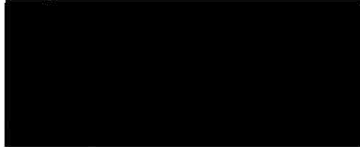




Mr. Jeffrey Reed
Cope, Hudson, Reed & McCreary, PLLC, Attorneys at Law



VIA EMAIL AND FIRST CLASS MAIL

August 22, 2013

Dear Mr. Reed:

We are writing to express our concern about the recent removal by the Rutherford County Board of Education (the “Board”) of “Safe Space” posters from classrooms at Central Magnet School (“CMS”). This censorship violated the free speech rights of both the teachers who agreed to display the Safe Space poster and of the students who requested that it be posted. Further, the forced removal of a poster that identifies the classroom as a space where all students can feel safe from bullying and harassment sends a chilling and dangerous message not only to lesbian, gay, bisexual, and transgender (“LGBT”) students but to the entire CMS community.

In our conversation on August 13, 2013, you argued that the Board’s action is justified by its belief that the poster’s content is of an inappropriate sexual nature simply because it contains the words “lesbian, gay, bisexual and transgender.” Yet even a cursory review of the poster reveals that its message is in no way sexual. You also indicated that the Board believes this poster violates a policy restricting the display of political material in classrooms, even though the poster does not take a position on any political issue, party or candidate. Further, because the school allows other student organizations to hang posters, the decision to ban this specific poster appears to be an unconstitutional viewpoint-based restriction on speech. We hope by writing this letter to make you aware of the multiple legal problems with the Board’s action. We ask the Board to take immediate action to remedy the wrong to the students and teachers, as well as provide us with sufficient assurance that this kind of incident will not happen in the future.

Factual Background

Sometime last year, student members of the CMS Gay Straight Alliance (“GSA”), a student organization officially recognized by CMS, approached social studies and history teacher Mr. Allen Nichols and several other teachers and asked if they would display the Safe Space poster on their classroom bulletin boards. The CMS administration approved the poster and Mr. Nichols displayed it in an area of his classroom designated for official notices and material supplied by school clubs. In the

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past Mr. Nichols posted information in his classroom on behalf of several school clubs, including the Fellowship of Christian Athletes.

The poster displays a rainbow-colored triangle image and the following text: "This is a safe and inclusive space for lesbian, gay, bisexual and transgender students and their allies. All students deserve a safe and welcoming school environment." The poster also contains some statistics concerning the prevalence of harassment of LGBT students and encourages students to "make your school a safe space." A photograph of the poster in question is attached.

Bullying and harassment of LGBT students is a documented serious problem in schools across the United States. The disturbing statistics on the poster come from the 2011 National School Climate Survey ("Survey") conducted by the Gay, Lesbian, Straight Education Network ("GLSEN"), which also designed and printed the Safe Space posters. GLSEN is a national organization dedicated to ensuring that all K-12 students are valued and treated with respect, regardless of their sexual orientation, gender identity, or gender expression. A copy of the Survey is attached. The 2011 Survey found that 63.5 percent of LGBT students feel unsafe at school because of their sexual orientation. Joseph G. Kosciw et al., *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in our Nation's Schools*, p. xiv, GLSEN (2012). A staggering 81.9 percent of LGBT students have been verbally harassed and 38.3 percent have been physically assaulted because of their sexual orientation. *Id.*, p. xiv. This harassment leads to absenteeism, lowered educational aspirations, decreased academic achievement and poorer psychological well-being. *Id.* at p. xv. The primary purpose of the Safe Space poster is to ensure that LGBT students know that there are places they can go at school where they will be protected from bullying and harassment.

The poster in question hung in Mr. Nichols' classroom for the remainder of last school year, without engendering any complaints. It is our understanding that another copy of the poster also hung without incident in another CMS teacher's classroom. On Tuesday, August 6, 2013, the school held an open house, during which parents had an opportunity to follow the class schedule of their children and meet their teachers. The poster was displayed in Mr. Nichols' classroom on that evening, as it had been throughout much of last school year. On August 7, Mr. Nichols and Dr. John Ash, the school principal, received a letter from a parent complaining about the poster. The parent stated that he was offended by the poster because, in his view, the poster encourages a lifestyle inconsistent with his personal religious beliefs and moral convictions. Mr. Nichols consulted with his assistant principal and Dr. Ash, who both agreed with Mr. Nichols that it was appropriate to keep the poster in place. Dr. Ash indicated that he would consult the Director of Rutherford County Schools, Don Odom, concerning the letter.

On August 8, Mr. Odom instructed Dr. Ash to remove the poster from CMS classrooms. Mr. Odom indicated that this instruction was based on his conversations with you.

On August 13, you, as the Board's attorney, explained to me that the poster was in violation of a Board policy barring the display of material of a sexual nature. Because the words "lesbian, gay, bisexual, and transgender" were used in the poster, the Board automatically classifies the poster as containing inappropriate sexual material. You next explained that the

poster carries a political message and that the Board has a policy against posting political material in the classroom. A review of the Board's published policies yields no written policy on what may or may not be posted on classroom bulletin boards.

Legal Analysis

A. Students Have a Constitutional Right to Free Speech at School

Forty-four years ago, in the landmark case of *Tinker v. Des Moines Independent Community School District*, the United States Supreme Court held that the First Amendment protects the free speech rights of students and teachers. 393 U.S. 503, 506 (1969). In fact, the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972). Any censorship of student speech must be "reasonably related to a legitimate pedagogical concern." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Restrictions on student speech that discriminate based on viewpoint are "prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." *Peck v. Baldwinville Central Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005); *see also Planned Parenthood of S. Nevada, Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991). Where neither obscene nor threatening, a student's speech may be lawfully proscribed only if it would substantially disrupt the work of the school or interfere with the rights of others. *Tinker*, 393 U.S. at 513. The Court in *Tinker* upheld students' right to express their views on the controversial issue of U.S. involvement in the Vietnam War by wearing black armbands to school, in part because the school officials who sought to ban the wearing of armbands were unable to show that the practice was causing "interference, actual or nascent, with the schools' work or... collision with the rights of other students to be secure and to be let alone." *Id.* at 508. There is nothing obscene, violent or disruptive about a poster assuring students that the classroom is a place safe from harassment, as shown by the poster's uneventful display at CMS for months. Additionally, the poster in question specifically aims to help protect, not interfere with, the right of all students "to be secure and to be let alone" at school.

B. Students' Free Speech Rights Apply to Speech About LGBT Issues

The case of *Gillman v. School Board for Holmes County, Florida*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008), provides a good example of what might transpire in court if the Board persists in a policy of censorship. In *Gillman*, a school board attempted to prohibit students from displaying or wearing to school slogans such as "Gay Pride," "I Support My Gay Friends," "Pro-Gay Marriage," and "Sexual Orientation is Not a Choice. Religion, However, Is." *Id.* at 1363-64. In striking down the ban on pro-gay messages, the federal judge ruled that the school board had violated the students' right to free speech and had discriminated against their viewpoint, in violation of the First and Fourteenth Amendments. *Id.* at 1375-79. The court also awarded the students \$325,000 for their legal fees and expenses. *Id.* at 1365.

There is no written policy governing the poster in question. The Board, through you, claims that the poster is inappropriate because it is somehow sexually suggestive. The defendant school officials in the *Gillman* case also made this argument, but the court rejected it as an “obvious mis-characterization of the speech.” *Id.* at 1377. Instead, the court found that “[t]he Holmes County School Board has imposed an outright ban on speech by students that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness, and support for not only a marginalized group, but more importantly, for a fellow student.” *Id.* at 1370.

The Board’s claim that the Safe Space poster is sexual in nature is nonsensical and archaic. Apparently, the Board automatically equates the words “lesbian, gay, bisexual, and transgender” with sexual acts. As the court found in *Gillman*, this position is an obvious mischaracterization of the speech. References to LGBT identities are not sexually explicit in nature. Based on the *Gillman* decision alone, the Board should immediately reconsider its decision and lift the ban on the Safe Space poster.

On at least two previous occasions, federal courts have rebuffed claims that the use of the word “gay” is inappropriate in a school context. *See, e.g., Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F. Supp. 2d 1233, 1238 (M.D. Fla. 2009) (rejecting school officials’ effort to force students to change the name of Gay-Straight Alliance club); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1146-47 (C.D. Cal. 2000) (same). Another federal court recently rejected, as unconstitutional viewpoint discrimination, a school district’s effort to exclude information about LGBT issues from its schools by blocking students’ access to websites that address topics like bullying of LGBT students. *Parents, Families, and Friends of Lesbians and Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012).

Several other federal courts have also previously tackled the issue of student speech with LGBT-related content and have concluded that such speech is constitutionally protected. *See, e.g., Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (student stated a claim for violation of his First Amendment right to free speech when he alleged that school officials prevented him from openly stating that he was gay and retaliated against him for doing so); *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) (public school violated lesbian student’s First Amendment rights by denying her request to bring a female date to prom); *Fricke v. Lynch*, 491 F. Supp. 381 (D. R.I. 1980) (public school violated gay student’s First Amendment rights when it banned him from bringing a male date to prom).

If there are CMS students who disagree with the message promoted by the CMS GSA through the Safe Space poster, they are welcome to express their views, and their right to do so is also constitutionally protected. In *Chambers v. Babbitt*, a federal court rejected Woodbury, Minnesota school officials’ ban on T-shirts bearing anti-LGBT messages as a violation of students’ freedom of speech. 145 F. Supp. 2d 1068 (D. Minn. 2001). Woodbury students were wearing the shirts in protest of posters that designated teachers who would provide a safe environment for LGBT students. In enjoining the T-shirt ban, the court addressed the school’s use of the posters:

The Court rejects Plaintiffs' arguments that the school is in any way promoting homosexuality. By displaying posters and lists of staff members who are willing to talk about issues of sexuality and now race, disability, gender, and religion, the school has made a conscious and commendable effort at creating an environment of tolerance and respect for diversity.

Id. at 1073.

C. Safe Space Posters are Not “Political” Material

The Board, through you, has also articulated as an additional rationale for censoring this poster an unwritten policy barring political speech from Rutherford County Schools classrooms. Again, the Board appears to be grossly misconstruing the nature of the poster. It does not champion a political party or candidate or even advocate equal rights for LGBT individuals. Instead, the poster brings to light the empirically proven problem of bullying of LGBT students in schools and its damaging educational and psychological effects. It seeks to influence students' personal behavior, in terms of giving and getting respect to and from all peers in the school community, not their views on any political matter.

D. Singling Out a Poster for Removal is Impermissible Viewpoint Discrimination

Because the poster does not fall within the parameters of any content-neutral Board policy, and because, by all accounts, the poster was appropriately posted in an area designated for club announcements and functioning as a limited open forum, removal of the poster can only be based on viewpoint discrimination. “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). The Board's removal of the poster, therefore, violates the right to freedom of speech of the students and teachers who displayed the anti-harassment message.

Schools cannot permit some student organizations to convey their messages, while denying the same opportunity to the GSA. “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The “fundamental principle” behind content analysis is that “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48–49 (1986).

Conclusion

The Board's proffered reasons for removing the Safe Space poster do not meet constitutional scrutiny. LGBT youth and their allies at Central Magnet School have the right to convey their message of tolerance and safety on school grounds. Attempts to mislabel their message as sexual or political will not save the Board's viewpoint-based restriction. In light of the several cases above, we ask that the Board reconsider its unwritten policies and immediately

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reauthorize the display of the poster. We also ask that the Board take prompt action to assure the students and teachers of Rutherford County that this type of censorship will not occur again. If we do not receive confirmation by September 6, 2013 that the Board has reversed its decision to censor the posters, we will be forced to consider other options, including possible litigation on behalf of the students and teachers whose constitutional rights have been violated.

Should you have any questions, please feel free to contact Thomas Castelli at (615) 320-7142 or Amanda Goad at (212) 549-2627.

Sincerely,



Thomas H. Castelli
Legal Director
ACLU of Tennessee



Amanda C. Goad
Staff Attorney
ACLU LGBT Project

cc: Don Odom, Director of Schools