

November 15, 2010

Dear Superintendent or Principal:

There may be in effect a policy at one or all of your schools prohibiting couples of the same sex from attending proms or school dances. On behalf of the American Civil Liberties Union Foundation (ACLU), I'm writing to inform you that such a rule violates the constitutional rights of gay and lesbian students and must be rescinded immediately.

Any policy excluding same-sex couples from proms or school dances violates the right to free expression guaranteed by the First Amendment to the U.S. Constitution. This is not just the opinion of the ACLU. It was the conclusion of at least two federal courts in cases in which a gay high school student successfully challenged his or her school's ban on same-sex couples at prom. [*Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980)]; [*McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (N.D. Miss. 2010)].

Whether based on prejudice or not, it is unconstitutional to exclude same-sex couples from school dances. In *Fricke v. Lynch* the principal being sued testified in court that the school's prom policy was based on concern about possible disruption and violence at the prom in reaction to the participation of a gay couple. The federal judge was convinced of the sincerity of the principal's concern but ruled that the Constitution required the school to take steps to protect the couple's free expression rather than to stifle it. "To rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto', allowing them to decide through prohibited and violent methods what speech will be heard," wrote the judge.

Two decades after *Fricke* was decided, a public school in Mississippi cancelled the prom rather than allow a student to bring a same-sex date. [*McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (N.D. Miss. 2010)]. In that case, a federal court determined once again that school policies that ban same-sex dates at the prom violate the right to free expression guaranteed by the First Amendment. The Court found that "this expression and communication of her viewpoint [bringing a same-sex date to prom] is the type of speech that falls squarely within the purview of the First Amendment... For all of the foregoing reasons, the Court finds that [student's] First Amendment rights have been violated." The Court further held that the school district had violated the student's rights by cancelling the prom instead of allowing her to attend with her same-sex date. This case resulted in a judgment entered against the school, as well as more than \$116,000 in damages and attorneys' fees.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
LESBIAN GAY BISEXUAL
TRANSGENDER &
AIDS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2627
F/212.549.2650
WWW.ACLU.ORG/LGBT

SAN FRANCISCO OFFICE:
39 DRUMM STREET
SAN FRANCISCO, CA 94111

CHICAGO OFFICE:
180 NORTH MICHIGAN AVENUE
SUITE 2300
CHICAGO, IL 60601-7401

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

In addition to violating free speech rights, a policy prohibiting same-sex couples from attending prom or school dances has equal protection implications. The U.S. Supreme Court has ruled that a policy of a public entity (like a public school) that's based on animosity or prejudice towards gay people violates equality rights guaranteed to all Americans by the 14th Amendment. [*Romer v. Evans*, 517 U.S. 620 (1996)].

Please do not hesitate to contact the ACLU if you have any questions about this letter or if we can be of any assistance to you. We can be reached via email at getequal@aclu.org.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,

A handwritten signature in black ink that reads "James D. Esseks". The signature is written in a cursive style with a large, looping initial "J".

James D. Esseks
Director
ACLU LGBT & AIDS Project