that's your choice. But with hair you can't do that. You can't say we are going to require you to have short hair at school, and then go do what you want at home. When you're imposing on the person's physical bodily integrity with the rule, there's a greater intrusion on that person's rights. And that's why some balancing has to enter in. If for instance you talk about separate restrooms. There's a balancing interest in the privacy of the individual that rises to a level in and of itself that may justify a separate treatment.

HECHT: Could they say that all students boys and girls could not have more than shoulder-length hair?

KNISELY: That would certainly not be a denial of equal rights on the basis of sex. There might be some other problems with it, but...

HECHT: You would have an intrusion on a girl wanting to wear her hair longer?

KNISELY: Sure and this is really a concern that some of us had in response to the Barber decision is that by abstaining from any intervention in these kinds of decision, even on constitutional grounds, the court is really saying even if there's a racially discriminatory rule, which by the way in this rule there is: afro hair shall not be longer than 3", and the school superintendent admitted that

only applied to African/American students.

BAKER: But that's equal treatment if it's to all African/American students?

KNISELY: That's like saying all African/Americans were allowed to sit on the back of the bus.

BAKER: But you have to look at it as the class, what's the protected class?

KNISELY: Well the protected class is boys and girls in this case. It's discrimination on the basis of sex.

BAKER: But your example of the African/American...

KNISELY: Well yes but in this very rule the Bastrop rule that we've set out in our brief also has in it a rule that deals solely with the length of African/American students hair. That kind of discrimination it seems to me...

BAKER: But it doesn't say that boys will be this way and girls will be this way?

KNISELY: Correct. It's a different classification, that's a racial classification.

BAKER: If it's an entire class what's the answer to that? Is it discriminatory if you treat the suspect class equally?

KNISELY: Yes. Because it is the very existence of the suspect class that is the basis for the discrimination. If you say all boys must do this, or all boys shall not do this, or all girls must have hair shoulder length, or all girls must shave their legs. Other things that interfere with the physical integrity of the person require a greater scrutiny ultimately than ones that are balanced by compelling interests such as privacy which would justify it.

OWEN: But focusing on the statute setting aside the constitutional issues, where is the touchstone, the legal touchstone for putting an overlay of balancing of rational relation and all of that on a statute as opposed to a constitutional issue?

KNISELY: In and of itself the legislature it seems to me has the authority to make an absolute rule. Now again there may be some point at which you say the rule cannot be absolute to then ultimate degree because there's certain circumstances where there are competing, compelling interests. But at the very least when the rule is made with the legislative authority on absolute terms, then there ought to be at least a compelling state interest demonstrated in order to overcome the prohibition against the discrimination.

PHILLIPS: _____ statute uses the word reasonable in it.

KNISELY: With respect to unreasonable burden particularly, yes. On the basis of sex.

PHILLIPS: Did you say with it based on that language we should require the district to show a compelling interest in order for the burden to not be...

KNISELY: It's hard to say you could have a compelling, but unreasonable decision. But I think that you can say at least with respect to this case that requiring an 8 year old boy to spend 4 months in isolation because he had a little wisp of hair below his collar is an unreasonable burden on the basis of his sex, as a matter of law.

PHILLIPS: If you have distinct claims on the basis of the initial rule itself and how the rule was applied with regard to the punishment of both does it work?

KNISELY: Yes. And that's really where that portion of the statute I think is most applicable is with respect to the punishment in this case. And that's why I think again this case factually is distinguishable from Barber apart from the fact that it's a statutory claim in addition to constitutional claim is that this punishment was grossly excessive for this boy's conduct regardless. And that's what the unreasonable burden language I think addresses in this case.

CORNYN: Are you arguing that the jury has no role in interpreting this anti discrimination statute as applied in an individual case?

KNISELY: Not necessarily. But again, I think if there were in fact evidence to show a compelling interest by the state and that was taken into account by a jury, I think that's possible.

CORNYN: Well if a jury has a role in these decisions as they apply to things like the DTPA and other circumstances, the jury can certainly refuse to make a finding in favor of the plaintiff can they not on the basis that they are not persuaded?

KNISELY: Yes.

CORNYN: And that doesn't require any evidence to support that no finding does it?

KNISELY: No, but there can be conclusive evidence to the contrary and that's what we say in this case.

CORNYN: I was trying to understand your argument. So you're saying you've proved this as a matter of law?

KNISELY: Again, under the instructions on remand the first time that the TC sets out in its opinion on page 2, which is attached as an appendix to our brief, where it sets out these are the instructions I was given by the appellate court, and this is the test I am following.

CORNYN: If it's a matter of law and the jury has no role under the facts of this case, why did the trial judge make findings of fact?

KNISELY: I think that the judge was basically giving an analysis for setting aside the jury verdict.

CORNYN: So we should give no weight to the findings of fact?

KNISELY: Again if the court as I understand was acting under instructions from the CA to do this analysis, to do this balancing analysis, and here are the facts that I looked at to determine whether the school district has done what it must do to tip the balance in its favor, and it didn't do that, it didn't prove anything like that, it didn't prove any compelling interest, these rationalizations that is stated just simply are _____. They don't have any substance on scrutiny. It's one thing to say we have a rule because we have a rule and kids need to have rules. But there's no substance to that. There is no evidence that can justify this discrimination in these circumstances. There just hasn't been any showing that the evidence is conclusive to the contrary.

ENOCH: Can you think of any circumstance that would be a prohibitive conduct under the statute based on differentiation of sex that would not be prohibited in the constitution for discrimination on sex?

KNISELY: If the court's decision in Barber is as I understand it to be that the court simply does not believe that this kind of issue arises to a constitutional level, but the legislature has made a determination that it's unlawful, then this issue itself I think fits into that category.

ENOCH: But my question really is does the statute make discrimination of conduct or declare certain conduct to be discrimination based on sex that would not otherwise be discrimination based on sex under the constitution?

KNISELY: I don't have an example in mind other than this case based on Barbers analysis of the constitution.

ENOCH: Barber doesn't declare it not to be unconstitutional. It just declares that the courts won't be involved in it.

KNISELY: That's correct. None comes to mind immediately. There may well be some.

ENOCH: You have acknowledged that there are certain circumstances, balancing test whatever, where discrimination based on sex is permissible. Segregated restrooms as an example. I suppose dressing areas in gyms. I guess as you say arguable.

KNISELY: Separate sports teams perhaps.

ENOCH: You say at least it's arguable but that's permissible but meaning that it's arguable somebody could claim that separate restrooms are discrimination based on sex and prohibited.

KNISELY: And then when the TC is asked to consider the evidence in that case, and the evidence _____ on that there's an interest in the privacy of the individuals because of the very nature of the sexual distinction, that is a sufficiently compelling reason to allow an exception to an absolute statement of the rule.

PHILLIPS: What you're saying I gather you think that the CA was crafting a test did not put enough of a burden on the state to justify any classifications _____. You keep using the word compelling.

KNISELY: The test that this court declared in the McClane case 10 years ago was the...

PHILLIPS: Now that's constitutional. You're saying the constitutional test has to be imported to the statute?

KNISELY: I think it should be in this instance. Yes.

PHILLIPS: And so the CA's opinion you think is insufficient?

KNISELY: I am not sure what your honor is getting at.

PHILLIPS: This statute by its long history has had very little judicial review. But the CA in two opinions has kind of crafted up a test and is that an adequate test or is it...

KNISELY: No I think it's an adequate test. I think it's a possible test. I think it's a legitimate test. Because it allows for a certain degree of flexibility in the interpretation of these kinds of issues.

PHILLIPS: The 5th circuit looked at a predecessor version of this statute some years back and found it to be not all encompassing and that discrimination knew to fall within a particular category in order for the courts to take a cognizance of it. What do you say about that case? It's one of only two cases we really have to look at that analyzes...

KNISELY: Which case was that?

PHILLIPS: Duke v. UTEP.

KNISELY: I don't recall. That was the professor tenor case? I don't recall frankly what the test was that was applied in that case.

PHILLIPS: Look at Duke and send us a letter brief.

HECHT: Is there indication in the legislative history that the amendment and statute were intended to have different meanings or applications?

KNISELY: I'm not aware of anything to that effect in the history itself. Again I would have to take another look to be sure, but I don't recall.

CORNYN: Is that one way or the other?

KNISELY: Correct. I don't recall that it addresses that one way or the other. But it does obviously have some very specific provisions about denying benefits, denying participation in a program, which really are well beyond what the constitution states.

State ex rel Lambert v. West Virginia State Board of Education, 447 S.E.2d 901, 1994 in which they held unconstitutional the scheduling of the girl's basketball team in a different part of the year than the boys team was and it had certain ramifications in terms of the quality of treatment and the quality of the facilities, and so forth.

PHILLIPS: The legislature has given pretty broad powers to the school district to make rules and make rules of conduct. Shouldn't we read that part of the education code along with this in deciding how specifically to apply these very general prohibitions against discrimination?

KNISELY: I don't think it would be inappropriate to consider them together. But to the same extent that the legislature grants broad authority to the school districts, it also has the authority to limit it. And when it limits it by saying you shall not discriminate on the basis of sex. That's certainly within their authority.

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REBUTTAL

SCHULTZ: First I would like to clarify some of the portions of the record that were referred to by opposing counsel. First, did Zachary have the same ponytail in second grade where he says oh, there was no disruption there because he had the same ponytail. Well in the record you will find the direct, positive clear testimony of the second grade teacher: No, he did not. He had a ponytail but it did not extend beyond the bottom of the collar. He was not in violation of the school rule in second grade. That's one of the things that the jury considered. The court in its own fact findings went the complete opposite direction.

PHILLIPS: Are we bound by the fact findings if there's any evidence to support?

SCHULTZ: Yes you are bound by the jury findings.

PHILLIPS: Despite our discussion in a worker's comp case and in Richards v. Meno about the

difficulties of jury findings in constitutional balancing?

SCHULTZ: That's another point I want to make. This is not a constitutional balancing aspect of the statutory claim. The CA when it initially reversed the summary judgment the school district had obtained and sent the case back for trial and said: Look, reasonable; we're talking about was there an unreasonable burden imposed upon Zachari. The court said reasonableness is inherently a fact issue for the finder of fact; take it back to trial; we don't have sufficient evidence to establish this on a summary judgment case.

HECHT: If the issue is whether a little ponytail is unreasonable, juries are likely to differ pretty widely about that around this state wouldn't they?

SCHULTZ: That's why this is an issue that is left up to the local school districts.

HECHT: You don't mind trying this case to a Bastrop jury, but you wouldn't want to try it to say a Houston jury?

SCHULTZ: Houston doesn't have to have this kind of a hair length rule. It's up to the local school boards to determine whether or not this is educationally effective policy for a particular school district. And also counsel was talking about well it's a differentiation between hair and dress. Justice Gammage in his dissent in the Barber opinion tried to make that same differentiation. The court did not find that type of differentiation in the Barber case. The jury in this case in response to answers to jury questions 3 and 4 specifically found indeed there was a compelling state interest for the school district's rules in this particular case. The jury found that indeed the school district proved its goals and objectives and its compelling educational reasons for this particular policy in answers to questions 3 and 4. And answers to questions 5 and 6 indeed the court said yes Zachari's long hair would materially affect and materially interfere with the school districts interests in this case. These are jury findings. And, no, the court was not empowered when the evidence supported the findings to just disregard that and step into the role over the fact finder in this case.

Also let me talk briefly just about this unreasonable burden about the isolation of Zachari. Is the court being led down the road that indeed if discipline in Bastrop was so lax that indeed there was 5 maybe 10 students who were in this in school suspension with Zachari that that would have been a reasonable thing as opposed to well he was the only one at this particular time who was in this in-school suspension. Is that where this argument is being led?