



March 2, 2010

***VIA ELECTRONIC AND FIRST CLASS MAIL***

Teresa McNeece  
Superintendent of Education  
Itawamba County School District  
605 South Cummings St.  
Fulton, MS 38843  
[tmcneece@itawamba.k12.ms.us](mailto:tmcneece@itawamba.k12.ms.us)

Principal Trae Wiygul  
Itawamba Agricultural High School  
11900 Highway 25 South  
Fulton, MS 38843  
[twiygul@itawamba.k12.ms.us](mailto:twiygul@itawamba.k12.ms.us)

Dear Superintendent McNeece and Principal Wiygul:

The ACLU and the Mississippi Safe Schools Coalition ("MSSC") have been contacted by Constance McMillen, a senior at Itawamba Agricultural High School ("IAHS"). Ms. McMillen has informed us that IAHS's prom policy prohibits her from exercising her constitutional rights to bring a same-sex date. She also informs us that IAHS policy prohibits her from wearing a tuxedo to the prom solely because she is a girl. Ms. McMillen states that she notified the school of these unlawful prohibitions and that the District refuses to remedy the situation.

We are writing to inform the District that preventing a student from bringing a same-sex date to the prom constitutes an unlawful act against Ms. McMillen and the other gay and lesbian students in your District. As you should know, students have the right under the First Amendment to bring a same-sex date to the prom. *See Collins v. Scottsboro City Board of Education*, CV-2008-90 (38th Judicial District) (enclosed for your convenience); *see also Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980). Moreover, the U.S. Supreme Court has ruled that a policy or act 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. *See Romer v. Evans*, 517 U.S. 620 (1996). But 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 court in that case 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

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*"Cultivating Freedom on Southern Soil"*

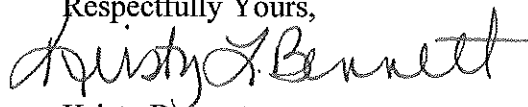
than to stifle it. "To rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto', allowing them to decide through prohibited and violent methods what speech will be heard." *Fricke, supra*; see also *Holloman ex. rel. Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004).

We are also writing to inform you that Constance and her classmates have the right under both federal statutes and the First Amendment to peacefully express their gender identity at prom by wearing gender-congruent attire. As you may know, Title IX prohibits public schools from discriminating on the basis of sex, which numerous courts have held includes discrimination on the basis of sex stereotypes. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."). A rule that prohibits a female student from wearing a tuxedo to the prom, or conversely, a male student from wearing a dress to the prom, violates laws against sex discrimination and also the First Amendment right to free expression. See *Logan v. Gary Community School Corp.*, 2008 WL 4411518 (N.D.Ind. Sept. 25, 2008) (holding that student stated a claim under Title IX and the First Amendment where school prohibited him from wearing a dress to the prom); see also *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440-41 (5<sup>th</sup> Cir. 2001) (holding that "First Amendment applies to the students' choice of clothing.").

We request that the District provide immediate permission for Constance to bring her same-sex date and to wear a tuxedo to the prom. We further request that the District make clear to Principal Wiygul and all other educators in the District that it is unlawful to censor peaceful and appropriate expressions by students of their sexual orientation, gender identity, and support for gay and transgender rights.

We would appreciate a response by March 10, 2010, so that we may determine whether we will have to pursue our legal options.

Respectfully Yours,



Kristy Bennett  
Legal Director  
ACLU of Mississippi

Christine P. Sun  
Senior Counsel  
ACLU LGBT Project

Mississippi Safe Schools Coalition  
R. Ashley Jackson  
Coordinator

March 2, 2010  
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cc:

Itawamba County Board of Education  
605 South Cummings St.  
Fulton, MS 38843  
Fax: (662) 862-4713

**In the Thirty-Eighth Judicial Circuit of Alabama  
Jackson County Circuit Court**

Sarah Collins, *ex rel.*, )  
C.O. a minor child, )  
and )  
Sarah Collins, as Next Friend of )  
and on behalf of )  
Jane Doe, a Minor )  
Plaintiff, )  
v. )  
Scottsboro City Board )  
of Education, )  
Defendant. )

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Civil Action No.: CV-2008-90

**TEMPORARY RESTRAINING ORDER, Ex Parte**

The Court has before it the Plaintiff's amended application and motion for temporary restraining order filed on behalf of a female student at Scottsboro High School, whom this court elects to identify only by her initials, C.O., because of her minority.

The gist of the motion is to enjoin and restrain the Defendant Scottsboro City Board of Education from barring the Plaintiff's minor child from attending the Scottsboro High School prom with her date, who is also a female. Paragraph two of the motion states that "the Scottsboro City Board of Education has sought to bar C[.]O[.] from the prom because she has proclaimed herself to be a lesbian." Paragraph four of the motion avers that the Scottsboro City Board of Education states, "students of the same sex are not allowed to attend the prom together."

The Plaintiff has now cured the pleading deficiencies that this court noted in its initial order of March 28, 2008, in full. The application and motion are now in

order and in conformity with the law and Rule 65 of the *Alabama Rules of Civil Procedure*.

This is a case where a public school seeks to prohibit prom attendance by two of its students who comprise a same-sex couple. Apparently, the students are otherwise eligible to attend the prom, but for the fact of their homosexuality. The Plaintiff pleads that the minor Plaintiff would suffer irreparable and immediate harm if prohibited from attending the prom.

There appears to be no Alabama case law directly on point. Therefore, this court must turn to other sources for direction and specifically to the federal courts. In *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996) the United States Supreme Court held that states and their agencies, such as the Defendant, cannot set-out homosexuals for special treatment, neither inclusive or exclusive.

In *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980), a very similar homosexual- couple-high-school-prom-attendance case, the United States District Court for the District of Rhode Island held that a male same-sex couple could attend a high school prom if the couple otherwise qualified for attendance under school rules. This case, although not from an Alabama or even Eleventh Circuit federal court, is directly on point in the case at bar today. The *Fricke* case is very persuasive to this court in its decision. The George Washington University law review article entitled *It's Not Just For Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students* (67 Geo. Wash. L. Rev. 577, *George Washington University Law Review*, March, 1999, Regina M. Grattan) is also instructive and argues persuasively that the 1984 federal Equal Access Act passed by Congress and signed into law by President Reagan prohibits publicly-funded schools, such as the Defendant, from barring same-sex couples from school functions.

The court is sympathetic to the Defendant's plight and to the traditions of the school and this community. The court also knows well the importance and social significance placed by students upon such symbolic and monumental events as high school proms. However, it is clear to this court--*upon an initial and hurried review over Friday night and Saturday morning in advance of a fast-approaching prom scheduled for later this date*--that the Defendant cannot legally prevent a same-sex couple from attending its prom, if that couple otherwise qualifies for attendance.

The court has read the pleadings and affidavit before it, has studied the relevant case law and has given very careful consideration to the same. Based upon this analysis, it is,

**THEREFORE, ORDERED, ADJUDGED and DECREED** that the Plaintiff's Motion and application for a temporary restraining order, *ex parte*, is due to be, and it is hereby, **GRANTED**.

1. The minor Plaintiff C.O. and her date, whose name has not been provided to this court but to whom the court shall refer as "Jane Doe," are both made parties hereto.

2. The person identified as Jane Doe shall be added to this lawsuit as a Plaintiff denominated as "Sarah Collins, as Next Friend of and on behalf of Jane Doe, a Minor." When her name is learned by the court upon further amendment of the lawsuit, the Jane Doe designation shall be changed to her true first and last initials.

3. The purpose of adding both minors as parties to the lawsuit is so that the orders of this Court might be enforced against them individually, including orders of contempt and punishment therefor, should such become necessary.

4. The Defendant Scottsboro City Board of Education, its officers, agents and employees, including but not necessarily limited to its board members, its superintendent of education, its high school principal and vice principals, its teachers, its class sponsors, its prom sponsors and chaperones, its security personnel, its student leaders, and all those acting in concert with them shall:

A. Conduct the 2008 Scottsboro High School prom on the date previously established for the same, at the time and place previously established for the same, absent some extraordinary disaster or *force majeure* beyond the Defendant's control. Stated plainly, the Defendant shall not cancel the prom solely to prevent attendance at the same by the Plaintiffs;

B. Re-issue prom tickets to the Plaintiffs upon payment for the same;

C. Allow unfettered and unrestricted attendance at the prom by the minor Plaintiff C.O. and her female date, Jane Doe, only if they are otherwise eligible for attendance at the event under previously-established, clearly defined, written prom attendance rules, which rules must have been made known to C.O. and Jane Doe before this present controversy arose;

D. C.O. and Jane Doe shall be allowed and afforded the exact same rules, opportunities, privileges and rights as all other student attendees at the prom, without restriction;

E. C.O. and Jane Doe themselves shall follow and be restricted by exact same rules, opportunities, privileges and rights as all other student attendees at the prom, without restriction.

5. All parties, Plaintiffs and Defendants, shall comport themselves in a decent, civilized, law-abiding, respectful manner while attending the prom. The minor Plaintiffs shall do nothing scandalous, disturbing, disruptive, vulgar, rude, indecent, offensive, unlawful, nor any other thing to draw undue attention to themselves. Likewise, no such thing shall be allowed by the Defendants to be done to the Plaintiffs while at the prom.

6. This court cannot, shall not and does not attempt to prohibit the parties and/or their attorneys from giving interviews to the media. The court does, however, strongly discourage the same.

7. The parties are reminded that this court shall enforce its orders by all sanction available to it, up to and including, monetary penalties and incarceration

in the Jackson County Jail or appropriate youth detention facility, should such become necessary.

8. The Sheriff of Jackson County, Alabama is directed to serve copies of this order upon the Defendant through its superintendent of education, Dr. Judith Berry; its high school principal, Mr. Carter Dale Hancock and upon the adult person or persons in charge of the prom at the Scottsboro Goosepond Civic Center **forthwith this date.**

9. This matter shall be set for trial within ten days hereof by separate order.

10. This Temporary Restraining Order shall be effective upon the posting of a bond as security in the amount of One Thousand Five Hundred Dollars (\$1,500.00) with sureties thereon approved by the clerk of this court.

**DONE and ORDERED** at Stevenson, Alabama, this 29<sup>th</sup> day of March, 2008, at 10:15 a.m.



**JOHN H. GRAHAM**  
Circuit Judge

cc: Don Word, Esq.  
Parker Edmiston, Esq.  
Sheriff of Jackson County, Alabama

COPY

**CERTIFICATION BY THE CLERK OF THE COURT**

I, Ken Ferrell, as Circuit Court Clerk, do hereby certify that the foregoing **TEMPORARY RESTRAINING ORDER** is a true and accurate copy as the same appears of record in my office.  
Given under by hand and the seal of this Court this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Ken Ferrell  
Circuit Clerk