

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii
STATEMENT OF JURISDICTION 1
STATEMENT OF THE ISSUES 1
STATEMENT OF THE CASE 3
STATEMENT OF THE FACTS 5
STATEMENT OF RELATED CASES AND PROCEEDINGS 17
STATEMENT OF STANDARD OF REVIEW 17
SUMMARY OF ARGUMENT..... 18
ARGUMENT..... 21

I. The School District has a likelihood of success on the merits of its appeal because the District Court abused its discretion both in its application of the Fraser standard of deferential reasonableness and the Tinker standard.21

A. The District Court erroneously failed to apply the Fraser standard of deferential reasonableness to affirm the School District’s reasonable manner restriction on student in-school speech.21

i. The District Court committed a fundamental error because it failed to apply the deferential standard of objective reasonableness set forth in Fraser.29

ii. The District Court’s finding that “I ♥ Boobies!” could not reasonably be considered vulgar is clearly erroneous, thus manifests an abuse of discretion.40

B. The District Court erroneously held that the School District’s restraint on “I ♥ Boobies!” did not meet the Tinker standard because an atmosphere of sexual harassment substantially interferes with every student’s right to an education.52

II. The District Court erred in its holding that the Plaintiffs would be irreparably harmed by a denial of a preliminary injunction because the Plaintiffs have multiple alternative channels of communicating a concern for breast cancer awareness.57

III. The harm to the School District by a preliminary injunction is far greater than the denial of a preliminary injunction to the Plaintiffs, particularly because the School District will be unable to exercise its prerogative granted by Fraser and its statutory obligations required by the School Code.59

IV. The public will be harmed via the diminishment of the District’s authority exercise its prerogative and obligation to regulate the manner of student speech pursuant to Fraser and the School Code.61

CONCLUSION 61

TABLE OF AUTHORITIES

Cases

Oburn v. Shapp,
521 F. 2D 142, 146-47 (3d Cir. 1975) 1

Punnett v. Carter,
621 F.2D 578, 582 (3d Cir. 1980)..... 1

Sypniewski v. Warren Hills Regional Bd. of Educ.,
307 F. 3D 243, 252 n.10 (3d Cir. 2002)..... 1, 17, 18, 33

Pappan Enterprises, Inc. v. Hardee’s Food Systems, Inc.,
143 F. 3D 800, 803 (3d Cir. 1998)..... 17, 18

Bethel School District No. 403 v. Fraser,
478 U.S. 675 (1986)..... 19, 23-25, 28, 30-31, 32- 35, 38-44, 49, 58

Guiles ex rel. Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006)..... 20, 25, 35, 42, 49

Tinker v. Des Moines Independent Community School District,
393 U.S. 503 (1969)..... 21- 22, 33, 41, 52-53, 55

Morse v. Frederick,
551 U.S. 393, 408 (22007)..... 24, 30, 33, 43, 51

Saxe v. State College Area School District,
240 F. 3d 200 (3d Cir. 2001).....25, 31, 54-56, 59

Broussard ex rel. Lord v. School Board of Norfolk,
801 F. Supp. 1526 (D. Va. 1992).....26, 30, 32, 34, 42, 44-45, 50, 53

DePinto v. Bayonne Bd. Of Educ.,
514 F. Supp. 2d 633, 644 (D.N.J. 2007) 26, 42

Mercer v. Harr,
No. H-04-3454, 2005 WL 1828581 (S.D. Tex. Aug. 2, 2005)..... 26, 34

<u>Pyle v. South Hadley School Committee,</u> 861 F. Supp. 157 (D. Mass 1994)	27, 32, 34, 44-45
<u>C.H. ex rel. Z.H. v. Olivia,</u> 226 F. 3d 198, 211-12 (3d Cir. 2000)	30
<u>Poling v. Murphy,</u> 872 F. 2D 757, 762 (6th Cir. 1989)	31
<u>Quarterman v. Byrd,</u> 453 F. 2d 54, 56-57 (4th Cir. 1971)	31
<u>FCC v. Pacifica Foundation,</u> 438 U.S. 726 (1978).....	32
<u>Doniger v. Niehoff,</u> 527 F. 3d 41 (2d Cir. 2008).....	34
<u>R.O. v. Ithaca City Sch. Dist.,</u> NO. 09-1651 (2d Cir. May 18, 2011)	34
<u>Smith ex. Rel. Smith v. Mt. Pleasant Public Schs.,</u> 285 F. Supp. 2d 987 (E.D. Mich. 2003).....	34
<u>Bragg v. Swanson,</u> 371 F. Supp. 2d 814, 823 (W.D. Va. 2005).....	35
<u>Davis ex. Rel. LaShonda D. v. Monroe County Bd. Of Educ.,</u> 516 U.S. 629 (199).....	53
<u>Ward v. Rock Against Racism,</u> 491 U.S. 781, 791 (1989).....	58
<u>Federal Statutes</u>	
28 U.S.C. § 1292 (a)(1)	1

Pennsylvania School Code

24 P.S. 5-510.....	59
24 P.S. 13-1317.3.....	59
24 P.S. 13-1317.....	60
24 P.S. 13-1318.....	60

STATEMENT OF JURISDICTION

This appeal is from a denial of a motion for preliminary injunction, thus this Court's review is limited to preliminary injunctive relief. 28 U.S.C. 1292(a)(1); Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980); Oburn v. Shapp, 521 F.2d 142, 146-47 (3d Cir. 1975). While a preliminary injunction is not a final order, this Court has jurisdiction pursuant to 28 U.S.C. 1292 (a)(1), which provides that "the courts of appeals shall have jurisdiction of appeals from [i]nterlocutory orders of the district courts of the United States...granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. 1292(a)(1); See Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243, 252 n.10 (3d Cir. 2002) (explaining that the Third Circuit Court of Appeals has jurisdiction of appeals from decisions regarding motions for preliminary injunction). Therefore, this Court has jurisdiction over appeals of orders granting preliminary injunctions, the subject of this appeal.

STATEMENT OF THE ISSUES

(1) Whether the District Court committed a fundamental error by failing to apply a deferential standard of objective reasonableness to review the Principal's decision regarding the appropriate manner of student speech.

Suggested Answer: Yes.

(2) Whether the District Court erred in finding that “I ♥ Boobies!” could not reasonably be deemed “vulgar” or “lewd” when the phrase contains sexual connotations.

Suggested Answer: Yes.

(3) Whether the District Court erred in concluding that the use of vulgar sexual innuendos in the public school cannot create a forecast for substantial disruption when Title IX provides that students in the public school have a right to an atmosphere free from sexual harassment.

Suggested Answer: Yes.

(4) Whether the District Court erred in concluding that the Plaintiffs will endure irreparable harm as a result of the denial of a preliminary injunction when the School District’s ban on “I ♥ Boobies!” bracelets was a reasonable restriction on manner of speech which left open multiple alternative means of expression.

Suggested Answer: Yes

(5) Whether the District Court erred in its balancing of the respective harms when the Plaintiffs may express the viewpoint of breast cancer awareness in multiple ways whereas the School District will lose its prerogative under Fraser and be unable to implement its responsibilities under the School Code if a preliminary injunction is granted.

Suggested Answer: Yes.

(6) Whether the District Court erred in holding that the harm to the public will be greater if the students are restrained from wearing “I ♥ Boobies!” bracelets when the message of breast cancer awareness has never been repressed and the Plaintiffs are free to wear “I ♥ Boobies!” bracelets off of the school grounds and outside of school activities.

Suggested Answer: Yes.

STATEMENT OF THE CASE

On October 28, 2010, the Principal of grades 7 and 8 of the Easton Area School District (hereinafter the “School District”) suspended the school attendance of 13-year-old B.H. and 12-year-old K.M. for refusing to remove bracelets containing the phrase “I ♥ Boobies!”. (App. Vol. II at 72, 99, 105, 206). All suspended students were not permitted to attend the Snowball Dance, which was a reward for students exhibiting positive behavior, pursuant to the “Positive Behavioral Support System applicable to all students in grades 7 and 8. (App. Vol. II at 205-06; Vol. III at 410-11). Therefore, B.H. and K.M. were similarly prohibited from attending the dance. (App. Vol. II at 123).

On November 15, 2010, B.H., via her mother Jennifer Hawk, and K.M., via her mother Amy Martinez, filed a Complaint in the District Court of the Eastern District of Pennsylvania (hereinafter referred to as the “District Court”) against the

School District alleging that the School District violated K.M. and B.H.'s First Amendment right to free speech. On November 15, 2010, the Plaintiffs filed a Motion for Preliminary Injunction and request for a Temporary Restraining Order, whereby the Plaintiffs requested that the School District lift its ban on the "I ♥ Boobies!" bracelets and allow the girls to attend the Snowball Dance.

Pursuant to the parties' stipulation, the girls were permitted to attend the Snowball Dance and the School District continued to enforce its ban of the "I ♥ Boobies!" bracelets. On November 18, 2010, due to this agreement, the District Court ordered that the Plaintiffs' Motion for Temporary Restraining Order be denied without prejudice. The parties proceeded to the discovery phase. On December 16, 2010, the District Court held a fact-finding hearing which included testimony from administrators of the School District, the minor Plaintiffs, and Kimberly McAtee of the Keep-A-Breast Foundation. The District Court heard oral argument regarding the Plaintiffs' Motion for Preliminary Injunction from both parties' attorneys on February 18, 2011.

On April 12, 2011, the District Court issued an Opinion and Order granting the Plaintiffs' Motion for Preliminary Injunction which enjoined the District from enforcing its restriction on bracelets stating "I ♥ Boobies! Keep-A-Breast." On April 21, 2011, the School District filed a Notice of Appeal to the April 12, 2011 Opinion and Order. Further, on May 19, 2011, the School District filed a Motion to

Stay with the District Court asking that the District Court stay its order granting Plaintiffs' motion for preliminary injunction, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure and Rule 8(a)(1)(c) of the Federal Rules of Appellate Procedure. The District Court denied said motion on June 21, 2011.

The School District respectfully requests that this Court reverse the judgment of the Eastern District Court of Pennsylvania rendered on April 12, 2011 erroneously granting Plaintiffs' a preliminary injunction. This matter is currently before this Court for disposition.

STATEMENT OF THE FACTS

The School District, located on the border of Pennsylvania and New Jersey, is an urban/suburban school district and serves a student population of about 9,200 students in an area with a population of about 62,000 individuals. (App. Vol. II at 202). Due to the student population, the School District divided its middle school into two buildings: Grades 5 and 6 are contained in one building (hereinafter referred to as the 5/6 Building) and grades 7 and 8 are contained in another building (hereinafter referred to as the 7/8 Building). (App. Vol. II at 203). The 5/6 Building and the 7/8 Building are housed in one entire complex but administered separately. (App. Vol. II at 203). Within the framework of School District policies, the administrators of both buildings make autonomous decisions with respect to

disciplinary matters. (App. Vol. II at 203-04). One such School District policy is the dress code which provides the following:

The dress speech and work habits of the student should in every way possible support the seriousness of the educational enterprise. The following examples are considered to be in poor taste and will merit disciplinary actions: No clothing imprinted with nudity, vulgarity, obscenity, profanity and double entendre pictures or slogans...

(App. Vol. II at 98, 392; Vol. III at 131-32). Within the framework of the School District's dress code, both building principals make independent determinations regarding violations. (App. Vol. II at 203-04, 404).

The School District's Board of Directors adopted October 28, 2010 as the district-wide Breast Cancer Awareness Day to observe the national Breast Cancer Awareness Month of October. (App. Vol. II at 208, 357). As part of its ongoing promotion of breast cancer awareness and research, over \$3,000 was raised for the School District's annual "Susan G. Komen Passionately Pink for the Cure" drive. (App. Vol. II at 208-09, 357, 359). The message of breast cancer awareness was similarly promoted in the 7/8 Building and included instruction for all students with respect to breast health and breast cancer. (App. Vol. II at 208-09, 235-36, 336-39). To promote breast cancer awareness, the 7/8 Building principals encouraged students and staff to wear pink, T-shirts, and pins, within the parameters of the dress code, *supra*, on Breast Cancer Awareness Day. (App. Vol. II at 208, 269; Vol. III at 412-13). The administration of the 7/8 Building never

stifled the message of awareness of breast cancer and, in fact, supported this message. (App. Vol. II at 238).

The administration of the 7/8 Building is as follows: Angela DiVietro, Principal; Amy Braxmeier, Grade 8 Assistant Principal; and Anthony Viglianti, Grade 7 Assistant Principal. (App. Vol. II at 173, 201, 203, 258). In the 7/8 Building, the classroom teachers are responsible for noticing and reporting dress code violations. (App. Vol. II at 268). Pursuant to the School District-wide dress code, students in the 7/8 Building have been asked to remove apparel with the following double entendres: (1) Hooters restaurant, (2) Big Peckers restaurant, and (3) "Save the ta-tas." (App. Vol. II at 255-56). Any student wearing an item containing a double entendre message or any other dress code violation was asked to remove the item and will receive no disciplinary consequences if compliant with the directive. (App. Vol. II at 267). Therefore, students were only given consequences for defiance, not dress code violations independently. (App. Vol. II at 267 371-72).

In September 2010, the beginning of the 2010-2011 school year, teachers in the 7/8 Building reported to Mr. Viglianti and Ms. Braxmeier that they were noticing students wearing bracelets containing the phrase "I ♥ Boobies!" and did not believe that the bracelets were appropriate under the school dress code. (App. Vol. II at 228, 260). Further, teachers in the 7/8 Building reported that the bracelets

were causing a distraction for students in their classrooms. (App. Vol. III Deposition of A. DiVietro at 20; Vol. II at 261, 268). Also, during the September through November 2010 timeframe, there were instances of sexual harassment in the 7/8 Building particularly focused on girls' breasts. (App. Vol. II at 230-31, 314, 360-71). A girl in the 7/8 Building, who was wearing an "I ♥ Boobies!" bracelet, reported to Ms. Braxmeier that boys approached the girls at her lunch table and stated that they "love boobies." (App. Vol. II at 231). Another girl reported to Ms. Braxmeier that, while she was having a conversation with other girls at her lunch table about the "I ♥ Boobies!" bracelets, a boy interrupted them and stated "I love boobies" and, while playing with fireball candies, chanted "boobies, boobies." (App. Vol. II at 231). There were also instances that were not reported to Ms. Braxmeier in which some boys were "immature" regarding the "I ♥ Boobies!" slogan and approached other middle school girls about "boobies." (App. Vol. II at 135; Vol. III at 442). Further, during the same timeframe, there were instances of boys touching girls in an unwanted sexual manner. (App. Vol. II at 230-31).

As of September and October of 2010, the School District as a whole had not officially banned or, aside from the dress code itself, offered any guidance regarding the "I ♥ Boobies!" phrase (App. Vol. II at 230, 238, 260, 346¹). After

¹ The memo from Stephen Furst sent to the School District administration was to support the decision of the 7/8 Building principals to ban the "I ♥ Boobies!" bracelets. (App. Vol. II at 347-46). The ban in effect at the time that B.H. and K.M.

meeting with Ms. Braxmeier and Mr. Viglianti, Ms. DiVietro, 7/8 Building Principal, decided that, due to the inherent sexual message, bracelets stating “I ♥ Boobies!” were inappropriate for the 7/8 Building students to wear in school. (App. Vol. II at 228, 238, 260, 268). The Principal and Assistant Principals believed that the phrase “I ♥ Boobies!” conveyed a sexual double entendre which is prohibited by the School District-wide dress code policy. (App. Vol. II at 228, 262, 264). Moreover, the unique age group of the 7/8 Building, which ranged from 11 to 14 years old, was considered in the principals’ decisions to ban the “I ♥ Boobies!” phrase, specifically because of the wide variety of sexual and physical development of its student population. (App. Vol. II at 23, 230, 238, 261). Accordingly, Grade 7 Assistant Principal, Anthony Viglianti, sent an email in September of 2010 to the 7/8 Building teachers informing them that “I ♥ Boobies!” bracelets were against the dress code and students seen wearing the bracelets should be individually asked to remove the bracelet. (App. Vol. II at 228, 343). Although the administration never made an official determination with respect to the appropriateness of “keepabreast.org,” the bracelets were not permitted to be turned inside out because students were quickly and easily returning their bracelets back to the “I ♥ Boobies!” side. (App. Vol. II at 280).

were suspended was only the ban instituted by the 7/8 Building principals. The District-wide ban did not occur until November 9, 2010 via the directive of Mr. Furst, long after the Plaintiffs in this case were suspended pursuant to the Building 7/8 ban.

Because of the sexual message conveyed via the “I ♥ Boobies!” phrase, on October 27, 2010, the day before Breast Cancer Awareness Day, the 7/8 Building issued a televised morning announcement instructing students not to wear “I ♥ Boobies!” bracelets in school. (App. Vol. II at 268, 344). Also, Mr. Viglianti made another announcement at the end of the day reminding students not to wear “I ♥ Boobies!” bracelets. (App. Vol. II at 268, 344). B.H. and K.M., two students in the 7/8 Building, asked their mothers whether they could wear “I ♥ Boobies!” bracelets in defiance of the ban. (App. Vol. II 81, 116-17; A. Martinez Dep. at 21-22; J. Hawk Dep. at 7-8). Both girls’ mothers gave their approval or acquiesced to their daughters wanting to wear “I ♥ Boobies!” bracelets. (App. Vol. II at 116; A. Martinez Dep. at 21-22; J. Hawk Dep. at 7-8). Ms. Martinez, K.M.’s mother, and Ms. Hawk, B.H.’s mother, both believe that students in school should be able to use any word to express their viewpoints of cancer awareness. (Vol. II J. Hawk Dep. at 11-12; A. Martinez at 17-18).

On October 27, 2010, John Border, School District Security, was informed by a cafeteria worker that B.H. was wearing an “I ♥ Boobies!” bracelet. (App. Vol. II at 220). Mr. Border asked B.H. to remove “I ♥ Boobies!” bracelet, but she would not. (App. Vol. II at 220). After B.H. refused to remove the bracelet, Mr. Border escorted B.H. to Ms. Braxmeier. (App. Vol. II at 220-22). Ms. Braxmeier pleaded with B.H. to remove the bracelet. (App. Vol. II at 221-22). As per the standard

dress code violation procedure, Ms. Braxmeier informed B.H. that if she removed the bracelet, she would not issue any disciplinary consequences. (App. Vol. II at 221-22). B.H. stated that it was her “right” to wear the bracelet and that it was her generation, “not [y]our generation.” (App. Vol. II at 222). After further discussion, B.H. removed the bracelet with no further disciplinary consequences and returned to the cafeteria. (App. Vol. II at 222).

On October 28, 2010, the 7/8 Building celebrated Breast Cancer Awareness Day. (App. Vol. III at 235-36). On this day, faculty and students wore pink as well as other pins and T-shirts, within the dress code, which demonstrated support for breast cancer awareness. (App. Vol. III at 235-36). On this day, Mr. Border was appraised that B.H. was wearing an “I ♥ Boobies!” bracelet again during lunch period. (App. Vol. II at 222). Mr. Border approached B.H. and asked her to remove her bracelet but B.H. refused to comply. (App. Vol. II at 222). At that time, K.M. stood up in the cafeteria and stated that she was wearing an “I ♥ Boobies!” bracelet and was not going to take it off. (App. Vol. II at 222). Then, a third girl, R.T., stood up as said that she was also wearing an “I ♥ Boobies!” bracelet as was not going to take it off. (App. Vol. II at 222). Mr. Border escorted the three girls to Ms. Braxmeier’s office. (App. Vol. II at 223-24). On their way to Ms. Braxmeier’s office, B.H. and K.M. gave each other a high-five because they were proud of themselves for defying the ban. (App. Vol. II at 118-19, 234). K.M. wanted to be

“caught” wearing the bracelet because she believed that students should not be punished for wearing clothing that the student believes is appropriate. (App. Vol. II at 131). Both K.M. and B.H. believe that, when used in the context of cancer awareness, any word for the female breast would be appropriate. (App. Vol. II at 101-02, 131, 138). B.H. believes that the existence of the “keep a breast” phrase on the bracelet negates any possible prurient understanding of “I ♥ Boobies!” (App. Vol. II at 102-03). Both girls knowingly defied the ban. (App. Vol. III Dep. K.M. at 31; Dep. B.H. at 33-34; App. Vol. II at 235).

When B.H., K.M., and R.T. arrived in her office, Ms. Braxmeier spoke with each girl individually about the “I ♥ Boobies!” bracelet. First, Ms. Braxmeier spoke with R.T. (App. Vol. II at 234). R.T. agreed to remove her bracelet. (App. Vol. III A. Braxmeier Dep. at 20). In the course of her discussion with Ms. Braxmeier, R.T. explained that she understood why students should not wear the “I ♥ Boobies” bracelets. (App. Vol. III A. Braxmeier Dep. at 20, 26, 67). Specifically, R.T. stated that some boys were “immature” and have been approaching girls and commenting “I love your boobies” or “I love boobies.” (App. Vol. III A. Braxmeier Dep. at 20, 26, 67). After removing her bracelet, R.T. was free to leave with no disciplinary consequences. (App. Vol. II at 234).

Ms. Braxmeier spoke with K.M. individually about whether there was any way within the school dress code that K.M. could express her support for breast

cancer awareness. (App. Vol. III at 235). K.M. said there was not. (App. Vol. III at 235). Ms. Braxmeier gave K.M. suggestions about other things she could do such as wearing pink. (App. Vol. III at 235). However, K.M. refused to express herself in any other way aside from wearing an “I ♥ Boobies!” bracelet. (App. Vol. III at 235). After discussing the bracelets with K.M., Ms. Braxmeier spoke with B.H. individually about her “I ♥ Boobies!” bracelet. (App. Vol. II at 237). Ms. Braxmeier asked B.H. if there was a way within the dress code that she could express her support for breast cancer awareness. (App. Vol. II at 237). B.H. stated that there was not and refused to remove her “I ♥ Boobies!” bracelet. (N.T. 12/16/2010 at 238). Because they refused to remove the “I ♥ Boobies!” bracelets when asked, B.H. and K.M. were sent to in-school suspension for the remainder of the day and were also given a full day of in-school suspension. (App. Vol. II at 206, 302-03).²

“I ♥ Boobies!” bracelets were a fad in the public school. (App. Vol. II at 72, 92; Vol. III at 442). B.H. first purchased an “I ♥ Boobies!” bracelet because she saw people wearing them “walking around the mall” and she saw “a lot of [her] friends wearing the bracelet.” (App. Vol. II at 72). Only subsequent to her decision to purchase an “I ♥ Boobies!” bracelet did B.H. discover that the bracelets

² Unlike out-of-school-suspension which is considered a more serious punishment, B.H. and K.M. were permitted to stay in school and complete their school work to avoid getting behind in their classes.

were intended to promote breast cancer awareness. (N.T. 12/16/2010 at 22). K.M. first saw the bracelets over the summer and purchased one because she thought “the bracelet was really cool.” (App. Vol. III at 442). While K.M.’s proffered intent for wearing the “I ♥ Boobies!” bracelet was also for an awareness message, she acknowledged that “[s]ome friends were wearing [the bracelets] just to wear them...” (App. Vol. III at 442).

The “I ♥ Boobies” bracelets worn by the Plaintiffs, B.H. and K.M., included a pink, black, green, and white-colored bracelets. (App. Vol. II at 77-78). The pink, black, and green bracelets had a one-inch band. The outside of the bracelet contained the phrase “I ♥ Boobies!” in approximately three quarters of an inch lettering with the phrase “(Keep-A-Breast)” in lettering measuring approximately one quarter of an inch. The web address, keep-a-breast.org, was contained on the inside of the bracelets. (App. Vol. II at 112; Vol. III at 406-07, 409). The white bracelet, which was also worn by both K.M. and B.H., has a band measuring approximately one and three-quarter-inch in width. That bracelet contained the phrase “I♥ Boobies!” in approximately half-inch lettering. (App. Vol. II at 78-79, 96). The white bracelet also contained the phrase “Glamour Kills” in approximately three-quarters-inch lettering. (App. Vol. II at 78, 96, 113). Both K.M. and B.H. acknowledged that “Glamour Kills” is a clothing line, unrelated to breast cancer awareness. (App. Vol. II at 96-97).

“I ♥ Boobies!” bracelets are marketed and distributed by the Keep-A-Breast Foundation, which is based in Los Angeles, California. (App. Vol. II at 154). The Keep-A-Breast Foundation sells “I ♥ Boobies!” bracelets and other merchandise to retailers, including Zumiez, Tilly’s, and the website loserkids.com, which are called “lifestyle stores,” meaning that the shops are targeted at 13 through 30-year-olds who are interested in action sports and music. (App. Vol. II at 146). Truck stops, 7- Elevens, vending machine companies, and “porn stars” have expressed interest in promoting the “I ♥ Boobies!” bracelets. (App. Vol. II at 151-52, 163). Kimberly McAtee, Peer Marketing Manager of Keep-A-Breast, sees a sexual message in the fact that “porn stars” are interested in the Keep-A-Breast brand. (App. Vol. II at 163). In her management capacities with the Keep-A-Breast Foundation, Ms. McAtee has received “a lot” of emails from teachers and principals requesting more information regarding the organization and its purpose. (App. Vol. II at 155-56). While Ms. McAtee maintained that some school administrators are not bothered by the “I ♥ Boobies!” phrase, she also admitted that she is aware of other school administrators who believe the expression is inappropriate. (App. Vol. II at 165).

The “I ♥ Boobies!” bracelets and message were a vehicle for the commercial advertising. (App. Vol. II at 160-63). In exchange for a donation, Keep-A-Breast allows other businesses to market their commercial products using the “I ♥

Boobies!” slogan. (App. Vol. II at 160-63). This is termed “co-branding” or “cause marketing.” (App. Vol. II at 161). Keep-A-Breast does “a lot” of co-branding, according to Ms. McAtee. (App. Vol. II at 160). Because of co-branding, the “I ♥ Boobies!” bracelets were used as a platform for the “Glamour Kills” clothing line to market its products. (Vol. II at 97, 161). On Glamour Kills’ press release web site, young women’s sexuality is used to market its clothing. (Vol. II at 97, 168). In addition to “Glamour Kills,” Keep-A-Breast co-brands with the following businesses: Etnies Kleen Canteen, Etnies shoes, and SJC Snare Drum brand apparel. (App. Vol. II at 161-63; Vol. III K. McAtee Dep. at 44-46). At the time of the fact-finding hearing, the “Plastic Sucks” campaign was forthcoming with the Keep-A-Breast Foundation. (App. Vol. II at 162).

Since the District Court’s grant of the Plaintiffs’ Motion for Preliminary Injunction on April 12, 2011, the students of the 7/8 Building administration have been testing the administration with dress code violations. In its opinion, the District Court stated that “[n]othing in his decision prevents a school from making a case by case determination that some speech is lewd and vulgar while other speech is not.” However, any school district that does not even have the authority to determine that “I ♥ Boobies!” is vulgar and inappropriate for middle school students has lost credibility with its student body and the community to make determinations regarding the manner of student speech. For that reason, the

decision of the District Court seriously undermined the School District's prerogative to protect children from sexual messages and teach civility in the public school context. The School District's appeal is now before this Court for disposition.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There has been no previous appeal in this case and no prior or related proceedings.

STATEMENT OF STANDARD OF REVIEW

In reviewing the District Court's decision to grant Plaintiffs' preliminary injunction, this Court should employ a three-part standard of review: (1) The District Court's legal conclusions are assessed *de novo*; (2) findings of fact are reviewed for a clear error; and (3) the District Court's final decision to grant the preliminary injunction is reviewed for abuse of discretion. Sypniewski, 307 F.3d 243, 252 (3d Cir. 2002). This Court should decide that the District Court abused its discretion if its decision was based upon an erroneous legal conclusion, or a clearly erroneous finding of fact, or an improper application of law to fact. Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc., 143 F.3d 800, 803 (3d Cir. 1998) (quoting Hofkin v. Provident Live & Accident Ins. Co., 81 F.3d 365, 369 (3d Cir. 1996)).

To determine whether the District Court appropriately granted a preliminary injunction, this Court must consider the following four factors: (1) Whether

Plaintiffs have a likelihood of success on the merits of their claim; (2) whether the Plaintiffs would be irreparably injured by a denial of the injunction; (3) whether there will be greater harm to the School District if the injunction is granted; (4) whether granting the injunction is in the public interest. Sypniewski, 307 F.3d 243, 252 (3d Cir. 2002) (citing Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 170 (3d Cir. 2001)). When considering the four-listed factors, this Court should overturn the District Court if it finds that the District Court based its decision upon an erroneous legal conclusion, or a clearly erroneous finding of fact, or an improper application of law to fact. Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc., 143 F.3d 800, 803 (3d Cir. 1998)(quoting Hofkin v. Provident Live & Accident Ins. Co., 81 F.3d 365, 369 (3d Cir. 1996)).

SUMMARY OF ARGUMENT

The District Court abused its discretion by failing to pay the appropriate deference to the 7/8 Building Principal's determination regarding the manner of speech in their public school. There is no evidence presented in this case that the 7/8 Building administration sought to suppress the viewpoint of concern for breast cancer awareness, only the manner in which that viewpoint was conveyed via the "I ♥ Boobies!" phrase. Accordingly, this case concerns only the principals' authority to regulate the manner of speech displayed on clothes that they reasonably regard as vulgar and inappropriate.

In the case of Bethel School District v. Fraser, the United States Supreme Court declared that school administrators may enforce reasonable restrictions on vulgar or lewd manners of speech and, therefore, found that a student's speech containing sexual metaphor was not protected by the First Amendment in the public school, even though the speech did not include a single express sexual reference. Subsequently, Federal Courts have given deference to school principals' objectively reasonable decisions regarding vulgarity, particularly because the reasonable sensibilities of the principal, as a duly-delegated agent of the voter-elected school board, reflects the community's standards of decency for its school children.

Here, the District Court failed to apply a standard of deferential objective reasonableness to the vulgarity determination of the 7/8 Building principals. Instead, the District Court found that the principals did not act reasonably because Plaintiffs' intended awareness message could be reasonably understood from the "I ♥ Boobies!" phrase. However, according to the prevailing case law, the fact that the Plaintiffs' intended message could be understood from the "I ♥ Boobies!" phrase, as contained on the Keep-A-Breast bracelets, does not render the manner restriction at issue "unreasonable." The law is clear that school principals are not required to adopt a literal interpretation and/or the interpretation of the students for their choice manner of speech. Administrators' vulgarity determinations with

respect to sexual innuendos have been consistently and without exception deemed objectively reasonable by the Supreme Court of the United States and our nation's federal courts, regardless of the students' intended purpose for the speech.

Therefore, the District Court abused its discretion by failing to apply a standard of objective deferential reasonableness.

The District Court abused its discretion by finding as fact that the "I ♥ Boobies!" phrase could not be considered vulgar and inappropriate. The manner of speech does not have to be obscene, unspeakable, or a "four-letter-word" for an administrator's ban to be reasonable. The Second Circuit Court of Appeals held in the case of Guiles ex rel. Guiles v. Marineau, discussed *infra*, that the Fraser standard applies to "profanity or sexual innuendo." Proclaiming "love" for a sexual part of the body, particularly when utilizing familiar terms, could be deemed sexual innuendo and vulgar by a reasonable public school administrator, particularly in the context of a public middle school. As will be set forth more clearly below, others outside of the 7/8 Building administration have found sexual innuendo in the "I ♥ Boobies!" phrase, thus it could not be said that the administration's vulgarity determination was "un"reasonable. For example, Playboy Magazine, a publication that is notoriously engaged in prurient commerce, printed an article regarding this case and a picture of the "I ♥ Boobies!" bracelets on the same page with articles regarding condom use, HIV, and a pornographic

movie. Therefore, a reasonable administrator could also find that the “I ♥ Boobies” phrase is vulgar and offensive. Accordingly, while sexual innuendo is not the only interpretation of the “I ♥ Boobies!” phrase as it is contained on the bracelets, the 7/8 Building administration acted reasonably.

Alternatively, pursuant to the case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), schools may regulate speech if there is a reason to forecast a substantial disruption, which includes the loss of student rights. Sexually harassing speech substantially interferes with the rights of all students according to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which provides students with the right to an environment free from sexual harassment. The District Court erred in its narrow application of Tinker to only include disruptions that are akin to mayhem. A loss of rights, including the right to be educated in an environment free from sexual harassment of even one child, constitutes a substantial disruption under Tinker. Therefore, the District Court erred in applying the law to the facts and, in so doing, abused its discretion.

ARGUMENT

I. The School District has a likelihood of success on the merits of its appeal because the District Court abused its discretion, both in its application of the Fraser standard of deferential reasonableness and the Tinker standard.

A. The District Court erroneously failed to apply the Fraser standard of deferential reasonableness to affirm the School District’s reasonable manner restriction on student in-school speech.

Our Supreme Court declared in the landmark case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), that schools cannot restrain speech because of “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Id. at 509. In Tinker, a group of students were suspended for wearing of a two-inch-wide plain black armband in protest of America’s involvement in the Vietnam War. Tinker, 393 U.S. at 504, 514. The defendant school district suspended the students pursuant to its ban on the plain black armbands which was instituted based upon the belief that the anti-Vietnam War sentiment might create a political disturbance, both inside and outside of the schoolhouse. Id. at 509 n.3. The Supreme Court explained that “students may not be regarded as closed-circuit recipient of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.” Id. at 511. Ultimately, the Court declared that, to “justify prohibition of a particular expression of opinion, [a school district] must be able to show...that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school’.” Tinker, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Nearly 20 years later, the Supreme Court, via the case of Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), declared that deference should be paid to the reasonable manner-of-speech restrictions set by public school administrators. Id. at 683. In Fraser, one student, Matthew Fraser, for the purpose of nominating his choice candidate in a way that developed “rapport” with his fellow students, delivered a speech containing sexual metaphors.³ Id. at 677-78; see also Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1363 (9th Cir. 1985) (explaining that Matthew Fraser’s stated reason for utilizing sexual metaphor was to develop “rapport” with his classmates), *overruled by* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), *supra*. The defendant school district responded by giving Matthew a three-day suspension due to the lewd manner in which he spoke to the students and faculty at attendance during the school assembly. Id. at 678-79. The Supreme Court explained that “[t]he First Amendment guarantees wide freedom in matters of adult public discourse...It does not follow, however, that

³ The speech was as follows:

I know a man who is firm-he's firm in his pants, he's firm in his shirt, his character is firm-but most ... of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts-he drives hard, pushing and pushing until finally-he succeeds. Jeff is a man who will go to the very end-even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president-he'll never come between you and the best our high school can be.

Bethel School District v. Fraser, 478 U.S. at 688 (Brennan, J., concurring).

simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in the public school.” Id. at 682. After distinguishing the viewpoint preclusion in Tinker from the manner restriction applied to Matthew’s speech, the Supreme Court declared that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.” Id. at 685; but cf. Morse v. Frederick, 551 U.S. 393, 408 (2007) (clarifying that the Fraser standard does not apply to public school instituted viewpoint restrictions that would “undermine the school’s basic educational mission,” such as religious or political viewpoints). Therefore, while schools are not generally permitted to ban offensive viewpoints absent substantial disruption, the Supreme Court has granted school administrators, who are duly-delegated agents of the school board, discretion to implement reasonable manner restrictions when a vulgar medium is used to convey students’ viewpoints. See e.g. Fraser, 478 U.S. at 683 (“The determination of what *manner* of speech in the classroom or in the school assembly is inappropriate properly rests with the school board.”)

While this Court has yet to address a manner restriction pursuant to Fraser,⁴ in the case of Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001), this Court provided the following guidance with respect to the type of reasonable manner restriction permitted by the Supreme Court in Fraser: “Fraser permits a school to prohibit words that ‘offend for the same reasons that obscenity offends’—a dichotomy neatly illustrated by the comparison between Cohen’s jacket and Tinker’s armband.” Id. at 213(quoting FCC v. Pacifica Found., 438 U.S. 726, 746 (1978)).⁵ The Second Circuit Court of Appeals in the case of Guiles ex rel. Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006), reasoned that the Fraser

⁴ This Court has heard the following four cases, all of which were addressed under the standard set forth in Tinker: J.S. v. Blue Mountain Sch. Dist., No. 08-4138 (3d Cir. June 13, 2011)(explaining that Fraser does not and cannot apply to a MySpace page created outside of school on a home computer); see also Layschock v. Hermitage Area Sch. Dist., 07-4465 (3d Cir. June 13, 2011)(explaining that Fraser does not and cannot apply to a MySpace page created outside of school on a home computer); Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002)(challenging a district’s ban on a T-shirts which were targeted due to the school district’s belief that the written content of the T-shirts expressed racist sentiments via the term “redneck”); Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001)(challenging a school harassment policy because students could not express their anti-gay religious beliefs under the policy).

⁵ For the proposition that Fraser permits reasonable manner restrictions, distinct from viewpoint, this Court cited the following two cases and explanatory parenthetical quotations: Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 286 n.2 (1988)(Brennan, J., dissenting)(Fraser exception limited “to the appropriateness of the manner in which the message is conveyed, not the message’s content”); East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F.Supp.2d 1166, 1193 (D. Utah 1999)(“Fraser speaks to the form and manner of student speech, not its substance. It addressed the mode of expression, not its content or viewpoint.”).

standard applies to “speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo or profanity.” Id. 327. As clarified by subsequent case law, student speech that appeals to the prurient interest is generally regarded as proscribable under Fraser. In Broussard ex rel. Lord v. School Board of Norfolk, 801 F. Supp. 1526 (D. Va. 1992), for example, the defendant school punished Kimberly Ann Broussard for wearing a shirt containing the phrase “Drugs Suck!”. At trial, Kimberly Ann testified that “the shirt’s message was that it is ‘not right to use drugs,’ a message that she wanted to convey to others. She intended the shirt to be provocative in its anti-drug message.” Id. at 1533. Because the use of the word “suck” in its meaning of “disapproval” has sexual connotations, the court held that the school district reasonably banned Kimberly Ann’s “Drugs suck!” shirt due to the vulgarity of its mode of expressing her anti-drug sentiment. Id. at 1536-37; see also DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 644(D.N.J. 2007) (explaining that Broussard appears to “fall squarely within the Guiles interpretation of ‘lewd,’ ‘vulgar,’ ‘obscene,’ and ‘plainly offensive’”; in other words, the District Court of New Jersey held that Broussard, *supra*, was complicit with the interpretation of Fraser established by the Second Circuit Court of Appeals). In Mercer v. Harr, No. H-04-3454, 2005 WL 1828581 (S.D. Tex. Aug. 2, 2005), a middle school student challenged her school’s proscription on a T-shirt that stated “Somebody Went to

HOOVER DAM And All I Got Was this ‘DAM’ Shirt.” The court held that Fraser and its progeny permit school districts to ban speech due to a vulgar double entendre, even when one possible meaning is entirely benign:

The case law is clear that school administrators are permitted to consider more than the literal meaning of words or images at issue...Given the homophonic nature of the word ‘dam,’ it was reasonable for the principal and the Board to consider the T-shirt offensive. The decision regarding ‘what manner of speech in the classroom is appropriate properly rests with the school board’.

Id. at *7(quoted Hazelwood v. Kuhlmeier, 484 U.S. 260, 267 (1988)). Finally, in Pyle v. South Hadley School Committee, 861 F. Supp. 157 (D. Mass. 1994),⁶ the court held that high school students could not wear a shirt that contained the phrase “See Dick Drink. See Dick Drive. See Dick Die. Don’t be a Dick.” The plaintiffs in Pyle argued that the court should be responsible for weighing administrators’ decisions on its own scale of offensiveness and conclude that the T-shirts were not vulgar. Id. at 159. The court explained as follows:

The question becomes, who decides what is “vulgar”? The question in most cases is easy: *assuming general reasonableness, the citizens of the community, through their elected representatives on the school board and the school administrators appointed by them, make the*

⁶ The First Circuit Court of Appeals vacated the District Court of Massachusetts’ decision relevant to *state law only* and deferred in its ruling of the state law issue pending the resolution of the Pyles’ rights with the Massachusetts Supreme Court. See Pyle v. South Hadley School District, 55 F.3d 20 (1st Cir. 1995). The District Court of Massachusetts’ decision with respect to the First Amendment of the United States Constitution has not been appealed, certified for appeal, or disturbed in anyway.

decision. On questions of coarseness or ribaldry in school, federal courts do not decide how far is too far.

This is because people will always differ on the level of crudity required before a school administrator should react. The T-shirts in question here may strike people variously as humorous, innocuous, stupid or indecent. In assessing the acceptability of various forms of vulgar expression in the secondary school, however, the limits are to be debated and decided within the community; the rules may even vary from one school district to another as the diversity of the culture dictates. *The administrator here acted within reason, and the court's inquiry need go no further.*

Id. (emphasis added).

Turning to the case at hand, there was no deference paid to the administration and no consideration by the District Court with respect to whether a reasonable administrator could have deemed vulgar the “I ♥ Boobies!” phrase. The District Court held that it was unreasonable for the administration to deem the “I ♥ Boobies!” bracelets lewd or vulgar because of the minor Plaintiffs’ awareness-raising intentions when wearing the phrase. In applying the law set forth in Fraser to the facts of this case, the District Court made a factual determination regarding the 12 and 13-year-old Plaintiffs’ intentions to raise breast cancer awareness via the bracelets. Then, the District Court conducted an analysis of whether the “I ♥ Boobies!” message could reasonably be understood to convey the Plaintiffs’ intentions. Additionally, the court reasoned that the administration’s interpretation of the bracelets was unreasonable due to the multiple meanings of the word

“boobies” and a perceived lack of credibility regarding the 7/8 Building administration’s belief that the bracelets were inappropriate for school due to vulgarity. After determining that “I ♥ Boobies!” in the context of the bracelets could reasonably be viewed as a breast cancer awareness tool, the District Court held that School District was not reasonable in its decision regarding the vulgarity of the bracelets. (App. Vol. I at 5, 38).⁷ Accordingly, the District Court erroneously failed to pay deference to the administration and consider when a reasonable administrator could have deemed vulgar the “I ♥ Boobies!” phrase. As such, the District Court abused its discretion.

i. The District Court committed a fundamental error because it failed to apply the deferential standard of objective reasonableness set forth in Fraser.

The 7/8 Building Principal and Assistant Principals restricted the “I ♥ Boobies!” manner in which the minor Plaintiffs conveyed their breast cancer awareness message, not the message of breast cancer awareness itself.⁸ Therefore,

⁷ Hereinafter, the District Court’s decision will be cited according to the pagination of the joint appendix. The official citation of the case is B.H. v. Easton Area Sch. Dist., No. 10-6283 (McLaughlin, J. April 12, 2011).

⁸ As stated, the 7/8 Building participated in the School District’s celebration of Breast Cancer Awareness Day for both students and staff as part of the School District’s recognition of the national Breast Cancer Awareness Month. Not only does the 7/8 Building address breast health and breast cancer awareness in its health curriculum, but it also annually raises funding for the Susan G. Komen for the Cure Foundation, which is an internationally recognized breast cancer awareness and research organization. While the School District did not and does not support the “I ♥ Boobies!” statement, many breast cancer awareness raising

this case involves only the authority of school officials to regulate language worn by students that the administration considers to be inappropriate and offensive in the context of its school. “Reasonable and nondiscriminatory regulations on time, place, and manner are permissible restrictions on expression.” Broussard ex rel. Lord, 801 F. Supp. at 1534; C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 211-12 (3d Cir. 2000) (explaining that public school teachers may institute reasonable time, place, and manner restrictions).

Deference to school principals’ judgment when carrying-out the daily work of their schools is firmly established by case law and statute. In Fraser, the Supreme Court clarified that lessons of civility and decency in student expression is the “work of the schools,” thus, school boards should be afforded discretion in instances of manner-only speech restraints. Fraser, 478 U.S. at 683 (“The determination of what *manner* of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”); but cf. Tinker, 393 U.S. at 508-09 (explaining that the control of student *viewpoints* is not the work of the schools and should only be done when the expression of student viewpoints substantially interferes with the work of the schools). See also Morse, 551 U.S. at 401 (giving deference to the principal’s reasonable pro-drug-use interpretation of Frederick’s banner while there were other possible interpretations); Fraser, 478

tools, such as the “Check Yourself” bracelet also marketed by the Keep-A-Breast Foundation, are permitted and encouraged by the 7/8 Building administration.

U.S. at 683 (“The inculcation of these values is truly the ‘work of the schools’... The determination of what manner of speech is inappropriate properly rests with the school board.”); Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (“Local control over the public schools, after all, is one of this nation’s most deeply rooted and cherished traditions.”); Quarterman v. Byrd, 453 F.2d 54, 56-57 (4th Cir. 1971) (“In prescribing general conduct within the school, the school authorities must have a wide latitude of discretion, subject only to a standard of reasonableness.”). Therefore, because regulating and eliminating vulgarity from the manner of student speech is the daily “work of the schools,” administrators’ reasonable determinations regarding vulgarity should be afforded deference.⁹

Moreover, this Court’s definition of “vulgarity” in the context of public schools requires deference to schools administrators’ judgment as the community standard. As set forth more clearly, *supra*, in Saxe, 240 F.3d at 213, this Court clarified that “Fraser permits a school to prohibit words that offend *for the same*

⁹ Pennsylvania School Law also firmly establishes that the daily administration of the school and its curriculum is best left up to the reasonable judgments of school administrators. See e.g. 24 P.S. 5-510 (“The board of directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper...regarding the conduct and deportment of all pupils.”); 24 P.S. 13-1317(“Every teacher, vice principal, and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over pupils attending his school...as the parents, guardians, or persons in parental relation to such pupils may exercise.”); 24 P.S. 13-1317.3(“The board of directors in any school entity may impose limitations on dress and may require pupils to wear standard dress or uniforms.”).

reasons that obscenity offends.” (emphasis added). The way that “obscenity offends” is community dependent. See e.g. FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (defining “indecent” by the “contemporary *community standards* for the broadcast medium...”). For the community of the Easton Area Middle School, particularly the 7/8 Building, the views of decency held by the 12 and 13-year-old Plaintiffs, their mothers, and the Keep-A-Breast Foundation¹⁰ did not and cannot represent the locally-accepted standards of decency. While the two minor Plaintiffs of this case and their mothers believe that any word may be used provided it is being used to raise cancer awareness,¹¹ it is the 7/8 Building administration, as duly delegated agents of the elected members of the School Board, who is ultimately answerable to the Easton voting community and, therefore, is in the best position to represent the community standard of decency, particularly in the middle school context. See Fraser, 478 U.S. at 696 (Stevens, J., dissenting)(explaining that the Court applies contemporary *community standards* in evaluating speech with sexual connotations); see also Pyle, 861 F. Supp. at 170 (“the school board...is in the best position to weigh the strengths and vulnerabilities of the town’s 785 high school students.”); and see Broussard ex rel. Lord, 801 F. Supp. at 1536 (“school

¹⁰ The Keep-A-Breast Foundation was founded and is operated in Los Angeles, California. (App. Vol. II at 154).

¹¹ See Appendix Vol. II J. Hawk Dep. at 11-12; A. Martinez at 17-18.

boards, school administrators, principals, and teachers must be permitted to govern schools attended by children.”). Therefore, the community standard for appropriate communication must be vested with the administration, mitigated by a standard of deferential reasonableness.

The distinction between the application of the Tinker and Fraser standards supports the deferential nature of the Fraser standard. To meet the Tinker standard, *supra*, a school must show that the speech would materially and substantially interfere with the “work of the school” or the rights of others. Sypeniewski, 307 F.3d at 257. The disruption must be more than hypothetical: There must be a reasonably foreseeable disruption. Id. Although it has been termed a “general rule,” the Tinker standard, particularly post-Fraser and Morse, is applied when a school district seeks to restrain “pure speech” targeted for its viewpoint or speech that occurs outside of school. See, supra cases cited and text accompanying note 4. In both of those types of instances, a school district must have an exceptionally high interest in restraining the speech in order to pass constitutional muster. The “water-mark” of this standard is much higher than the standard set for speech restrains pursuant to manner, as defined by Fraser. In Fraser, the Supreme Court made clear that teaching values regarding manner of speech is the “work of the schools,” thus the school board can restrain vulgar and offensive speech without the showing of a substantial disruption. Fraser, 478 U.S. at 683. Because it is a

“highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse,” when schools seek to restrain on-campus speech due to its vulgar manner, as opposed to offensive viewpoint, the Fraser standard permits such a restriction, mitigated by a standard of reasonableness. Fraser, 478 U.S. at 683 (“The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”).

Also, when in-school speech was banned by district administrations due exclusively to its vulgar manner, particularly when sexuality is involved, there has not been a single court in this country, aside from the District Court in the instant case, which has refused to defer to the reasonable sensibilities of a school principal. See R.O. v. Ithaca City Sch. Dist., No. 09-1651 (2d Cir. May 18, 2011) (holding that a school acted reasonably under Fraser in banning a cartoon featuring people in various sexual positions); Smith ex rel. Smith v. Mt. Pleasant Public Schs., 285 F.Supp. 2d 987 (E.D. Mich. 2003) (holding that student use of the terms “skank” and “tramp” when expressing his viewpoint regarding the inappropriateness of school policy and the corruption of teachers is punishable by the defendant district under Fraser); Mercer v. Harr, No. H-04-3454, 2005 WL 1828581 (S.D. Tex. 2005); Pyle v. South Hadley School Committee, 861 F.Supp. 157 (D. Mass 1994); Broussard ex rel. Lord v. School Board of Norfolk, 801 F.

Supp. 1526, 1534-36 (D. Va. 1992); and see also Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (student posted an independent blog outside of school which called school administrators “douche bags” and encouraged others to contact the superintendent “to piss her off more;” court concluded that, had the speech occurred on campus, the student could be punished pursuant to Fraser). Compare with Guiles ex rel. Guiles v. Merineau, 461 F.3d 320, 327 (2d Cir. 2006) (holding that symbols and pictures on a T-shirt are not “vulgar” pursuant to the Fraser standard which the court noted, applies to sexual innuendos); see also Bragg v. Swanson, 371 F. Supp. 2d 814, 823 (W.D. Va. 2005) (holding that a symbol—i.e. the confederate flag—was not vulgar as such to satisfy the standard set forth in Fraser).¹² Accordingly, while this Court and others have been reluctant to grant

¹² Courts have been reluctant to grant deference to schools banning symbols. This is because the symbols’ offensiveness is more indicative of viewpoint preclusion than of a manner-only restraint, as proscribed by the Supreme Court under Fraser. In Guiles ex rel. Guiles, 461 F.3d at 328-29, the Second Circuit held that pictures of drugs as part of a T-shirt that was critical of the president were not offensive in the same way that Fraser’s speech was offensive, particularly because there were no sexual innuendos and would only be offensive because of the insinuation of the viewpoints. Similarly, in Bragg, 371 F. Supp. 2d at 823, the school district’s ban on wearing Confederate flags, believing that they were offensive as racist speech, could not pass constitutional muster. This is because the Confederate flag was only offensive because of the offensive viewpoint that it set forth. Third Circuit First Amendment jurisprudence has been particularly protective against viewpoint preclusion. See e.g. Sypniewski, 307 F.3d at 254-55 (holding that school district may not ban the term “redneck” due to its association with racist viewpoints even after years of racial hostility in the school). The School District is not advancing an argument that schools should be given deference to restrain viewpoints, only that school districts should be given deference to teach their children, within the

school districts latitude in their “forecasts for disruption,” similar scrutiny has not been paid to a school district’s decisions to regulate the mode of students’ communication, particularly in the case of sexual innuendo.

Here, the District Court failed to pay deference to the 7/8 Building’s judgment regarding vulgarity. Instead of conducting an analysis of whether one meaning of “I ♥ Boobies!” could convey a prurient interest in the female breast, the District Court conducted an analysis of whether the Plaintiffs’ breast cancer awareness message could be understood from the “I ♥ Boobies!” phrase. (App. Vol. I at 35-36)(explaining that the “I ♥ Boobies!” phrase is presented in the context of a breast cancer awareness campaign and appears with the Keep-A-Breast Foundation name on the bracelets which are inscribed on the inside with the foundation’s website; also explaining that the “I ♥ Boobies!” phrase enhances the effectiveness of the communication to the target audience; further stating the “I ♥” is not inherently sexual). The only consideration given to the 7/8 Building administrators’ interpretation was a credibility determination specific to the issue of whether the administration really did ban “I ♥ Boobies!” because of a belief that the phrase was vulgar, or whether the administration was simply trying to exercise unfettered control over its student population. This is an erroneous application of

communities that they live, how to appropriately express viewpoints in a way that is considerate of the sensibilities of others and to maintain an atmosphere free of sexual nuance.

the law. The standard of reasonableness applied to review a school district's restriction on manner is an objective standard. (Vol. I at 31-32)(defining the issue as "whether the ban on the 'I ♥ Boobies! (Keep-A-Breast)' bracelets constitutes an objectively reasonable exercise of public school's authority to ban lewd or vulgar speech under Fraser"). In other words, the question is whether a reasonable school administrator could determine that the bracelets were vulgar. As such, the District Court abused its discretion in applying the law to the facts.

The District Court failed to apply a standard of deferential reasonableness to the administration's vulgarity determination and, instead, deferred to the minor Plaintiffs' intentions. When applying the law to the facts, the District Court should have first determined whether "boobies," from the expression "I ♥ Boobies!", *could* be understood as a familiar term for the female breast.¹³ Then, the next inquiry should have been whether expressing a love for the female breast *could* be

¹³ The District Court stated that it "cannot conclude that any use of the word 'boobies' is vulgar and can be banned no matter what the context," particularly because "boobie" may refer to "a dull, heavy, stupid fellow." (App. Vol. I at 32-33). It rendered this conclusion after interpreting the word, not only out of the context of the "I ♥ Boobies!" phrase, but also after reciting a definition according to the Oxford English Dictionary, a dictionary not commonly used in America. (App. Vol. I at 33). School principals are not required to interpret words out of context according to their dictionary definitions. In the context of "I ♥ Boobies!", a reasonable interpretation is the slang term for a female breast. See WEBSTER'S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 2133 (Borders Group, Inc. 2001)(**Boob**, n. *Slang (sometimes vulgar)*. a female breast..). Under the Fraser standard of deferential reasonableness, the inquiry should go no further.

understood as prurient.¹⁴ The District Court explained that the inclusion of the Keep-A-Breast Foundation name on the bracelet, along with the keepabreast.org URL inscription on the inside, renders a finding of vulgarity for the “I ♥ Boobies!” message unreasonable. (App. Vol. I at 31)(“[T]he phrase ‘I ♥ Boobies!’ in the context of these bracelets cannot reasonably be deemed vulgar. ‘I ♥ Boobies!’ is presented in the context of a national breast cancer awareness campaign. The phrase ‘I ♥ Boobies!’ is always accompanied by the Foundation’s name ‘Keep A Breast’.”). This is an incorrect application of the law to the facts. Under a deferential, objective standard of reasonableness, the issue is whether a reasonable administrator, viewing the “I ♥ Boobies!” phrase next to the Keep-A-Breast Foundation name, *could* believe that that “I ♥ Boobies!” manner of communicating the Keep-A-Breast message appeals to a prurient interest in the female breast. The District Court’s analysis inverts this standard and, instead, asks the question of whether a reasonable person could believe that the “I ♥ Boobies!” phrase communicates a message of breast cancer awareness in the context of the Keep-A-Breast Foundation’s campaign. Applying a standard of deferential reasonableness to children’s choice manners of speech effectively surrenders control of the public schools from the teachers, administrators, and elected officials to the public school

¹⁴ As will be discussed more fully, *infra*, the intentions of the two Plaintiffs for their speech are irrelevant to a determination of whether the School District implemented a reasonable manner restriction.

students, which is an effect specifically derided by the Supreme Court. Fraser, 478 U.S. at 686 (favorably quoting Tinker, 393 U.S. at 526 (Black, J., dissenting)) (“I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teacher, parents, and elected school officials to surrender control of the American public school system to public school students.”). Accordingly, the standard of deference that the District Court paid to the students’ interpretations of the “I ♥ Boobies!” message is an erroneous application of law to fact. As such, the District Court abused its discretion.

Not only is the District Court’s application of the law erroneous, but the precedent set by the District Court’s decision promotes inefficiency for the courts and impotence for principals and elected school officials. Local communities elect school board officials who will best represent the policy concerns of the community. School administrators, appointed by those local officials as their duly delegated agents, are chosen to affect the policies set by the elected school board officials. Any time students wear new expressions produced as part of an awareness raising campaign, the administration will have to either allow the choice language of that campaign, even if it is an aberration of the community standards of decency, or the courts will be tasked with determining whether the item was vulgar under the Fraser standard. The District Court’s analysis provides, in its effect, an exception to the Fraser standard when the students and their parents can

prove that the speech at issue was used to enhance the message of an awareness raising campaign. (App. Vol. I at 5)(“This Court concludes that these bracelets cannot reasonably be considered lewd or vulgar under the standard of Fraser. The bracelets are intended to be and they can reasonably be viewed as speech designed to raise awareness of breast cancer and to reduce the stigma associated with openly discussing breast health.”). Considering the adolescent imagination, particularly in middle school, it is not out of the question to conceive of multiple possibilities for language that could be used as an “awareness raising tool.” Therefore, the District Court’s decision has set the stage for ineffective school administrators and inefficient courts.

According to all of the above, the District Court erroneously applied a standard of subjectivity and deference to students when the law provides an objective standard of deference to public school administrators. As such, the District Court abused its discretion.

ii. The District Court’s finding that “I ♥ Boobies!” could not reasonably be considered vulgar is clearly erroneous, thus manifests an abuse of discretion.

Under a deferential standard of objective reasonableness as discussed, *supra*, the District Court’s holding under the Fraser standard is based upon the clearly erroneous factual finding that the “I ♥ Boobies!” phrase could not reasonably be deemed vulgar. The “I ♥ Boobies!” phrase as contained on the Keep-A-Breast

Foundation bracelets, could be interpreted as conveying the double entendre of a prurient interest in the female breast. Therefore, a reasonable administrator could determine that “I ♥ Boobies!” is a vulgar and offensive in the context of a public school.

As set forth more clearly, *supra*, the Principal’s decision regarding student manners of speech should be reviewed under the following standard of objective reasonableness: Whether a reasonable administrator could consider the phrase “I ♥ Boobies!” vulgar in the context of the public school. This standard is not one of unfettered discretion. For example, it could not be argued that the wearing of a plain black armband is “vulgar.” There was no evidence at trial or in depositions that the School District banned “I ♥ Boobies!” bracelets as a pretext to discriminate against the viewpoint of breast cancer awareness—regardless of the 7/8 Building administration’s perceived lack of credibility for vigorousness of belief that the bracelets were vulgar, there was never any evidence or accusation that the School District precluded the breast cancer awareness message.

Moreover, the expressive right of students to utilize sexuality to enhance the communication of their viewpoints is not co-extensive with the rights of adults to utilize sexual expression. See Kuhlmeier, 484 U.S. at 266 (quoting Tinker, 393 U.S. at 506)(explaining that First Amendment rights must be applied “in light of the special circumstances of the school environment.”); see also Fraser, 478 U.S. at

682(explaining that the First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings”). In Fraser, the Supreme Court gave particular consideration to the fact that Matthew Fraser’s speech contained sexual innuendo and his audience included children “only 14 years old and on the threshold of awareness of human sexuality.” Fraser, 478 U.S. at 683.¹⁵ In so doing, the Supreme Court noted that its First Amendment jurisprudence “has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.” Id. at 684. Post-Fraser, Federal Courts have defined the Fraser manner restriction with specific regard to sexual innuendo. See Saxe, 240 F.3d at 213 (explaining that “Fraser permits a school to prohibit words that ‘offend for the same reasons that obscenity offends’”);¹⁶ Guiles ex rel. Guiles, 461 F.3d at 327 (reasoning that the Fraser standard applies “speech that is something less than obscene but related to that concept, that is to say, speech containing *sexual innuendo* or profanity.”); Broussard ex rel. Lord, 801 F. Supp. at 1563-67 (applying Fraser because the “Drugs Suck!” phrase could be understood to have sexual connotations); see also DePinto v. Bayonne Bd. of Educ., 514

¹⁵ *A fortiori*, the students of the 7/8 Building, ages 11 through 14, are generally vulnerable to sexual messages.

¹⁶ Obscenity has traditionally been defined by applying a contemporary community standard to determine whether the speech or work at issue appeals to the prurient interest. See Miller v. California, 413 U.S. 15, 23-24 (1973).

F.Supp. 2d 633, 644(D. NJ 2007) (explaining that Broussard appears to “fall squarely within the Guiles interpretation of ‘lewd,’ ‘vulgar,’ ‘obscene,’ and ‘plainly offensive’.”). Therefore, the minor Plaintiffs do not have a First Amendment right to utilize sexual innuendo to enhance their breast cancer awareness message, even without the intent of sexual expression.

The District Court abused its discretion by focusing on the Plaintiffs’ stated intentions for wearing “I ♥ Boobies!” because the United States Supreme Court has made clear that students’ stated intentions for their speech do not negate a school principal’s reasonable determination to the contrary. In the case of Morse v. Frederick, 551 U.S. 393 (2007), the Supreme Court analyzed whether the speech, BONG HiTS 4 JESUS, could reasonably be understood as advocacy for illegal drug use. The student in the case stated that it was meant to be “gibberish,” while the school principal understood the speech to be advocating drug use. The Supreme Court of the United States reasoned that “[g]ibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless denies its undeniable reference to illegal drugs.” Morse, 551 U.S. at 402.¹⁷ The dissenting judges in Morse credited Joseph Fredrick’s alleged motivation of simply wanting a television appearance. Id. at 444-45,

¹⁷ Notably, only one of the dissenting justices in Morse is a current member of the Supreme Court: The dissenting justices were Justice Stevens, Justice Souter, and Justice Ginsberg.

(Stevens, J., dissenting). The majority singled out this specific point for admonishment and stated as follows: “[Frederick’s motive] is not an interpretation of what the banner says.” *Id.* at 402; see also Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1363 (9th Cir. 1985) (explaining that Matthew Fraser utilized sexual metaphor in his speech to develop a rapport with his classmates to enhance the effectiveness of his speech), *overruled by* 478 U.S. 675 (1986). Therefore, in its analysis of the reasonableness of an administration’s speech interpretation, the United States Supreme Court focused specifically on the words, not the motivation of the speaker. Moreover, the administration does not have to adopt the literal meaning or the students’ meaning of their chosen manner of expression. See also Fraser, 478 U.S. at 677-78

When determining whether a manner restriction was reasonable, Federal Courts have also considered student intent to be irrelevant. For instance, in Pyle, the student argued that his T-shirt conveyed a political message and should, therefore, be given absolute protection. Pyle, 861 F. Supp. at 169. The T-shirt at issue in the Pyle case contained a blatant anti-drinking-and-driving message: “See Dick Drink. See Dick Drive. See Dick Die. Don’t be a Dick.” While the District Court of Connecticut did not deny that the motivation of the students was political in nature, the court explained that “[a]t least in high school, a political message does not justify a vulgar medium.” *Id.* at 169. Similarly, in Broussard, the plaintiff

testified that “[s]he intended the shirt to be provocative in its anti-drug message,” and that “children her age generally do not consider the word ‘suck’ to have a vulgar or sexual connotation.” Broussard ex rel Lord, 801 F. Supp. at 1533. The T-shirt at issue in Broussard proclaimed a clear anti-drug message: “Drugs Suck!” While the District Court of Virginia did not deny the veracity of the plaintiffs anti-drug motivation, the court found as fact that “a reasonable middle school administrator could find that the word ‘suck,’ even as used on the shirt, may be interpreted to have a sexual connotation.” Id. at 1534. In both Pyle and Broussard, the district courts utilized an objective standard, without regard to the motivation of the minor plaintiffs, to determine that the phrase at issue could be interpreted as sexual and vulgar by a reasonable school administrator. Therefore, the District Court in the instant case erred in its focus on the Plaintiffs’ motivations in rendering a finding regarding the vulgarity of the “I ♥ Boobies!” message. Accordingly, the District Court’s factual finding with respect to the reasonableness of the School District’s interpretation of the “I ♥ Boobies!” phrase is clearly erroneous. Furthermore, the District Court’s misapplication of the law to the facts manifests an abuse of discretion.

In conducting an objective analysis of whether “I ♥ Boobies!” could reasonably be deemed vulgar, this Court should consider whether the phrase could be interpreted to convey sexual connotations, even in the context of the Keep-A-

Breast Foundation's awareness campaign. The "I ♥ Boobies!" phrase, utilized as part of a breast cancer awareness campaign could and has been considered by many to convey the double entendre of a prurient interest in the female breast. As will be explained by clearly by the following list, the 7/8 Building administrators and the School District were not alone in their belief that the bracelets conveyed a vulgar sexual double entendre:

(1) Playboy Magazine, a publication regularly engaged in the marketing of prurient commerce, believed that this case would be of interest to its readers. In the February 2011 issue of Playboy Magazine, a picture the "I ♥ Boobies!" bracelets and an article about this case was featured on page 131 of the magazine, along with other articles on the topics of condom use, HIV, and a pornographic movie.

(2) Truck stops, convenience stores, vending machine owners, and "porn stars" were interested in marketing the "I ♥ Boobies!" bracelets created by the Keep-A-Breast Foundation. (App. Vol. II at 151-52, 163; see also Vol. I at 10). The interest of prurient commerce in the "I ♥ Boobies!" bracelets supports the reasonableness of the School District's belief that the "I ♥ Boobies!" bracelets were an inappropriate medium for communication by children in the public school.¹⁸

¹⁸ After finding as fact that truck stops, vending machine companies, and "porn stars" were interested in the bracelets, the District Court emphasized the Keep-A-Breast Foundation's refusal to market the "I ♥ Boobies!" bracelets via those

(3) Media commentators, most notably Peggy Orenstein of the New York Times, have noted the sexual connotation of the “I ♥ Boobies!” bracelets. (App. Vol. II at 326-27). On November 12, 2010, the New York Times Magazine published an article by Peggy Orenstein, New York Times best selling author and breast cancer survivor, which states the following regarding the “I ♥ Boobies!” bracelets: “That rubber bracelet is part of a newer trend: the sexualization of breast cancer. Hot breast cancer. Saucy breast cancer. Titillating breast cancer!” (App. Vol. II at 328). Moreover, Ms. Ornstein addressed the “I ♥ Boobies!” message as part of the problem as follows: “today’s fetishizing of breasts comes at the expense of the bodies, heart, and minds attached to them.” (App. Vol. II at 328). See also App. Vol. I at 33 (noting the Peggy Ornstein article as “criticizing ‘sexy cancer’

sources. (App. Vol. I at 10). This is an erroneous emphasis on the reasonableness of the viewpoint, not the medium through which the viewpoint was conveyed. The fact that the Keep-A-Breast Foundation refused to sell “I ♥ Boobies!” bracelets with truck stops, vending machines, and “porn stars” supports the veracity of the foundation’s motivation regarding the bracelets. However, it does not change the fact that the “I ♥ Boobies!” phrase, even within the context of the bracelets, has been interpreted by those regularly engaged in the prurient commerce as having an appeal to their clientele. The interest of prurient commerce in the “I ♥ Boobies!” bracelets, supports the reasonableness of the School District’s belief that the “I ♥ Boobies!” bracelets were an inappropriate medium for communication by children in the public school.

awareness, but noting that Ms. Ornstein acknowledged that the irreverence is utilized with the purpose of combating fatigue).¹⁹

(4) The “I ♥ Boobies!” phrase has been utilized by T-shirt companies that sell T-shirts and other paraphernalia that are vulgar, offensive, and particularly debasing to women and girls. See www.foulmouthshirts.com and www.sikworld.com.

(5) In September 2010, the beginning of the 2010/2011 school year, teachers of the 7/8 Building began noticing the “I ♥ Boobies!” bracelets and made inquiries regarding their appropriateness under the school dress code which prohibits the wearing of double entendre expressions. The students also deciphered a sexual message from the bracelets and made comments expressing “love” for “boobies.” Therefore, both teachers and students recognized a prurient interpretation of the “I ♥ Boobies!” phrase, even within the Keep-A-Breast Foundation context.

(6) K.M.’s mother, Amy Martinez, saw an inappropriate meaning in the words of the “I ♥ Boobies!” bracelets. (Vol. III Deposition of A. Martinez at 12, lines 13-17) (“When I initially bought the bracelet for my daughter, the very first one, yes, I absolutely was a parent who said, Oh, my God, boobies is on a bracelet; is that appropriate for a child of 12 in middle school.”)

¹⁹ Ms. Ornstein noted the following breast cancer awareness raising slogans: Save the T-Tas, Save Second Base, Project Boobies: “I grab a feel so cancer can’t steal” with hot pink handprints, and the “I ♥ Boobies!” bracelets. (Vol. II at 327-28).

According to all of the above responses to the “I ♥ Boobies!” phrase contained specifically on the bracelets of the Keep-A-Breast Foundation, a reasonable administrator could find that the “I ♥ Boobies!” phrase, even in the context of the Keep-A-Breast Foundation’s cancer awareness campaign, conveys a sexual double entendre and is, therefore, vulgar and inappropriate in the public school context.

The District Court erred in applying Fraser narrowly to only exclude unspeakable profanity from First Amendment protection in the public school. Specifically, the District Court noted that the 7/8 Building administrators have comfortably spoken the phrase in court for this case and over the morning announcements to inform students of the ban on the “I ♥ Boobies!” bracelets. (App. Vol. I at 36). Also, the District Court noted that numerous magazines, newspapers, and internet publications have utilized the “I ♥ Boobies!” phrase when reporting on the Keep-A-Breast bracelets and this case. (App. Vol. I at 33). Nowhere in the Fraser opinion does the Supreme Court state that speech must be a “four-letter word” or outright unspeakable profanity to be restrained in the public school for its manner of communication. In fact, Matthew Fraser’s speech did not contain a single overt sexual reference, mention of a sexual body part, or actual expletive that could not bear repeating. The manner of language does not have to be unspeakable or explicitly sexual to meet the standard set forth by the United

States Supreme Court in Fraser. See Fraser, 478 U.S. at 683 (explaining that vulgar and offensive manners of communicating may be excluded from school to teach concrete lessons of civility, and giving discretion to the school board to determine what is appropriate); Guiles ex rel. Guiles, 461 F.3d at 327 (reasoning that the Fraser standard applies to “speech that is something less than obscene but related to that concept, that is to say, speech containing *sexual innuendo* or profanity.”).

Further, the District Court erred in analyzing the veracity of the 7/8 Building administrators’ belief that the “I ♥ Boobies!” phrase was vulgar because the Fraser standard, particularly as it was interpreted subsequently by Federal Courts, is based upon a standard of objective reasonableness. As has been stated earlier, the appropriate standard that should be applied is whether a reasonable school administrator *could* believe that “I ♥ Boobies!” conveys a double entendre and is vulgar in the context of the public school. See Broussard, 801 F.Supp. at 1534 (“The Court finds that a reasonable middle school administrator *could* find that the word ‘suck,’ even as used on the shirt, may be interpreted to have a sexual connotation.”). In this case, the District Court assessed the 7/8 Building administrators’ credibility by noting their use of the “I ♥ Boobies!” phrase when informing students of the ban and when testifying in court. Also the District Court emphasized the immediacy of the 7/8 Building Principal in completely banning the “I ♥ Boobies!” phrase, particularly in comparison with the immediacy of the

Bethel School District's response to Matthew Fraser's speech. (App. Vol. I at 37-38). This comparison is factually erroneous and ultimately led to a legally erroneous conclusion by the District Court. The reaction of the 7/8 Building administration was congruent with the speech at issue. Matthew Fraser's speech was announced to the student body at an assembly via spoken word and created an instant school sensation; the "I ♥ Boobies!" speech was delivered on an individual basis via written expression and was viewed by administration as a dress code violation. (See App. Vol. II at 228, 260). Therefore, the reaction of the administration was appropriately congruent with the type of speech at issue. Moreover, the District Court's focus on the immediacy of the School District's reaction as a factor weighing against the administrators' credibility is a legally erroneous application of an objective standard of reasonableness, thus an abuse of discretion.

The "I ♥ Boobies!" phrase contained on the Keep-A-Breast bracelets has been interpreted by its readers in multiple ways. To some, the phrase was construed to convey sexual double entendre which, couched as a breast cancer awareness message, suggested a prurient attraction to the female breast. Probably to some the bracelets were purely sophomoric. The Plaintiffs in this case claimed that they wore the bracelets for a breast cancer awareness message meant to appeal to their peers. But the 7/8 Building administration, and, ultimately, the School

District interpreted the phrase as a sexual innuendo and, therefore, an inappropriate and offensive medium for school children to communicate. That interpretation is plainly reasonable according to the above-listed facts. Therefore, by a standard of objective reasonableness, a reasonable administrator could believe that the “I ♥ Boobies!” phrase is vulgar and offensive. See Morse, 551 U.S. at 401.²⁰ As such, the District Court erred in applying the law to the facts. Further, the District Court made a clearly erroneous factual finding regarding the reasonableness of the administration’s interpretation of the bracelets. Accordingly, the District Court abused its discretion.

B. The District Court erroneously held that the School District’s restraint on “I ♥ Boobies!” did not meet the Tinker standard because an atmosphere of sexual harassment substantially interferes with every student’s right to an education.

The School District demonstrated a reasonable forecast of disruption due to the atmosphere of sexual harassment created by the “I ♥ Boobies!” phrase. “I ♥ Boobies!” has sexual connotations and, particularly in the mind of students in the middle school, creates a sexually charged environment which is disruptive to the

²⁰ “The message on Frederick’s banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others it probably means nothing at all. Frederick himself claimed that the words were just nonsense meant to attract television cameras. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use and that interpretation is plainly a reasonable one.” Morse, 551 U.S. at 401.

public school education. Therefore, under the Tinker standard of disruption, the School District did not violate the Plaintiffs' First Amendment rights by proscribing the "I ♥ Boobies!" bracelets. Accordingly, the District Court's conclusions regarding Tinker were legally erroneous and constitute an abuse of discretion. See Broussard ex rel. Lord, 801 F. Supp. at 1537 (opining in dicta that the sexual meaning of "Drugs Suck" creates a reasonable forecast of disruption).

Under the standard set forth in Tinker, a school may "forecast" a disruption and take preemptive action. Tinker, 393 U.S. at 509. No circuit court in this nation has required the administration to wait for an actual disruption before acting. In Tinker, the Court upheld students' right to wear plain black armbands in protest of the United States' participation in the Vietnam War because the school showed "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students..." Tinker, 393 U.S. at 508. Under the facts of this case, the "rights of other students" are set forth under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits "student-on-student" sexual harassment in the public schools. See e.g. Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ., 516 U.S. 629 (1999). Under Title IX, a private cause of action exists for students when a school "acts with deliberate indifference to known acts of harassment in its programs or activities...[S]uch an action will lie only for harassment that is so severe, pervasive, and objectively

offensive that it effectively bars the victim's access to an educational opportunity or benefit." Id. at 633. Whether sexual harassment rises to the level of actionable "harassment" under Title IX depends upon the surrounding circumstances including the ages of the harasser, the victim, and the number of individuals involved. Id. at 651 (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)). In this case, the "I ♥ Boobies!" phrase was deemed inappropriate for school due to the likelihood of a resultant increase in student-on-student sexual harassment. Student in middle school are at various stages of sexual development and are particularly vulnerable to prurient expressions, especially when said phrases are utilized in school where students are also easily distracted.²¹

In Saxe, this Court considered the constitutionality of a public school's harassment policy which completely excluded speech that offended an individual

²¹ The Plaintiffs have repeatedly emphasized the fact that the "I ♥ Boobies!" phrase was banned in the high school. Also the District Court believed that the ban in the high school belied the reasonableness of the ban in the middle school. This is an erroneous assertion of both law and fact. As to the error of fact, it is completely false and wholly unsupported by the testimony in this case that the School District-wide ban was applied to the two Plaintiffs of this case. Prior to the School District's official ban on the "I ♥ Boobies!" bracelets, the 7/8 Building administration autonomously banned the bracelets from its school building. Subsequently, the School District banned the bracelets in support of the decision of the 7/8 Building administrators. However, the Plaintiffs at issue in this case are protesting the decision of the 7/8 Building administration. There is no plaintiff at this time who is suing the School District with respect to the School District-wide ban. Therefore, the School District's ban on the bracelets, which was not even in existence at the time that the administration punished the two Plaintiffs in this case, is not at issue and has nothing to do with the 7/8 Building administration's decision to ban the "I ♥ Boobies!" phrase.

due to gender, race, religion, color, national origin, sexual orientation, disability, or other personal characteristics. Saxe, 240 F.3d at 202-03. In striking down the policy, this Court criticized the Middle District Court for naming a categorical “harassment exception” to the free speech guarantees of the First Amendment. Id. at 204. Also, this Court cautioned against “[l]oosely worded anti-harassment laws” which “may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.” Id. at 207.

However, in Saxe, this Court also qualified that “[w]e do not suggest, of course, that no application of anti-harassment law to express speech can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace and in the schools is not only a legitimate, but a compelling, governmental interest.” Id. at 209-10 (citing Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987)). The policy of the school district in Saxe was deemed unconstitutional because, *inter alia*, it included the expression of offensive viewpoints. Saxe, 240 F.3d at 215 (citing Tinker, 393 U.S. at 509). Also, this Court explained that offensiveness to the listener is not sufficient to “intrude upon...the rights of students” as is required and articulated by the Supreme Court in Tinker. Saxe, 240 F.3d at 217 (quoting Tinker, 393 U.S. at 504). To exclude core political and religious speech, there must be a showing of “severity of pervasiveness” of harassment. Saxe, 240 F.3d at 217. Therefore, this Court held that the policy

covers substantially more speech than could be proscribed under Tinker's substantial disruption test. Accordingly, for a sexual harassment policy or proscription to pass constitutional muster under this Court's understanding of Tinker, the proscription may not be targeted at "pure speech."

In this case, the 7/8 Building administration prohibited the "I ♥ Boobies!" bracelets from school due to its dress code proscription of double entendre phrases. Unlike the policy in Saxe, *supra*, which would prohibit students from speaking out against same-sex partnerships, the "I ♥ Boobies!" ban only prohibits the use of that specific phrase which was deemed vulgar and offensive by the 7/8 Building Principal. It does not prohibit students from communicating a concern for breast cancer and it does not prohibit students from any other "pure speech," targeted only for its expressive content.

Particularly in the context of a public middle school, administrators must be mindful of the fact that sexual harassment is damaging to its sexually developing population of students. While some students are comfortable with reporting sexual harassment to the administration, at the middle school level, most do not. The school maintains its dress code as a proactive measure to curb the sexual harassment that is particularly problematic in its middle school context. Further, the administration acted preemptively in banning the bracelets to avoid the result of sexual harassment which, based upon the experience of all of the administrators,

was inevitable. At no point was a viewpoint every prohibited. Moreover, the target speech was the specific preclusion of one phrase due to its sexual meaning, not all speech pertaining to breast cancer awareness or all speech that could be offensive. Accordingly, the District Court erred in applying too narrow a standard of “substantial disruption” that did not include an analysis of students’ Title IX right to an atmosphere free of sexual harassment. Therefore, the District Court abused its discretion.

II. The District Court erred in its holding that the Plaintiffs would be irreparably harmed by a denial of a preliminary injunction because the Plaintiffs have multiple alternative channels of communicating a concern for breast cancer awareness.

The District Court erroneously held that the Plaintiffs would be irreparably harmed by denial of the preliminary injunction because of “the loss of First Amendment freedoms.” (App. Vol. I at 41). The Plaintiffs did not lose any “First Amendment freedoms” because the “I ♥ Boobies!” bracelets were banned pursuant to a reasonable manner restriction. Therefore, the District Court abused its discretion.

The United States Supreme Court has consistently declared the following with respect to time, place, and manner restrictions:

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a

significant governmental interest and they leave open ample alternative channels for communication of the information.’

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). The justification for the ban on the “I ♥ Boobies!” bracelets was pursuant to a manner restriction applied because of the School District’s significant interest in prohibiting vulgar and offensive terms from the school campus. Fraser, 478 U.S. at 683. With the restraint being “narrowly tailored” only to cover the specific “I ♥ Boobies!” phrase, the School District has left open a plethora of other ways for the Plaintiffs’ communication of their concern for breast cancer awareness, including the “Check Yourself” bracelets that are also marketed by the Keep-A-Breast Foundation as part of its breast cancer awareness campaign. Therefore, the School District’s ban on the “I ♥ Boobies!” bracelets constitutes a reasonable restriction on manner of speech.

In the context of a public school, children do not have a First Amendment interest in the use of vulgar expression. See Fraser, 478 U.S. at 682 (“The First Amendment guarantees wide freedom in matters of adult public discourse...It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in the public school.”) Provided that school districts do not categorically exclude a viewpoint, it

is entirely the prerogative of the public school to categorically exclude vulgar or lewd manners of expression. Saxe, 240 F.3d at 214. Therefore, because the “I ♥ Boobies!” phrase was removed from the School District pursuant to a reasonable manner restriction, the Plaintiffs have not been deprived of any First Amendment guarantees. Accordingly, the District Court erred in its application of the law to the facts and, as such, abused its discretion.

III. The harm to the School District by a preliminary injunction is far greater than the denial of a preliminary injunction to the Plaintiffs, particularly because the School District will be unable to exercise its prerogative granted by Fraser and its statutory obligations required by the School Code.

The District has certain statutory responsibilities under the School Code regarding the maintenance of safety and order in the public school. In relevant part, those obligations and/or objectives are set forth in the following provisions of the Pennsylvania School Code:

1. 24 P.S. 13-1317.3 (“The board of directors in any school entity may impose limitations on dress and may require pupils to wear standard dress or uniforms.”);

2. 24 P.S. 5-510 (“The board of directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper...regarding the conduct and deportment of all pupils.”);

3. 24 P.S. 13-1317(“Every teacher, vice principal, and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over pupils attending his school...as the parents, guardians, or persons in parental relation to such pupils may exercise.”);

4. 24 P.S. 13-1318(“Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct...”).

At this time, the School District is revising its dress code for the 2011-2012 school year and has no clear guidance on how it should proceed. According to the District Court’s holding, if students choose to wear an item containing a sexual double entendre as an awareness raising tool, the School District loses its authority under Fraser to disassociate itself from the language itself and require the students to use another mode of communication. This leaves the School District without any certainty with respect to its dress code specifically regarding sexually provocative or suggestive messages, vulgarity, and double entendres. By failing to recognize the deference due school authority to determine the manner of expression appropriate to the school community, school board, and its duly-delegated agents, the Principal and Vice-Principals, have been prevented from performing one of their basic functions, that of regulating the deportment and conduct of students.

IV. The public will be harmed via the diminishment of the District's authority exercise its prerogative and obligation to regulate the manner of student speech pursuant to Fraser and the School Code.

The public will be substantially harmed by the loss of school authority to manage its student population, particularly in an urban/suburban district. Without reasonable authority in the schools to regulate students' manners of speech, much of the purpose of obtaining a public education will be lost, particularly with respect to students' transition from school to work.

CONCLUSION

The daily operations of the school, including the manner of student speech, should rest with school principals, the duly-delegated agents of the voter-elected school board, who are ultimately answerable to the voting community. In this case, the students were only subject to a speech manner restriction—at no point was the viewpoint of breast cancer awareness restrained and, in fact, it was an openly encouraged viewpoint. Therefore, the appropriate standard to review the Principal's decision should be one of deferential reasonableness: Whether a reasonable middle school administrator could believe that the "I ♥ Boobies!" phrase was vulgar. A declaration of love for a sexual part of the human anatomy, even if intended to be benign, could be interpreted as sexual innuendo, particularly in the context of a public school. Further, in addition to the opinions of the principal and vice-principals of the 7/8 Building, the "I ♥ Boobies!" phrase was

interpreted to convey sexual innuendo by school teachers, students, media, “porn stars,” vending machine companies, truck stops, and Playboy Magazine. Therefore, it is reasonable that the 7/8 Building principals would believe that the “I ♥ Boobies!” phrase conveys sexual innuendo and is inappropriate for its 11-14 year-old students. The District Court abused its discretion by paying deference to the students’ interpretations of their communication, as opposed to the reasonable interpretation of the 7/8 Building administration. This release of authority from the principal to the students is not only poor public policy, by completely inconsistent with current First Amendment jurisprudence.

Alternatively, due to the atmosphere of sexual harassment created by the wearing of double entendre expressions, the 7/8 Building Principal could reasonably anticipate a substantial disruption created by a loss of students’ rights to an atmosphere free from sexual harassment in the public schools, particularly because the administration was appraised of multiple incidents of sexual harassment precipitated by the bracelets. Accordingly, the “I ♥ Boobies!” bracelets were appropriately banned by the 7/8 Building administration. As such, the District Court committed a fundamental error and abused its discretion.

WHEREFORE, the School District respectfully requests that this Court reverse the judgment of the Eastern District Court of Pennsylvania rendered on April 12, 2011 erroneously granting Plaintiffs’ a preliminary injunction.

Respectfully submitted,

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COMBINED CERTIFICATIONS

John E. Freund, III, Esquire, hereby certifies that (1) he was admitted to practice before the United States Court of Appeals for the Third Circuit on April 27, 1983; (2) the foregoing brief meets the page and word requirements of the Court; (3) an e-mail version of this brief has been sent to the Court and it is identical to the hard copy version; (4) a virus check is confirmed and was performed by AVG Antivirus version 8.0.176.

DATED: 6/27/11

/s/ John E. Freund, III

John E. Freund, III, Esquire

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June 2011, I served true and correct copies of Easton Area School District Brief of Appellants and Volume I of the Parties' Joint Appendix (J.A. 1-43) upon the following person(s) by depositing same in the United States Mail, regular, first-class mail, postage prepaid, addressed as follows:

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I HEREBY ALSO CERTIFY that on this 27th day of June 2011, I served true and correct copies of Volume II of the Parties' Joint Appendix (J.A. 44-405) & Volume III of the Parties'

Joint Appendix (J.A. 406-776) upon the following person(s) by depositing same in the United States Mail, regular, first-class mail, postage prepaid, addressed as follows:

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**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NO. 11-2067

B.H. & K.M., ET AL
PLAINTIFFS, APPELLEES

v.

EASTON AREA SCHOOL DISTRICT
DEFENDANTS, APPELLANTS

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-10-cv-06283; The Honorable Mary A. McLaughlin

VOLUME I OF THE JOINT APPENDIX (J.A. 1-43)

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TABLE OF CONTENTS

VOLUME I (J.A. 1-43)

1. Notice of Appeal, April 21, 2001 J.A. 1
2. Memorandum & Order, April 12, 2011..... J.A. 2

VOLUME II (J.A. 44-405)

3. Civil Docket. Eastern Pa. Case No. 5:10-cv-06283-mam J.A. 44
4. Transcript of evidentiary hearing, December 16, 2010 J.A. 51
5. Plaintiffs Exhibit 7 J.A. 301
6. Plaintiffs Exhibit 8 J.A. 302
7. Plaintiffs Exhibit 9 J.A. 315
8. Plaintiffs Exhibit 11 J.A. 316
9. Plaintiffs Exhibit 19 J.A. 317
10. Plaintiffs Exhibit 33 J.A. 318
11. Plaintiffs Exhibit 35 J.A. 324
12. Plaintiffs Exhibit 36 J.A. 327
13. Plaintiffs Exhibit 38 J.A. 329
14. Plaintiffs Exhibit 39 J.A. 339
15. Plaintiffs Exhibit 40 J.A. 340
16. Plaintiffs Exhibit 41 J.A. 341
17. Defendants Exhibit 1 J.A. 342
18. Defendants Exhibit 2 J.A. 343
19. Defendants Exhibit 3 J.A. 344
20. Defendants Exhibit 4 J.A. 345
21. Defendants Exhibit 5 J.A. 346
22. Defendants Exhibit 6 J.A. 348
23. Defendants Exhibit 7 J.A. 349
24. Defendants Exhibit 8 J.A. 350
25. Defendants Exhibit 9 J.A. 351
26. Defendants Exhibit 10 J.A. 357
27. Defendants Exhibit 11 J.A. 360
28. Defendants Exhibit 12 J.A. 365
29. Defendants Exhibit 13 J.A. 367
30. Defendants Exhibit 14 J.A. 368
31. Defendants Exhibit 15 J.A. 369
32. Defendants Exhibit 16 J.A. 370
33. Defendants Exhibit 17 J.A. 371

34. Defendants Exhibit 18	J.A. 372
35. Defendants Exhibit 19	J.A. 373
36. Defendants Exhibit 20	J.A. 400

volume iii (j.a. 406-776)

37. Defendants Exhibit 21	J.A. 406
38. Defendants Exhibit 22	J.A. 410
39. Defendants Exhibit 23	J.A. 411
40. Defendants Exhibit 24	J.A. 412
41. Defendants Exhibit 25	J.A. 414
42. Defendants Exhibit 26	J.A. 441
43. Defendants Exhibit 27	J.A. 442
44. Defendants Exhibit 28	J.A. 443
45. Defendants Exhibit 29	J.A. 484
46. Defendants Exhibit 30	J.A. 516
47. Defendants Exhibit 31	J.A. 543
48. Defendants Exhibit 32	J.A. 553
49. Defendants Exhibit 33	J.A. 579
50. Defendants Exhibit 34	J.A. 599
51. Defendants Exhibit 35	J.A. 608
52. Defendants Exhibit 36	J.A. 649
53. Defendants Exhibit 37	J.A. 671
54. Defendants Exhibit 38	J.A. 696
55. Defendants Exhibit 39	J.A. 732
56. Defendants Exhibit 40	J.A. 734
57. Defendants Exhibit 41	J.A. 735
58. Defendants Exhibit 42	J.A. 737
59. Plaintiffs Exhibit 53	J.A. 739
60. Certificate of Service	

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____	:	
B.H., a minor, by and through her mother,	:	
JENNIFER HAWK, and	:	
K.M., a minor, by and through her mother,	:	
AMY MCDONALD-MARTINEZ,	:	NO. 10-6283
	:	JUDGE MCLAUGHLIN
Plaintiffs,	:	
v.	:	
	:	
EASTON AREA SCHOOL DISTRICT,	:	
	:	
Defendant.	:	
_____	:	

NOTICE OF APPEAL TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOTICE is hereby given that the Easton Area School District, above-captioned Defendant, appeals to the United States Court of Appeals for the Third Circuit from the Order of the Honorable Mary A. McLaughlin, Judge for the United States District Court for the Eastern District of Pennsylvania, entered on April 12, 2011, which granted the Motion for Preliminary Injunction filed by B.H. and K.M., above-captioned Plaintiff, enjoining the Easton Area School District from enforcing a ban on certain bracelets containing the phrase “I ♥ Boobies.”

The parties to the aforementioned Order, as well as the names and addresses of their respective counsel are as follows:

Easton Area School District

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JENNIFER HAWK, and
K.M., a minor, by and through her mother,
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Date: April 21, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

H., et al. : CIVIL ACTION
 :
 v. :
 :
 EASTON AREA SCHOOL DISTRICT : NO. 10-6283

ORDER

AND NOW, this 12th day of April, 2011, upon consideration of the plaintiffs' Motion for Preliminary Injunction (Docket No. 2), the opposition, and reply thereto, and following an evidentiary hearing on December 21, 2010, and oral argument held on February 18, 2011, and for the reasons stated in a memorandum of today's date, IT IS HEREBY ORDERED that the plaintiffs' motion is GRANTED. The defendant is hereby ENJOINED from suspending, threatening to suspend, or otherwise punishing or disciplining the plaintiffs for wearing the bracelets presented to the Court in this case. The Court waives the Rule 65(c) security bond requirement.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

H., et al. : CIVIL ACTION
:
v. :
:
EASTON AREA SCHOOL DISTRICT : NO. 10-6283

MEMORANDUM

McLaughlin, J.

April 12, 2011

This case involves a middle school's ban on breast cancer awareness bracelets that bear the slogan "I ♥ Boobies! (Keep A Breast)" and similar statements. These bracelets are distributed by the Keep A Breast Foundation, which operates breast cancer education programs and campaigns that are oriented toward young women. On the school's designated breast cancer awareness day, two female students defied the school's bracelet prohibition and both were suspended for a day and a half and prohibited from attending an upcoming school dance. The students, by and through their parents, filed this law suit seeking, among other things, a preliminary injunction to enjoin the school district from enforcing the ban.

The plaintiffs argue that the school has violated their First Amendment right to freedom of speech. The two Supreme Court cases examining student speech that are most relevant to this case are Fraser and Tinker. See Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty.

Sch. Dist., 393 U.S. 503 (1969). Fraser allows schools to ban speech that is lewd or vulgar. If the speech does not meet the standard of Fraser, Tinker applies. Tinker forbids the suppression of student expression unless that expression is reasonably foreseen as a material and substantial disruption of the work and discipline of the school. The school district contends that the bracelets are lewd and vulgar under Fraser and if not, that they caused a substantial disruption of school operations under Tinker or the School District had a reasonable expectation of such disruption.

The Court concludes that these bracelets cannot reasonably be considered lewd or vulgar under the standard of Fraser. The bracelets are intended to be and they can reasonably be viewed as speech designed to raise awareness of breast cancer and to reduce stigma associated with openly discussing breast health. Nor has the school district presented evidence of a well-founded expectation of material and substantial disruption from wearing these bracelets under Tinker. The Court will therefore grant the plaintiffs' motion for preliminary injunction.

I. Procedural History

On November 15, 2010, the plaintiffs filed this law suit and a motion for a temporary restraining order and

preliminary injunction. The plaintiffs' motion sought a temporary restraining order allowing the plaintiffs to attend the upcoming "Snow Ball" middle school dance, which the school had prohibited the plaintiffs from attending as punishment for wearing their breast cancer awareness bracelets, along with one and a half days of in-school suspension.

The Court held a telephone conference with counsel for the parties and urged the school to allow the students to attend the school dance with the option of imposing comparable punishment if the Court held that the ban was constitutional. The school agreed to the Court's proposal. The Court then denied the motion for a temporary restraining order without prejudice.

On December 16, 2010, the Court held a day-long evidentiary hearing. At the hearing, the Court heard testimony from the two minor plaintiffs, B.H. and K.M.; Kimberly McAtee, a representative from the Keep A Breast Foundation; Stephen Furst, the Director of Teaching and Learning for the Easton Area School District; Anthony Viglianti, the Seventh Grade Assistant Principal; Amy Braxmeier, the Eighth Grade Assistant Principal; and Angela DiVietro, the Head Principal of Easton Area Middle School for grades seven and eight. On February 18, 2011, the Court held oral argument on the plaintiffs' motion.

II. Findings of Fact

This case involves two students, B.H. and K.M., who are currently enrolled in the Easton Area Middle School. B.H. is a thirteen-year-old, eighth grade student at Easton Area Middle School. K.M. is a twelve-year-old, seventh grade student at Easton Area Middle School. The defendant Easton Area School District (the "School District") is a political subdivision of the Commonwealth of Pennsylvania. (Notes of Testimony, Evidentiary Hearing, Dec. 16, 2010 ("N.T.") at 22:4-5;¹ Compl. ¶¶ 6-7; Answer ¶¶ 6-7.)

Easton Area Middle School (the "Middle School") is a large complex that holds two separate schools: a fifth and sixth grade school and a seventh and eighth grade school. The fifth and sixth grade school has a separate entrance, separate classrooms, separate lunchrooms, and is administered separately from the 7-8 building. The plaintiffs attend classes in the Middle School's 7-8 building. (N.T. 153:2-154:5.)

The bracelets at issue in this case include several colored rubber bracelets that contain various slogans including "I ♥ boobies! (KEEP A BREAST)", "check y♥ur self!! (KEEP A

¹ The page citations are to the page numbers in the paper version of the hearing transcript. The page numbering of the electronic version differs by one.

BREAST)", and a bracelet with an amalgam of similar slogans.²
The web address for the Keep A Breast Foundation, keep-a-breast.org, is contained on the inside of all of the bracelets. (See Pls.' Ex. 39, 40.)

A. Keep A Breast Foundation

The Keep A Breast Foundation (the "Foundation"), a 501(c)(3) nonprofit organization, distributes these bracelets. The Keep A Breast Foundation operates breast cancer education programs and campaigns that are oriented towards young women. The "I ♥ Boobies! (Keep A Breast)" bracelets serve as an

² Pictures of these bracelets may be found online. See, e.g., The Keep A Breast Foundation, Zumiez!!, <http://www.keep-a-breast.org/blog/zumiez/> (last visited Feb. 22, 2011). The bracelet with the amalgam of slogans is co-branded with the clothing line "Glamour Kills." The bracelet includes the slogans "♥ boobies!", "KAB", "Glamour Kills", and "KEEP A BREAST." The co-branded bracelet also includes the web address glamourkills.com on the inside of the bracelet. In exchange for a donation, the Keep A Breast Foundation allows other businesses to market their products using the Keep A Breast name and slogans, including "I ♥ Boobies!". (N.T. 110:12-113:4.) This is termed "co-branding" or "cause marketing." In addition to Glamour Kills, the Keep A Breast Foundation co-brands with the following businesses: Kleen Canteen, Etnies shoes, and SJC Snare Drum brand apparel. (K. McAtee Dep. 43:24-47:10; Transcript of oral argument, Feb. 18, 2011, ("Tr.") at 19:19-21:11.) The School District argues that these bracelets are commercial speech and are therefore afforded less constitutional protection. The presence of co-branding on one of the several bracelets at issue here, however, does not transform these bracelets into commercial speech. The bracelets are not the type of speech that "does no more than propose a commercial transaction." See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-68 (1983) (citation omitted).

awareness and fund-raising tool for the Foundation. The Foundation targets its awareness efforts to young women under 30. One of the goals of the Foundation is to educate young women about breast cancer and to help young women discuss breast health openly with their doctors. The Foundation encourages young women to establish a baseline knowledge of how their breasts feel in order to improve their ability to detect changes in their breasts. Breast cancer prevention and health information is available by clicking on the health page of the Foundation's website. (N.T. 105:21-24, 120:19-121:2, 121:3-6.)

The Keep A Breast Foundation believes that a barrier to achieving their goals is negative body images among young women. Young women may feel that a stigma is associated with touching, looking at, or talking about their breasts. The Foundation's "I ♥ Boobies!" campaign seeks to reduce this stigma and to help women talk openly and without embarrassment about their breasts. The bracelets are intended to be and may be reasonably viewed as conversation starters to facilitate discussion of breast cancer, and to help overcome fear and taboo associated with discussing breast health.³ (N.T. 98:9-20.)

³ There was evidence that a teacher at the Middle School felt that these bracelets offer "cutesy" or insufficiently serious treatment of breast cancer awareness. The Court takes no view as to whether these bracelets are an effective breast cancer awareness tool or whether the bracelets may be viewed as making light of a very serious disease. The Court finds, however, that the bracelets are intended to be, and may be reasonably viewed

The Foundation controls the distribution of the bracelets to ensure that the purchaser will have access to the Keep A Breast Foundation's educational materials. Truck stops, convenience stores, vending machine companies, and even "porn stars" have expressed interest in selling or being associated with the bracelets and the Foundation, but the Keep A Breast Foundation has rejected these requests. (N.T. 101:18-102:13.)

B. The Plaintiffs' Purchase of the Bracelets

The plaintiffs purchased their "I ♥ Boobies! (Keep A Breast)" bracelets with their mothers prior to the start of the 2010-11 school year. B.H. learned about the bracelets and their purpose from her friends. B.H. and her mother Jennifer Hawk sought out the bracelets together, making multiple attempts to find them in stores. After purchasing the bracelets, B.H. wore them every day, up until her suspension. By purchasing and wearing the bracelets, B.H. wanted to show her support for breast cancer prevention, raise awareness and initiate dialogue about breast cancer, and support the Keep A Breast Foundation's breast cancer prevention programs. B.H. also wanted to honor a close friend of the family who survived the disease after undergoing a

as, speech designed to raise awareness of breast cancer and reduce stigma associated with openly discussing breast health.

double mastectomy. (N.T. 22:6-21, 56:12-15, 22:13-15, 22:15-21, 23:4-17, 26:1-5, 27:20-22, 23:18-24:23, 24:1-20, 43:1-10.)

K.M. first learned about the "I ♥ Boobies! (Keep A Breast)" bracelets over the summer of 2010 from her friend B.H. Before the school year started, K.M. and her mother Amy McDonald-Martinez traveled together to the mall to purchase "I ♥ Boobies! (Keep A Breast)" bracelets. After purchasing the bracelets, K.M. wore them every day, up until her suspension. K.M.'s mother, Amy McDonald-Martinez, also wore a Keep a Breast Foundation bracelet that contained the phrase "check y♥ur self!! (Keep A Breast)." (N.T. 55:25-56:8, 56:14-57:9, 59:5-24, Pls.' Ex. 41.)

Both young women researched and learned more about breast cancer after purchasing these bracelets. B.H. learned about the Keep A Breast Foundation through in-store displays and the Foundation's website. After purchasing the bracelets, K.M. sought out more information about breast cancer, and learned that the youngest girl diagnosed with breast cancer was ten years old. She also learned about breast cancer risk factors, the effects of breast cancer, and how to check one's self for lumps. She learned about her great aunt who had breast cancer and that breast cancer "can run in the family." Both B.H. and K.M. believe that the bracelets more effectively raise awareness for breast cancer than the color pink. B.H. explained that "no one really notices [the color pink]." (N.T. 42:12-25, 60:11-23,

74:3-10, 56:25-58:12, 91:22-92:6, 24:12-23, 64:24-66:4, 24:12-23.)

C. The School's Bracelet Ban

The "I ♥ Boobies! (Keep A Breast)" bracelets became popular with students at the Easton Area Middle School during the beginning of the 2010-2011 school year, which began on August 30, 2010. In mid- to late-September, approximately four or five of the 120 teachers in the Middle School's 7-8 building spoke to or electronically contacted Ms. Braxmeier about the "I ♥ Boobies! (Keep A Breast)" bracelets. The teachers sought instruction regarding how the school would choose to handle the bracelets. The three principals, Mr. Viglianti, Ms. Braxmeier, and Ms. DiVietro, conferred and agreed that the bracelets should be banned. (N.T. 190:10-16, 210:16-211:5.)

On September 23, 2010, Mr. Viglianti sent an email instructing faculty and staff to ask students to remove "wristbands that have the word 'boobie' written on them." Mr. Viglianti stated that students instead may wear pink on October 28th in honor of Breast Cancer Awareness Month. This initial ban was not communicated directly to the students. On October 27, 2010, a day before the School District's designated breast cancer awareness day, Ms. DiVietro recirculated the email that Mr. Viglianti sent on September 23, 2010. In response, a teacher

requested that the ban be communicated to the students directly by the administration.⁴ On the afternoon of October 27, 2010, approximately two months into the school year, Mr. Viglianti read a prepared statement over the public address system describing the ban. The next morning, October 28, 2010, a student delivered a statement prepared by the School administration on the School's TV station that reiterated the ban. The School's TV announcement contained the word "boobies." (Pls.' Ex. 1.; Pls.' Ex. 2.; N.T. 64:3-5.)

At the time that the ban initially went into effect, September 23, 2010, none of the three principals had heard any reports of disruption or student misbehavior linked to the bracelets. Nor had any of the principals heard reports of inappropriate comments about "boobies." The three principals offered various reasons for their decision to ban the bracelets.

Mr. Viglianti testified at his deposition that the administrators' decision was based on the term "boobies," which was "not appropriate." He thought that some of the students were not mature enough "to understand and see that [as] appropriate",

⁴ The email stated, "Can this please be announced either via the morning TV announcements or by someone in the main office? We were issued a similar email in the past but the students have not been told by administration that these bracelets are a violation of dress code and if they wear them they will be written up for defiance. . . . We need a direct statement from administration." Email from Carrie A. Sanal to Angela DiVietro, October 27, 2010 (Pls.' Ex. 3).

and he was concerned that the use of the word "boobies" in the bracelets would cause students "to start using the word just in communication with other students, talking with other students." He testified at the evidentiary hearing that the word "boobies" was "vulgar," based on his understanding that "vulgar is slang." At his deposition, Mr. Viglianti also testified that it would be similarly inappropriate for either the word "breast" or the phrases "keep-a-breast.org" or "breast cancer awareness" to be displayed on clothing in the middle school. During the evidentiary hearing, he changed his position and concluded that a bracelet bearing only "keep-a-breast.org" would be permissible. (Viglianti Dep. 50:1-10, 18:3-19:1, 20:12-23, 24:14-21; N.T. 128:16-19, 124:18-125:21.)

Ms. DiVietro also clarified her position at the evidentiary hearing. At her deposition, Ms. DiVietro testified that the words "keep-a-breast.org" are "not acceptable" for middle schoolers because the word "breast" "can be construed as a sexual connotation." At the evidentiary hearing, she concluded that the words "breast cancer awareness" or a bracelet that only said "keep-a-breast.org" would not be vulgar in a middle school. (DiVietro Dep. 23:4-25, 51:24-52:2; N.T. 229:3-230:23, 242:18-243:3.)

At the evidentiary hearing, the School's principals testified that the bracelets violate the Middle School's dress

code because the phrase "I ♥ Boobies!" is an impermissible double entendre about sexual attraction to breasts. (N.T. 179:18-22, 211:16-22.)

Ms. DiVietro testified that allowing students to wear the Keep A Breast Foundation's "I ♥ Boobies! (Keep A Breast)" bracelets would diminish her authority to prevent students from wearing clothing with other statements that the administrators deemed "inappropriate." She explained that banning the "I ♥ Boobies! (Keep A Breast)" bracelets "makes a statement that we as a school district have the right to have discretionary decisions on what types of things are appropriate and inappropriate for our school children." (N.T. 211:23-212:1, 224:14-226:19, 228:5-10.)⁵

On October 27, 2010, B.H. wore her bracelets to school. During lunch, a cafeteria monitor noticed her bracelets and summoned the security guard, John Border.⁶ B.H. admitted to Mr.

⁵ The justification for the ban as explained by the three administrators during their testimony differs from the justification first articulated by the School District in its November 9, 2010 letter to the plaintiffs' counsel. In that letter, the School District claimed that it banned the bracelets because some Middle School students are uncomfortable with discussion of the human body; some male Middle School students had made "embarrassing" comments to female students about their breasts; the students who defied the ban were then observed "high-fiving" each other in the cafeteria; and some Middle School teachers believe that the bracelets trivialize the subject of breast cancer and they are personally offended by the bracelets' "cutesy" treatment of the disease. (Compl. ¶ 29; Answer ¶ 29.)

⁶ Prior to taking the position of security for the District, John Border was a police officer for the Easton Police Department. He also served as Chief of the Easton Police

Border that she was wearing the bracelets but refused to remove them, so Mr. Border escorted her to Ms. Braxmeier's office. After speaking with Ms. Braxmeier, B.H. agreed to remove the bracelets, and was then allowed to return to the cafeteria without punishment. The bracelets had not caused any disruption in the cafeteria. (N.T. 175:2-8 (Border testifying).)

Later that day after school, October 27, 2010, B.H. told her mother that the "I ♥ Boobies! (Keep A Breast)" bracelets had been banned and asked permission to wear her bracelets despite the ban. Her mother agreed. K.M. also told her mother of the ban on the "I ♥ Boobies! (Keep A Breast)" bracelets. K.M. was also given permission by her mother to wear her bracelets on the following day, the School's Breast Cancer Awareness Day. (N.T. 31:11-32:6; J. Hawk Dep. 8:2-9; N.T. 66:5-15; A. McDonald-Martinez Dep. 21:3-22:14.)

On October 28, 2010, the School District observed Breast Cancer Awareness Day. For the district-wide Breast Cancer Awareness Day, faculty and students were encouraged to wear pink to demonstrate support for breast cancer awareness. On October 28, 2010, Mr. Border was again notified that B.H. was wearing the "I ♥ Boobies! (Keep A Breast)" bracelets during lunch period in defiance of the ban. Mr. Border approached B.H. and asked her to remove the bracelet. B.H. informed Mr. Border that she would not

Department for five years. (N.T. 168:16-169:2.)

remove her bracelet. At that time, K.M. stated that she was wearing an "I ♥ Boobies! (Keep A Breast)" bracelet and was also not going to take it off. (N.T. 158:12-19; 218:25-219:19, 75:25-76:22; 172:9-174:18).

After B.H. and K.M. stated that they would not remove their bracelets, a third girl, R.T., stood up and said that she also had a bracelet on and was not going to take it off. Mr. Border allowed the girls to finish eating their lunches, then escorted them to Ms. Braxmeier's office. On their way to Ms. Braxmeier's office, B.H. and K.M. gave each other a "low-five" because they were proud of themselves for standing up for what they believe in. This did not create a disruption and Mr. Border testified that he did not notice it. (N.T. 33:15-21; 45:10-17; 174:6-10.)

Ms. Braxmeier first spoke with R.T. R.T. agreed to remove her bracelet. In the course of her discussion with Ms. Braxmeier, R.T. explained that she understood why students were not allowed to wear the "I ♥ Boobies! (Keep A Breast)" bracelets. Specifically, R.T. stated that some boys or some boy was "immature" and had been approaching girls and commenting "I love your boobies" or "I love boobies." When the School elicited a written statement from R.T. on November 15, 2010 (after receiving the plaintiffs' November 4, 2010 demand letter), R.T. equivocated as to whether the incident involved multiple boys or

just one boy, and stated that she did not know the student's name. (N.T. 185:2-5; A. Braxmeier Dep. 20:23-21:1, 26:25-27:4, 67:13-16; Def.'s Ex. 14 (R.T.'s written statement), N.T. 194:18-20.)

Ms. Braxmeier then spoke with K.M individually. K.M. stated that she was unwilling to remove her bracelets. After discussing the bracelets with K.M., Ms. Braxmeier spoke with B.H. individually about her "I ♥ Boobies! (Keep A Breast)" bracelets. B.H. explained to Ms. Braxmeier that the bracelet was "for breast cancer and people in [her] family have been affected by breast cancer" and she felt that it was her freedom of speech to wear the bracelets. Ms. Braxmeier then conferred with Mr. Viglianti and Ms. DiVietro, and they agreed that B.H. and K.M. would be punished with an in-school suspension for the remainder of that day and for all of the following day and could not attend the upcoming "Winter Ball" school dance. (N.T. 185:6-187:16; 187:18-24; 37:1-7.)

The Court was presented with evidence of two incidents in late October and mid-November where the school administrators received reports of boys making inappropriate remarks about "boobies" in reference to the "I ♥ Boobies! (Keep A Breast)" bracelets. First, during Ms. Braxmeier's October 28, 2010 conversation with R.T. about her "I ♥ Boobies! (Keep A Breast)" bracelets, R.T. stated that she believed some boy(s) had made

remarks to girls about their "boobies." The specific details surrounding this incident were never confirmed. Second, on or about November 16, 2010, the Middle School administrators received a report that two female students were discussing the "I ♥ Boobies! (Keep A Breast)" bracelets when a boy sitting with them at lunch interrupted them and made statements such as "I want boobies" and made inappropriate gestures with two fireball candies. The administrators spoke with the boy, who admitted to the incident and was suspended for one day. (Braxmeier Dep. 14:24-15:3, 16:9-17:5.)

There were also two unrelated incidents of inappropriate touching by middle school boys of eighth grade girls in October. There is no evidence that either incident was caused by the plaintiffs' "I ♥ Boobies! (Keep A Breast)" bracelets. (Braxmeier Dep. 22:19-23:9; Def.'s Ex. 11; N.T. 143:1-18.)

III. Analysis

The plaintiffs have filed a motion for a preliminary injunction to enjoin the Middle School from enforcing its ban of the "I ♥ Boobies! (Keep A Breast)" bracelets. A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will

not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.” Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). See also ACLU v. Black Horse Pike Reg’l Bd. of Educ., 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc).

A. Likelihood of Success on the Merits

The plaintiffs claim that the School’s ban on the “I ♥ Boobies! (Keep A Breast)” bracelets violates their First Amendment right to freedom of speech. There are four Supreme Court cases analyzing the First Amendment free speech rights of students in public schools: (1) Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); (2) Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); (3) Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); and (4) Morse v. Frederick, 551 U.S. 393 (2007).⁷

In Tinker, several students were suspended from school for wearing black arm bands to protest the Vietnam War. The Supreme Court noted that the wearing of armbands was “closely akin to ‘pure speech’” which the Court has held is entitled to comprehensive protection under the First Amendment. Tinker, 393 U.S. at 505 (citation omitted). The Court first observed that

⁷ Only Tinker and Fraser are directly relevant here, but the Court will discuss all four cases for completeness.

"[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. But the Court also recognized the authority of school officials to control conduct in schools "consistent with fundamental constitutional safeguards[.]" Id. at 507. In balancing these competing interests, the Court focused on whether the speech "intrudes upon the work of the schools or the rights of other students." Id. at 508. The Supreme Court held that student expression may not be suppressed unless school officials reasonably forecast that it will "materially and substantially disrupt the work and discipline of the school." Id. at 513-14.

In Bethel v. Fraser, Matthew Fraser delivered a speech before a high school assembly to nominate a fellow student for student elective office. Fraser's speech employed what the Court described as "an elaborate, graphic, and explicit sexual metaphor." Fraser, 478 U.S. at 678. The Court held that schools may prohibit speech that is lewd, vulgar, indecent, or plainly offensive even in the absence of a substantial disruption under Tinker. Id. at 684-86; Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213-14 (3d Cir. 2001) (Alito, J.).

In Hazelwood School District v. Kuhlmeier, the Supreme Court addressed the publication of a school-sponsored high school newspaper that contained articles addressing students' experience

with pregnancy and the impact of divorce on students at the school. Kuhlmeier, 484 U.S. at 263. The Court held that the school could exercise editorial control over school-sponsored speech provided that the school's actions are "reasonably related to legitimate pedagogical concerns." Id. at 273.

Most recently, Morse v. Frederick addressed speech that advocates illegal drug use. In Morse, a student unfurled a banner that contained the phrase "Bong Hits 4 Jesus" at a school-sanctioned and school-supervised event. Morse, 551 U.S. at 396-97. The Supreme Court held that schools may prohibit speech that can "reasonably be regarded as encouraging illegal drug use." Id. at 397.

In summary, a school may categorically prohibit speech that is (1) lewd, vulgar, or profane; (2) school-sponsored speech on the basis of a legitimate pedagogical concern; and (3) speech that advocates illegal drug use. If school speech does not fit within one of these exceptions, it may be prohibited only if it would substantially disrupt school operations. See Saxe, 240 F.3d at 214.

The plaintiffs argue that Tinker applies and that the School acted impermissibly because the School had no reasonable expectation of a substantial disruption of school operations. The defendant argues that the standard of Fraser is met and the School acted within its discretion to ban lewd and vulgar speech.

Alternatively, the School District argues that the bracelets may be banned because there was a reasonable expectation that they would cause or did cause a substantial disruption to the School.

In deciding whether the plaintiffs are likely to succeed on the merits, the Court first discusses the substantive standard of Fraser, and then addresses the standard of review of a school district's determination that certain conduct fits within the Fraser standard. The Court then applies that legal framework to the facts of this case. Finding that the Fraser standard is not met, the Court then examines whether the standard of Tinker is met.

1. Fraser Analysis

a. Substantive Standard of Fraser

In Bethel v. Fraser, Matthew Fraser delivered a speech to a school assembly that endorsed a fellow student for elective office by means of "an elaborate, graphic, and explicit sexual metaphor." Fraser, 478 U.S. at 678.⁸ The school suspended

⁸ The text of Fraser's speech is:

I know a man who is firm – he's firm in his pants, he's firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the

Fraser for three days and removed his name from the list of candidates for graduation speaker at the school's commencement exercises. The Court held that the school district "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." Id. at 685. The Court did not conduct a Tinker disruption analysis.

The lewd nature of Fraser's speech was apparent to all those who had heard it. During the speech, some students "hooted and yelled", others made gestures simulating the sexual allusions in the speech, while other students appeared to be "bewildered and embarrassed by the speech." Id. at 678. One teacher found it necessary to forgo a portion of the next day's scheduled class lesson to discuss the speech with the class.

The Court of Appeals for the Third Circuit interpreted Fraser in Saxe v. State College Area School District, 240 F.3d 200, 213-14 (3d Cir. 2001). In Saxe, the Court of Appeals addressed a school district's anti-harassment policy. The Court observed that "Fraser permits a school to prohibit words that 'offend for the same reasons that obscenity offends' - a

very end - even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president - he'll never come between you and the best our high school can be.

Fraser, 478 U.S. at 687 (Brennan, J. concurring).

dichotomy neatly illustrated by the comparison between Cohen's jacket and Tinker's armband." Saxe, 240 F.3d at 213.⁹ After reviewing Fraser, the Court concluded that there is no First Amendment protection for "lewd," "vulgar," "indecent," and "plainly offensive" speech in school. Id. This standard is "relatively more permissive" than Tinker because schools may prohibit speech that falls in the category of lewd or vulgar speech even in the absence of a substantial disruption. Id. at 214, 216.¹⁰

In Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 255-58 (3d Cir. 2002), the Court of Appeals considered the constitutionality of prohibiting a T-shirt that contained a slang word for a female's breasts, although this word was not a primary focus for the Court and the parties agreed that the case should be analyzed under Tinker. Thomas Sypniewski was suspended for wearing a Jeff Foxworthy T-shirt. Id. at 246.

⁹ "Cohen's jacket" here refers to Paul Robert Cohen, an adult who wore a coat to the Los Angeles County Courthouse that bore the words "Fuck the Draft." See Cohen v. California, 403 U.S. 15, 16 (1971).

¹⁰ The supporting cases cited by Fraser likewise all concern vulgarity, obscenity, and profanity. See Fraser, 478 U.S. at 684-85 (citing Ginsberg v. New York, 390 U.S. 629, 639-41 (1968) (upholding ban on sale of sexually oriented material to minors); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871-72 (1982) (school may remove "pervasively vulgar" books from library); FCC v. Pacifica Found., 438 U.S. 726, 745-48 (1978) (upholding FCC's ability to censor "obscene, indecent, or profane" speech).

The T-shirt listed 10 reasons one might be a "redneck sports fan."¹¹ The 10 reasons included references to gambling, the "Bud Bowl,"¹² and the restaurant chain "Hooters." Id. at 249-50. The Court of Appeals noted that the defendants did not contend that the Foxworthy shirt contained "indecent language," nor was the shirt school-sponsored. Id. at 254. Accordingly, under Saxe, the Court of Appeals analyzed the T-shirt under Tinker's general rule of substantial disruption. Id. The Court concluded that the school could not prohibit the T-shirt under Tinker despite a history of racial incidents in the school district. Id. at 258.

In Morse, the Supreme Court distilled from Fraser two basic principles. First, constitutional rights of students are not automatically coextensive with the rights of adults in other

¹¹ The T-shirt contained the following 10 reasons one may be a "redneck sports fan."

10. You've ever been shirtless at a freezing football game.
9. Your carpet used to be part of a football field.
8. Your basketball hoop used to be a fishing net.
7. There's a roll of duct tape in your golf bag.
6. You know the Hooter's [sic] menu by heart.
5. Your mama is banned from the front row at wrestling matches.
4. Your bowling team has it's [sic] own fight song.
3. You think the "Bud Bowl" is real.
2. You wear a baseball cap to bed.
1. You've ever told your bookie "I was just kidding."

Sypniewski, 307 F.3d at 249-50.

¹² "The Bud Bowl is a fictional football game between bottles of beer used in a beer advertising campaign."
Sypniewski, 307 F.3d at 251 n.7.

settings. If the speech had been delivered in a public forum outside of the school, it would have been protected. Morse, 551 U.S. at 404-05. Second, when speech fits within the Fraser standard, a court need not do a "substantial disruption" analysis. "Whatever approach Fraser employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by Tinker." Id. at 405.

The Supreme Court in Morse also cautioned against over extending Fraser. Chief Justice Roberts explained that Fraser should not be read to encompass any speech that could fit under some definition of "offensive."

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in Fraser. We think this stretches Fraser too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some.

Morse v. Frederick, 551 U.S. 393, 409 (2007) (citations omitted).

The School District relies on the rule articulated by Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000). In Boroff, the United States Court of Appeals for the Sixth Circuit upheld a school ban of "Marilyn Manson" band T-shirts that the school deemed were "contrary to the educational mission of the school." Id. at 469-71. The Boroff standard, however, is inconsistent the Third Circuit's decision in Saxe and

with Justice Alito's criticism of such a standard in Morse:

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J. concurring) (citations omitted). See also Morse, 551 U.S. at 409 (cautioning against an expansive understanding of the term "offensive" as used in Fraser).¹³

The heart of Fraser's holding was that a school may

¹³ Examples of courts' decisions on what does and does not satisfy the standard of Fraser are the following. Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008) (calling school administrators "douchebags" and encouraging others "to piss [the principal] off more" satisfy the standard of Fraser); Guiles v. Marineau, 461 F.3d 320, 329 (2d Cir. 2006) (Fraser standard not met for a T-shirt that criticized President George W. Bush); Bragg v. Swanson, 371 F. Supp. 2d 814, 823 (W.D. W.Va. 2005) (Fraser standard not met for a Confederate flag T-shirt); Smith v. Mt. Pleasant Pub. Schs., 285 F. Supp. 2d 987, 989 (E.D. Mich. 2003) (a student calling a teacher "skank," "tramp," discussing two principals having an affair, and questioning the sexuality of an assistant principal satisfy the standard of Fraser); Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1534-36 (D. Va. 1992) (Fraser standard met by T-shirt containing the word "suck").

prohibit speech that is lewd or vulgar. As the United States Court of Appeals for the Third Circuit succinctly put it, "Fraser permits a school to prohibit words that 'offend for the same reasons that obscenity offends[.]'" Saxe, 240 F.3d at 213 (quoting Fraser, 478 U.S. at 685) (additional quotation omitted). The Court concludes that a proper Fraser analysis involves the narrow inquiry as to whether the speech at issue is lewd, vulgar, or otherwise offends for the same reason that obscenity offends. Id.

b. Standard of Review of a School District's Decision

The determination of what deference, if any, should be given to a school district's determination under Fraser goes to the heart of the tension in First Amendment cases involving public schools. As the Supreme Court has observed, students do not shed their constitutional rights to freedom of speech at the schoolhouse gate. Fraser, 478 U.S. at 680. On the other hand, schools must play a role in protecting children from exposure to "sexually explicit, indecent, or lewd speech." Id. at 684. But school officials do not act in loco parentis for First Amendment purposes. When public schools regulate student speech, they regulate speech as the government, not as parents.¹⁴

¹⁴ As Justice Alito explained,

Although Fraser does not directly address the issue of review, the Supreme Court has appeared to apply a reasonableness standard in its decisions in Kuhlmeier, Morse, and Tinker. In Kuhlmeier, the Court held that the school district did not violate the First Amendment by exercising editorial control over the content of student speech in a school-sponsored publication "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns." Kuhlmeier, 484 U.S. at 273. Likewise, in Morse, the Supreme Court concluded that a school may

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority – including their authority to determine what their children may say and hear – to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis.

Morse, 551 U.S. at 424 (Alito, J. concurring).

restrict student speech at a school event "when that speech is reasonably viewed as promoting illegal drug use." Morse, 551 U.S. at 403. In Tinker, the Court observed that the record did not demonstrate facts which may "reasonably have led school authorities to forecast substantial disruption" Tinker, 393 U.S. at 514.

The Court concludes that a reasonableness standard properly applies to a school's Fraser determination. A rule of review that would provide no deference to a school's vulgarity determination would maximize the protection of students' First Amendment freedoms, but at the cost of unduly interfering with a school's responsibility to protect students from lewd or vulgar speech. Courts must balance the competing tensions of constitutional freedoms with the role that schools perform in maintaining safe and effective learning environments. This standard is consistent with public school First Amendment case law, and balances the competing interests of school management with the protection of students' constitutional rights. A public school's decision to censor lewd or vulgar speech under Fraser is permissible if the school's determination is an objectively reasonable application of Fraser. A school may not censor speech under Fraser if the speech cannot reasonably be considered lewd or vulgar or if does not "offend for the same reasons that

obscenity offends." Saxe, 240 F.3d at 213.¹⁵

c. Application of *Fraser* to these Facts

The next question is whether the ban of the "I ♥ Boobies! (Keep A Breast)" bracelets constitutes an objectively reasonable exercise of a public school's authority to ban lewd or vulgar speech under Fraser. The Court concludes that it does not.

The justification asserted by the School District in this litigation is that the word "boobies" is vulgar and therefore meets the standard of Fraser. Alternatively, the District argues that the phrase "I ♥ Boobies!" is vulgar because it can be viewed as a double entendre.

First, the Court cannot conclude that any use of the word "boobies" is vulgar and can be banned, no matter what the context. The word "boobies" in the context of breast cancer awareness does refer to a female's breast. However, the words

¹⁵ The plaintiffs' status as middle school students may also be a factor to consider in evaluating the reasonableness of a school's vulgarity determination. Cf. Fraser, 478 U.S. at 683 (noting that some members of the audience were only 14 years old); Kuhlmeier, 484 U.S. at 274-75 (noting that the school newspaper would presumably be read by some high school students' younger brothers and sisters). The Court notes, however, that the bracelets have been banned at both the middle school and the high school levels. (N.T. 161:11-13.) This fact undercuts the School District's argument that the ban was enacted in response to special concerns regarding the maturity of middle school students.

boob, booby, and bubby have a number of possible meanings, and thus context matters in interpreting the word. According to the Oxford English Dictionary, the word booby or boobie may refer to "a dull, heavy, stupid fellow: a lubber", a clown, or a nincompoop. It may also refer to the last boy in a school class, the dunce. A booby is also a type of seabird. The word "boob" is defined as a slang word for breasts, but may also be a foolish mistake or blunder. (See Ex. A to Pls.' Reply.)

These bracelets have also been reported and widely discussed in the media. Many of these articles contain the phrase "I ♥ Boobies!" See, e.g., Peggy Orenstein, Think About Pink, The New York Times Magazine, Nov. 12, 2010, available at <http://www.nytimes.com/2010/11/14/magazine/14FOB-wwln-t.html> (last visited Mar. 29, 2011) (criticizing "sexy cancer" awareness campaigns but noting that "I get that the irreverence is meant to combat crisis fatigue, the complacency brought on by the annual onslaught of pink"). The media also uses the word boobies in other contexts, either to refer to female breasts, birds, or nincompoops.¹⁶

¹⁶ Compare David Bouchier, Out of Order; A Day for the Marginalized Dad, The New York Times, June 15, 2003, available at <http://www.nytimes.com/2003/06/15/nyregion/out-of-order-a-day-for-the-marginalized-dad.html> (last visited March 29, 2011) (describing television sitcoms as portraying fathers as "incompetent boobies") with Marci Alboher, New Ventures Help Fight the Frustrations of Fighting Breast Cancer, The New York Times, Oct. 25, 2007, available at <http://www.nytimes.com/2007/10/25/business/smallbusiness/25sbiz.h>

Second, the phrase "I ♥ Boobies!" in the context of these bracelets cannot reasonably be deemed to be vulgar. "I ♥ Boobies!" is presented in the context of a national breast cancer awareness campaign. The phrase "I ♥ Boobies!" is always accompanied by the Foundation's name "Keep A Breast." If the phrase "I ♥ Boobies!" appeared in isolation and not within the context of a legitimate, national breast cancer awareness campaign, the School District would have a much stronger argument that the bracelets fall within Fraser. This is not the case here. One of the bracelets worn by B.H. did not even contain the word "boobies," but rather said "check y♥ur self!! (KEEP A BREAST)." The other bracelets all contained the phrase "Keep A Breast" and all bore the web address of the Keep A Breast Foundation, which provides information on breast cancer prevention and detection.

Nor is the use of the phrase "I ♥ Boobies!" gratuitous. The words were chosen to enhance the effectiveness of the communication to the target audience. There is, of course, no inherent sexual association with the phrase "I ♥ [something]." For example, T-shirts that bear the slogan "I ♥ NY" suggest affinity, not sexual attraction, to New York. The use of the word "boobies" is directed to the target audience of

tml (last visited March 29, 2011) (describing efforts to encourage women to conduct breast self-examination).

teenage girls. The students testified that "boobies" is the word that they use to refer to their breasts. The phrase is a shorthand way of communicating the importance of breast cancer awareness and of keeping one's breasts healthy.¹⁷

The School District's argument in this litigation that the bracelets are lewd and vulgar also is undermined by the School District's offering several differing reasons to justify its ban of the bracelets. The School District's initial justification was that the bracelets had been banned because of student discomfort discussing the human body, inappropriate comments by students, and because some Middle School teachers

¹⁷ The School District has also argued that the bracelet ban is permissible because the School District did not engage in viewpoint discrimination because it recognized Breast Cancer Awareness Day and encouraged its students to wear pink. For this proposition, the School District cites Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Perry addressed whether the First Amendment had been violated when one union with exclusive bargaining power was granted access to a school's internal mail system, while a rival union was denied access. The Court concluded that the mail system was not a public forum, and the state may draw such distinctions among unions. Id. at 55. At least one court in this Circuit has concluded that the Third Circuit has not limited Tinker to viewpoint discrimination or analyzed student speech under a forum analysis. See C.H. v. Bridgeton Bd. of Educ., No. 09-5815, 2010 U.S. Dist. LEXIS 40038, at *20 (D.N.J. Apr. 22, 2010).

But even if a separate category was carved out for viewpoint neutral regulation of student speech, it would not be met here. The bracelets are part of a campaign to effect a particular healthcare response to the dangers of breast cancer. Young girls are encouraged to perform self examination and to talk openly and without embarrassment about their breasts. These bracelets represent a much more particularized effort to raise awareness for early detection than wearing pink on a certain day.

were personally offended by the bracelets' "cutesy" treatment of breast cancer awareness. The School's principals testified at their depositions that the word boobies, and even the web address keep-a-breast.org, would be "inappropriate." The School and its counsel later focused their attention on the double entendre of the phrase "I ♥ Boobies!", although Ms. DiVietro continued to emphasize that the bracelet ban reinforces the School's purported discretionary authority to determine what is appropriate and inappropriate for student dress. (Compl. ¶ 29; Answer ¶ 29; N.T. 211:23-212:1, 224:14-226:19, 228:5-10.)

The School itself used the word "boobies" in a prepared statement delivered by a student announcing the bracelet ban. A school would not have been willing to use lewd or vulgar language in a broadcast to its entire student body.¹⁸ This supports a conclusion that the School did not actually consider the word "boobies" to be vulgar. It appears to the Court that the Middle School has used lewdness and vulgarity as a post-hoc justification for its decision to ban the bracelets. Ms. Braxmier testified that banning these bracelets "makes a statement that we as a school district have the right to have

¹⁸ The Court notes that in her testimony, Ms. DiVietro freely referred to the word "boobies," but was noticeably unwilling to discuss other hypotheticals in open court. In reference to a hypothetical bracelet addressing testicular cancer, Ms. DiVietro became uncomfortable and explained "I don't know if I can say the word that, you know" (N.T. 225:2-24.)

discretionary decisions on what types of things are appropriate and inappropriate for our school children.” (N.T. 228:5-10.)

A court may also take into consideration that a school’s decision to ban speech was based on an erroneous understanding of the law. See Guiles, 461 F.3d at 327 (faulting lower court for accepting the school district’s judgement that a T-shirt was inappropriate and misjudging the scope of Fraser). Public schools do not have the broad authority to make “discretionary decisions on what types of things are appropriate and inappropriate” (N.T. 228:5-10.) If this were the case, public schools would have the authority to ban both Tinker’s arm band as well as Cohen’s jacket.

The delay in both enacting the ban and announcing the ban also undermines the School District’s argument that the bracelets are lewd and vulgar. The record shows that the bracelets became popular among students at the beginning of the 2010-2011 school year, which began August 30, 2010. After the two plaintiffs wore the bracelets every day until mid- to late-September, the School took no action. The ban was never communicated directly from the administration to the students until October 27, 2010, which is approximately two months after students began wearing the bracelets to school. In contrast, after Matthew Fraser delivered his speech, “students appeared to be bewildered and embarrassed by the speech” and the next day one

teacher "found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."

Fraser, 478 U.S. at 678.

For all of these reasons, the Court concludes that it would have been unreasonable for these school officials to conclude that these breast cancer awareness bracelets are lewd or vulgar under the Fraser standard. Even in a middle school, these bracelets do not "offend for the same reasons that obscenity offends." Saxe, 240 F.3d at 213.

2. Tinker Analysis

Having concluded that the bracelets cannot be banned under Fraser, the Court must consider whether this speech is proscribable under the Tinker "substantial disruption" analysis. "[I]f 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." Saxe, 240 F.3d at 212. "As subsequent federal cases have made clear, Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." Id. at 211.

Cases that have applied Tinker have consistently noted that a general fear of disruption does not constitute the type of necessary disruption. See Sypniewski v. Warren Hills Reg'l Bd.

of Educ., 307 F.3d 243, 255-58 (3d Cir. 2002) (concluding that the district's ban on the Jeff Foxworthy T-shirt was unconstitutional because there was no substantial disruption); C.H. v. Bridgeton Bd. of Educ., No. 09-5815, 2010 U.S. Dist. LEXIS 40038, at *26 (D.N.J. Apr. 22, 2010) (finding no substantial disruption where school district only articulated "a general fear of disruption" where student wore an anti-abortion armband); DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 646 (D.N.J. 2007) (finding no "specific and significant fear" of disruption where fifth grade students wore buttons to school depicting the Hitler youth to protest the school's dress code); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 456 (W.D. Pa. 2001) (concluding that evidence of upset school employees did not constitute a substantial disruption); Nuxoll v. India Prairie Sch. Dist. #204, 523 F.3d 668, 674 (7th Cir. 2008) (noting that symptoms of substantial disruption are akin to symptoms of a "sick school").

There is no evidence before the Court of any incidents that caused the type of disruption required by Tinker. Notably, there were no incidents presented to the Court of any disruption prior to the School's bracelet ban. In mid- to late-September, a handful of teachers of the 120 teachers approached the administration to seek guidance regarding the School's policy towards the bracelets. At this point, the bracelets had been on

campus for at least two weeks without any evidence of disruption. Despite any incidents that would suggest a problem, the School banned the bracelets without any official announcement. At the time of the ban, the School had at most a general fear of disruption.

After the ban was enacted, two incidents took place that are related to the bracelets. During Ms. Braxmeier's October 28, 2010 conversation with a student about her "I ♥ Boobies! (Keep A Breast)" bracelets, the student stated that she believed one or possibly more boys had made remarks to girls about their "boobies" in relation to the bracelets. Second, on or about November 16, 2010, the Middle School administrators received a report that two female students were discussing the bracelets at lunch. A boy sitting with them interrupted and made statements such as "I want boobies" while making inappropriate gestures with two spherical candies. The boy admitted to the incident, and he was suspended for a day. (Braxmeier Dep. 14:24-15:3, 16:9-17:5.)

Even ignoring the lack of justification for the initial ban under Tinker, the two events in October and November fail to create a "substantial disruption." Such isolated incidents are well within a school's ability to maintain discipline and order and they did not cause a disruption to the School's learning environment. Accordingly, the Court concludes that the School's

ban of these bracelets was not justified under Tinker.

The Court, therefore, concludes that the plaintiffs have demonstrated a reasonable likelihood of success on the merits that the School District violated their First Amendment rights.

B. Irreparable Harm

The second requirement for a preliminary injunction is a showing that the plaintiff will suffer irreparable harm if an injunction is not issued. It is well-established that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). In this case, the plaintiffs have been directly penalized by the suspensions as well as by the ongoing restraint of the freedom to wear these breast cancer awareness bracelets.

C. Balance of Harm and Public Interest

The remaining two factors, balance of harm and public interest, also favor the plaintiffs. The Court first considers "whether granting preliminary relief will result in even greater harm to the nonmoving party." Allegheny Inc. v. DOE, Inc., 171 F.3d 153, 158 (3d Cir. 1999). The Court is satisfied that the continued denial of the plaintiffs' First Amendment rights

outweighs any harm the School District may suffer by suspending this ban pending the final outcome of this litigation. The School has expressed concern that if the ban is lifted, then students will try to test the permissible boundaries with other clothing. Nothing in this decision prevents a school from making a case by case determination that some speech is lewd and vulgar while other speech is not. It should be clear, however, that a school must consider the contours of the First Amendment before it decides to censor student speech.

Likewise, the public's interest favors the protection of constitutional rights in the absence of legitimate countervailing concerns. See Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 884 (3d Cir. 1997).

IV. Conclusion

The Court concludes that the plaintiffs have satisfied their burden and are entitled to a preliminary injunction to enjoin the Middle School from enforcing its prohibition of the breast cancer awareness bracelets at issue in this case. As this is a non-commercial case involving a relatively small amount of money, and the balance of hardships favors the plaintiffs, the Court waives the Rule 65(c) security bond requirement. Elliot v. Kieseewetter, 98 F.3d 47, 59-60 (3d Cir. 1996).

An appropriate Order shall issue separately.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

H., et al. : CIVIL ACTION
: :
v. : :
: :
EASTON AREA SCHOOL DISTRICT : NO. 10-6283

ORDER

AND NOW, this 12th day of April, 2011, upon consideration of the plaintiffs' Motion for Preliminary Injunction (Docket No. 2), the opposition, and reply thereto, and following an evidentiary hearing on December 21, 2010, and oral argument held on February 18, 2011, and for the reasons stated in a memorandum of today's date, IT IS HEREBY ORDERED that the plaintiffs' motion is GRANTED. The defendant is hereby ENJOINED from suspending, threatening to suspend, or otherwise punishing or disciplining the plaintiffs for wearing the bracelets presented to the Court in this case. The Court waives the Rule 65(c) security bond requirement.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.