

Moffat County School District Ban of "I ♥ Boobies!" Breast Cancer Awareness Bracelets"

May 12, 2011

Joe Petrone
Superintendent
Moffat County School District
775 Yampa Avenue
Craig, Colorado 81625
Via Email: joe.petrone@moffatsd.org
Via Fax: (970) 824-6655

Re: "I ♥ Boobies! Keep a Breast!" Bracelets

Dear Superintendent Petrone,

I am writing you on behalf of Jordan Harmon, an eighth grader at Craig Middle School. She wishes to express support for breast cancer awareness, research and survivors by donning colorful rubber bracelets that say "I ♥ Boobies! Keep a Breast!" Yet, the Moffat County School District has banned students from wearing these bracelets. This letter is to inform you that this prohibition violates students' constitutionally-protected right of expression, and to demand that the ban be rescinded immediately.

The "I ♥ Boobies! Keep a Breast!" bracelets are distributed by the Keep-A-Breast Foundation, a nonprofit organization whose mission is to help eradicate breast cancer by educating young people – by speaking their language – on methods of prevention, early detection, and support. The backside of the bracelet bears the web address of the Keep-a-Breast Foundation. The bracelets serve as an awareness and fundraising tool. As you may know, many students throughout Moffat County School District have been wearing these bracelets since the beginning of the school term. By all accounts, the bracelets have caused no significant disruptions of school activities, classes, or operations.

Over spring break of this year, Jordan purchased several "I ♥ Boobies! Keep a Breast!" bracelets with her own money while she was in Grand Junction with her parents. She did so to honor and show support for her close family friend, "Grammy," who has undergone a double mastectomy in her battle against breast cancer. Jordan was proud to spend her money giving to this important cause. When Jordan saw the URL of the Keep-A-Breast foundation on the back of her bracelet, she went to the site to learn more about breast cancer. She read stories of breast cancer survivors and was shocked to learn that even boys can get breast cancer. After purchasing the bracelets, Jordan began proudly wearing one every day, including school days.

Within a week of wearing the bracelets to school, Jordan was called to Vice Principal

Hasey's office. She had never been called to a principal's office before. Ms. Hasey demanded that Jordan remove the bracelet, explaining that the word "boobies" offends her and others. Jordan protested but ultimately complied with Ms. Hasey's demand, understanding that her failure to do so could result in discipline. A week later, Ms. Hasey went to each pod in the school and informed students that they were not permitted to wear "I ♥ Boobies! Keep a Breast!" bracelets at school, because the word "boobies" offends her and because, she said, young people should use the word "breasts" instead of "boobies."

The law is clear that Jordan and the other students attending Moffat County public schools who wish to express their support for breast cancer awareness and prevention by wearing "I ♥ Boobies! Keep a Breast!" bracelets have the right to do so under the First Amendment to the United States Constitution – even if this expression offends school administrators. As long as it is neither "obscene" nor "threatening," a school may only lawfully prohibit speech that would substantially disrupt the work of the school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."). There is no evidence to suggest that the bracelets caused any disruption of the school's operation, much less a significant one. To the contrary, the greatest disruption related to these bracelets appears to have been caused by the school's decision to prohibit this form of expression, leading students to engage in protest. Importantly, public schools may not ban speech simply because it is "offensive" to some.

Chief Justice Roberts recently explained in *Morse v. Fredericks*, 551 U.S. 393, 409(2007), that schools cannot constitutionally prohibit "any speech that could fit under some definition of 'offensive.'" After all, much political and religious speech might be perceived as offensive to some." Additionally, it is clear that use of the word "boobies" in this breast cancer-fighting context, does not constitute the type of "lewd," "vulgar" or "indecent" expressions that schools may permissibly ban under certain circumstances.

The word "boobie," is simply a slang synonym for "breast," and – in the context of the bracelets – indicates nothing more than that "boobies" are worth saving from breast cancer. Use of the word "boobies" in this manner, stands in stark contrast to the "lewd," "vulgar," and "indecent" student expressions that the Supreme Court held could be constitutionally banned in *Bethel Sch. Dist No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, a high school student delivered a speech at a school assembly that included "an elaborate, graphic, and explicit sexual metaphor." Id. at 677-678. The bracelets worn by Jordan simply bear no resemblance to the overtly sexualized, lewd speech at issue in *Fraser*. In the context of these bracelets, at least, the word "boobies" may be silly, funny, irreverent and perhaps even juvenile – which is why the bracelets are an effective vehicle for educating young people about breast cancer. However, the term is plainly not "lewd," "vulgar," or "indecent."

This was precisely the conclusion that a federal court reached last month in a lawsuit brought by the ACLU against a Pennsylvania middle school which had enacted a similar ban of the "I ♥ Boobies! Keep a Breast!" bracelets. See *H., et al. v. Easton Areas School*

District, Civil Action No. 10-6283, 29-35 (E.D. Pa. April 12, 2011) (holding as a matter of law that the use of the word “boobies” in the “I ♥ Boobies! Keep a Breast!” bracelet was not lewd, vulgar, nor indecent for constitutional purposes). Easton Area School District is a good example of what might transpire in court if Moffat County School District persists in its censorship of Jordan’s speech. In that case, the three principals of Easton Area Middle School banned “I ♥ Boobies! Keep a Breast!” bracelets because they believed the term “boobies” was “inappropriate” for young people, was “vulgar,” and could be construed as having a sexual connotation. Id. at 9-12. In granting a preliminary injunction of the ban, the court found that the ban did not “constitute[] an objectively reasonable exercise of a public school’s authority to ban lewd or vulgar speech....” Id. at 29. Further the court found that even two incidents in which male students made purportedly sexual comments related to the “I ♥ Boobies! Keep a Breast!” bracelets did not constitute the kind of “substantial disruption” of school activities that could justify a school’s infringement on students’ right to free speech. Id. at 37. Thus, the court struck down the ban during the pendency of the litigation, because the students had demonstrated a reasonable likelihood of success on the merits that the school district’s ban violated their First Amendment rights.¹ Id. at 38. Given the remarkable factual similarities between Easton Area School District and the instant case, a court would almost certainly find that the school’s decision to prohibit Jordan from wearing her bracelets in support of breast cancer awareness cannot be justified under the United States Constitution.

In sum, the United States Constitution requires that Moffat County School District allow Jordan to wear her “I ♥ Boobies! Keep a Breast!” bracelets. Every day that passes during which the Moffat County School District forbids Jordan to express herself on this issue of great social import that rests close to her heart, she suffers irreparable injury. *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (“[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). To prevent further injury to Jordan through the continued squelching of her First Amendment freedoms, Moffat County School District must ensure that each of its schools immediately rescind any ban of the “I ♥ Boobies! Keep a Breast!” bracelets and permit students to wear their breast cancer awareness bracelets to school without fear of reprisal.

It is crucial to restore Jordan and other students’ First Amendment rights as soon as possible. For that reason, we ask that you contact our office by May 19, 2011, to confirm that Moffat County School District will comply with the United States Constitution and rescind its ban of “I ♥ Boobies! Keep a Breast!” bracelets. If we do not hear from you by that date, we will presume that Moffat County School District’s ban of the bracelets is still in effect, and will consider appropriate next steps.

Rebecca T. Wallace
Staff Attorney, ACLU of Colorado
Encl. H., et al. v. Easton Areas School District, Civil Action No. 10-6283 (E.D. Pa.
April 12, 2011)

cc Jo Ann Baxter
President, Moffat County School