SPLC Southern Poverty Law Center

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Southern Poverty Law Center
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February 14, 2013

Mr. Rich Thomas
Principal
Scott Country Central High School
20794 U.S. Highway 61
Sikeston, MO 63801

Mr. Alvin McFerren
Superintendent
Scott Country Central School District
20794 U.S. Highway 61
Sikeston, MO 63801

VIA EMAIL AND FIRST CLASS MAIL

Dear Principal Thomas and Superintendent McFerren:

Stacy Dawson, a student at Scott County Central High School, recently notified us that the Scott County Central School District prohibits students from attending school dances with a same-sex date. On behalf of the Southern Poverty Law Center, which has been retained to investigate Stacy's claims, I write to inform you that unless you discontinue the practice of refusing to allow Stacy, or any other student, to bring a same-sex date, the SPLC will bring a legal action to end these unlawful policies.

Background

Stacy is a student at Scott County Central High School and is openly gay. In September of this year Stacy told a school administrator that he planned to bring a same-sex date to the prom. The administrator referred Stacy to the policy outlined in the student handbook, readily available on the District website, which instructs that "[h]igh school students will be permitted to invite one guest, girls invite boys and boys invite girls."[1] The administrator explained to Stacy that she would ask the school board about his situation. Approximately a week after Stacy's initial meeting with the administrator, she informed Stacy that the school board had decided he would not be allowed to attend the prom with his same-sex date. The prom is set for April 20th of this year and Stacy would like to attend with his same-sex date. It is important for him to express the message that same-sex couples deserve the same right to go to the prom as their heterosexual peers.

SCCHS Policy Violates the First Amendment

The District's policy discourages the participation of students who wish to bring a same-sex date to prom, chilling the exercise of their First Amendment right to express their orientation. *Laird v. Tatum*, 408 U.S. 1, 25 (1972) ("The 'deterrent effect' on First Amendment rights by government oversight marks an unconstitutional intrusion."). It is impermissible for Stacy to receive fewer

1. Scott County Central School District Student Handbook, *available at* http://www.scottcentral.k12.mo.us/Student%20Handbook.docx.

constitutional protections merely because he is gay, and the current policy denies him his First Amendment right to free expression. The U.S. Supreme Court has emphasized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." *Tinker v. Des Moines Indep. Cmty. School Dist*., 393 U.S. 503, 506 (1969) (upholding rights of high school and middle school students to wear black arm bands to protest the Vietnam War).

Stacy has the right to express his views freely, so long as that expression does not "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513. A school administrator's fear of disruption must have a genuine basis in fact and be reasonable – "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508. Instead, "there must be demonstrable factors that would give rise to a reasonable forecast . . . of 'substantial and material' disruption of school activities before expression may be constitutionally restrained." *Holloman ex. rel. Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004). The Supreme Court has explained:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09. If there are students who will react disruptively to Stacy's attending prom with a boy, the District has a duty to punish the disruptive students, not to prohibit Stacy's speech. "If a student's conduct traverses the threshold of acceptable heated exchange into the realm of material and substantial disruption, the law requires school officials to *punish the disruptive student, not the student whose speech is lawful*." *Gillman ex rel. Gillman v. Sch. Bd. for Holmes County*, 567 F. Supp. 2d 1359, 1374 (N.D. Fla. 2008) (emphasis added); *see also Holloman*, 370 F.3d at 1275 (To curtail a student's freedom of expression because of potential disruptive behaviors by other students "is to sacrifice freedom upon the alter of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob."). If the censorship of Stacy's expression is out of concern that other students will behave disruptively, your school has allowed those disruptive students to exercise a "heckler's veto" over Stacy's free speech rights. The First Amendment does not permit such an outcome.

The District's policy is similar to a case in Mississippi, *McMillen v. Itawamba Cnty. School Dist*., 702 F. Supp.2d 699 at 701 (N.D. Miss. 2010). There, a female high school student asked to bring a same-sex date to prom and to wear a tuxedo. The school district informed the student that the two girls could not attend prom or slow dance together because it could "push people's buttons." *Id.* The district also told her that all girls must wear dresses. *Id.* After the school district received a letter informing it that these policies were unlawful, it elected to cancel the prom. The court held that the student's effort to "communicate a message by wearing a tuxedo and to express her identity through attending prom with a same-sex date" was "the type of speech that falls squarely within the purview of the First Amendment," *id*. at 705. The court concluded that the district violated her First Amendment rights under "clearly established case law" by its actions, including the cancellation of the prom. *Id.* at 704.[2] Ultimately, the District paid $35,000 in damages to the student and over $80,000 in fees to the

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2. The court declined to order a preliminary injunction only because the district promised that a privately sponsored prom would go forward where all students would be welcome. *Id*. at 705. When in fact the private prom excluded the student, she sued again,

student's attorneys.[3] In another similar case, *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980), a school paid more than $116,000 in damages and attorneys' fees for denial of students' First Amendment right to bring a same-sex date to a school dance.

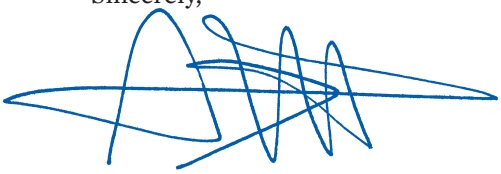
Finally, in addition to the clear violation of established First Amendment law, the policy violates the Equal Protection Clause of the Fourteenth Amendment. The U.S. Supreme Court has ruled that a policy or act of a public entity (like a public school) based on prejudice towards gay people violates the Equal Protection Clause. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (Fourteenth Amendment protects against government discrimination based on sexual orientation).

Conclusion

Please confirm in writing by **5 p.m., Monday, February 25th**, that you have rescinded your unlawful policy and that Stacy and all other students within the District may participate in school events with a same-sex date. Without prompt and meaningful action to remedy the constitutional violations suffered by our client and to compensate him for the harm caused by the District's policy, we intend to file a federal lawsuit seeking full redress, including but not limited to injunctive and declaratory relief, damages, and attorneys' fees and expenses.

Thank you for your careful attention to this important matter.

Sincerely,



Alesdair Ittelson
Skadden Fellow/Staff Attorney, LGBT Rights Project
Southern Poverty Law Center

cc: Scott County Central School Board Members

President: Steve Johnson
Vice-President: Michael Blissett
Secretary: Melette Pobst
Treasurer: Steve Pobst
Member: Tony Lackey
Member: Ray Shoaf
Member: Dee Cookson

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and the district agreed to a substantial settlement. *See* ACLU Press Release, *Victory for Constance McMillen!* (July 20, 2010), at www.aclu.org/blog/lgbt-rights/victory-constance-mcmillen.

3. *McMillen v. Itawamba Cnty. School Dist.*, 702 F. Supp.2d 699 (N.D. Miss. 2010) (order assessing and awarding attorney's fees and expenses), *available at* http://www.aclu.org/files/assets/Order_McMillen_Attorney_Fees_Award.PDF.