



FEDERAL DISTRICT COURTS PROVIDE SOME GUIDANCE FOR SCHOOL OFFICIALS ON STUDENT FREE SPEECH RIGHTS AND PROVOCATIVE CANCER AWARENESS BRACELETS

For the past several school years, California school officials have grappled with the appropriate response to students wearing bracelets to school with provocative slogans supporting cancer awareness. Since April 2011, two different federal district courts in Pennsylvania and Wisconsin have reached different conclusions on whether the First Amendment prohibits a school from barring students from wearing these edgy accessories. The rulings, despite their conflicting results, provide some guidance to school officials on how to address this free speech conundrum.

The Keep a Breast Foundation, a nonprofit organization that promotes detection, prevention and treatment of breast cancer distributes bracelets reading "I Love Boobies" and "I ♥ Boobies! (Keep a Breast)." In 2011, a U.S. district court in Pennsylvania ruled a school district could not enforce a ban on middle school students wearing "I ♥ Boobies! (Keep a Breast)" bracelets. (*H. v. Easton Area Sch. Dist.* (E.D. Pa. Apr. 12, 2011) Case No. 10-6283.)

The court looked at whether school officials had the authority to ban the bracelets under the U.S. Supreme Court's student speech decisions *Bethel School District No. 43 v. Fraser* (1986) 478 U.S. 675, and *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503. The *Fraser* decision permits school officials to restrain student expression that is lewd, vulgar or is otherwise plainly offensive. In this case, the court determined that *Fraser* did not apply, rejecting the assertion that the word "boobies" is vulgar in any context, and especially when the bracelets are designed to raise breast cancer awareness. The *Tinker* decision allows a school district to restrain speech causing a substantial disruption of school activities. In the Pennsylvania case, the court ruled that the district had offered no evidence that the bracelets caused a substantial disruption. Therefore, the court issued a preliminary injunction barring the district from prohibiting the bracelets at school.

However, in February 2012, a U.S. district court in Wisconsin denied a student's request for a preliminary injunction to prevent a middle school principal from banning students from wearing "I ♥ Boobies! (Keep a Breast)" bracelets. (*K.J. v. Sauk Prairie Sch. Dist.* (W.D. Wis. Feb. 6, 2012) No. 11-622.) A principal banned the bracelets unless students turned them inside out so that the slogan was not visible. The principal believed that the bracelet's message constituted sexual innuendo which violated the school's dress code.

The court concluded that, under *Fraser*, schools are permitted to prohibit vulgar or offensive speech that is related to, but falls short of, being profane, obscene or indecent speech. The court also gave substantial deference to officials' decision to prohibit the bracelets, reasoning that existing case law supports such action where the bracelets amounted to a positive social

CLIENT NEWS BRIEF

March 2012

Number 11

statement reasonably interpreted as vulgar or offensive in the middle school atmosphere.

Easton Area School District and *K.J.* highlight how courts may respond differently, even when presented with very similar facts, to the regulation of provocative apparel. The school district has appealed the court's decision in *Easton Area School District*, which may result in clearer guidance on this issue from the Third Circuit Court of Appeals. Until then, schools should glean what they can from these federal rulings, seeking to balance student speech rights against the interests in a disruption-free educational environment and administrator discretion to determine age-appropriate speech suitable for school.

Because of the known cancer-awareness purpose of the bracelets' message, it may be difficult to justify banning them on the basis that they constitute vulgar speech under *Fraser*. The age of students, however, is relevant. For example, while the courts split on whether the bracelets were objectionable under the *Fraser* standard in the middle school setting, the bracelets may be more objectionable in an elementary school, and less objectionable in a high school setting.

Schools may also measure whether the bracelets are subject to regulation under *Tinker's* substantial disruption standard. Absent actual disruption to the educational environment caused by the bracelets, the *Tinker* standard will generally not validate bans on the apparel. There is also an open question whether the bracelets may be regulated if disruption is caused not by the students wearing the bracelets, *but other students'* reactions and behavior in response to them. Officials should proceed with caution if disruption is caused by the reaction of others to the bracelets, as opposed to the students wearing them.

Finally, California schools must also take cues from the student speech rights embodied in Education Code sections 48907 and 48950. Section 48907 protects students' speech right to wear buttons, badges and other insignia, and while limiting speech that is "obscene" or causes a substantial disruption, does not expressly limit "vulgar" speech. And, on its face, section 48950 purports to protect high school students from discipline solely on the basis of speech, that when engaged in outside of campus, is protected under the First Amendment.

If you have any questions or concerns regarding the issues impacting regulation of Keep a Breast's cancer awareness bracelets, or any other student free speech issue, please contact one of our [eight offices](#) located statewide, visit our [website](#), or follow Lozano Smith on [Facebook](#).

Written by:

[Sloan Simmons](#)

Shareholder and Co-Chair of the Student Practice Group

Sacramento Office

ssimmons@lozanosmith.com

[Aimee Perry](#)

Associate

Sacramento Office

aperry@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.