IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Thomas N. McLaughlin, by his next friend Delia McLaughlin; Delia McLaughlin; and Thomas W. McLaughlin, Plaintiffs, -v- Board of Education of the Pulaski County Special School District and Superintendent Donald J. Henderson, Principal Brenda Allen, Assistant Principal Emanuel McGhee, Assistant Principal Sharon Hawk, Linda Derdon, Jessica Geurin, Joan Blann, and Jimmie Brooks, in their official and individual capacities, Defendants.	)	Civ. No. _____

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs seek a preliminary injunction enjoining defendants from further restricting Thomas N. McLaughlin ("Thomas") from engaging in speech at school that i) discloses or concerns the fact that he is gay, or ii) concerns past discipline he has received by school officials. Plaintiffs are likely to prevail on the merits of their claims under the First Amendment to the United States Constitution. Moreover, a preliminary injunction is necessary to prevent

irreparable harm to Thomas, it will not harm others, and it is in the public interest.

STATEMENT OF FACTS

Plaintiff Thomas N. McLaughlin is 14 years old and a 9th grader at Jacksonville Junior High School in Pulaski County. Affidavit of Thomas N. McLaughlin ("Thomas Aff."), ¶ 1. Plaintiffs Delia and Thomas W. McLaughlin are Thomas' parents. Affidavit of Delia McLaughlin ("Delia Aff."), ¶ 1.

Thomas is gay. Thomas Aff., ¶ 2. He is comfortable with being gay and has lived openly and honestly about his sexual orientation for over a year. *Id.* Thomas' parents are also comfortable with the fact that their son is gay and support his decision to live openly and honestly about who he is. Delia Aff., ¶ 2.

As an openly gay person, Thomas does not hide his sexual orientation at school and has spoken with classmates about the fact that he is gay. Thomas Aff., ¶ 3. This has enabled him to form closer bonds with his friends at school. *Id.* He participates in the fabric of school life, both socially and in extracurricular activities such as choir. *Id.*

While the other students at the School generally have not had a problem with Thomas' sexual orientation, unfortunately several teachers and administrators have. *Id.*, ¶ 4. Thomas has been prohibited by school officials from being open about and discussing his sexual orientation with other students during non-instructional time and he has even been disciplined for doing so.

In mid-November, 2002, Ms. Blann (Thomas' choir teacher) told Thomas that she did not

want to hear any talk of his sexual orientation and that she found it sickening. *Id.*, ¶ 6.[1] She also told Thomas that because he was openly gay, she might not take him to the All Region choir competition, for which Thomas had qualified, because it would give the choir a bad name and cause kids to get beaten up. *Id.* Thomas had told some fellow choir members that he was gay, but he had never discussed his sexual orientation during choir class. *Id.*

Ms. Blann called Thomas' mother to complain about the fact that he told some of his friends that he is gay. Delia Aff., ¶ 3. She said that she would be taking him off-campus to the All Region competition and didn't want any talk of Thomas being gay as it would give a bad name to the boys' choir. *Id.*

Later that month, when Ms. Derdon (Thomas' computer teacher) heard Thomas in the hallway between classes speaking with a female friend about cute boys, she sent Thomas, but not his friend, to the assistant principal's office. Thomas Aff., ¶ 11. Nor did she discipline other students standing within earshot who were talking explicitly about sex. *Id.* Ms. Derdon told Thomas that his conversation was not appropriate for school grounds. *Id.*

Shortly thereafter, Ms. Derdon called a conference with Thomas' parents to complain about Thomas talking about his sexual orientation in school. Delia Aff., ¶ 6. Principal Allen and Assistant Principal McGhee, who participated in the conference, agreed with Ms. Derdon that it was "inappropriate" for Thomas to discuss his sexual orientation at school. *Id.* See November 18, 2002 Referral (Exhibit 1 to Complaint), and November 22, 2002 Referral (Exhibit

[1]This occurred a few days after Ms. Blann held Thomas after class and asked him if he was gay, and when he said that he was, she asked him if he knew what the Bible says about homosexuality and offered to give him some scriptures. Thomas Aff., ¶ 5; Delia Aff., ¶ 3.

2 to Complaint).[2]

Moreover, teachers have attempted to silence Thomas by telling him that speaking openly about being gay puts him at risk of physical harm from which the school would not protect him. Ms. Derdon has told Thomas on a number of occasions that he had better keep his mouth shut about his sexual orientation or he will end up getting beaten up. Thomas Aff., ¶ 13. On at least one occasion, she warned that he could end up like Matthew Shepard, a young man who was murdered because he was gay. *Id.* Assistant Principal Hawk told Thomas that it was his openness about his sexuality that is to blame for another boy, who was mistaken for Thomas, being so frequently beaten up at school last year that he had to transfer to another school. *Id.*, ¶ 9. She also told Thomas that his openness about being gay endangers his little brother's safety. *Id.*

On or around November 18, 2003, Assistant Principal McGhee further tried to silence Thomas' openness about his sexual orientation by preaching to Thomas, as part of a disciplinary action, his personal religious views about homosexuality, and forcing Thomas to read passages from the Bible aloud.[3] Thomas Aff., ¶ 8. Thomas felt extremely uncomfortable being preached to and made to read the Bible in school and this incident was very upsetting to him. *Id.*[4]

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[2] Ms. Derdon had also preached to Thomas her religious belief that homosexuality is sinful. Thomas Aff., ¶ 14; January 30, 2003 Referral with statement from Ms. Derdon (Exhibit 3 to Complaint).

[3] Thomas had been sent to Assistant Principal McGhee by Ms. Derdon because she called him "abnormal" and "unnatural" for being gay and he argued with her about it. Thomas Aff., ¶ 7.

[4] Of course the establishment clause of the 1st Amendment of the United States Constitution prohibits public school officials from imposing mandatory Bible reading and other religious preaching on students in school during the school day. *School Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Steele v. Van Buren*

On January 30, 2003, when Thomas expressed to his classmates his feelings about being forced to read the Bible at school,[5] he was suspended for two days. Thomas Aff., ¶ 15; January 30, 2003 Referral and attached statement (Exhibit 3 to Complaint); Suspension Notice dated January 31, 2003 (Exhibit 4 to Complaint). Thomas was then told by Principal Allen, Assistant Principal McGhee and Ms. Derdon that if he told any of his friends why he was suspended, he would automatically be recommended for expulsion. Thomas Aff., ¶ 15.

In February, 2003, after Thomas returned to school after his suspension, he was written up twice by Ms. Derdon for talking to classmates during non-instructional time about his suspension and being made to read from the Bible. *Id.*, ¶ 17; Referrals dated February 5, 2002 and February 7, 2003 (Exhibit 5 to Complaint). In one of these incidents, Ms. Derdon had overheard a conversation between Thomas and a friend before class began in which Thomas' friend had told him that she had been disciplined for complaining too much in another class; Thomas responded that at least she didn't get suspended for something stupid like he did. Thomas Aff., ¶ 17. Assistant Principal McGhee called Thomas' mother and told her that he intended to suspend Thomas for four days for this. Delia Aff., ¶ 7. Thomas ultimately was not suspended that time. Thomas Aff., ¶ 17.

It is important to Thomas to be honest about who he is and for his friends to know the

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Public Sch. Dist., 845 F.2d 1492 (8th Cir. 1988) (band teacher's prayer sessions with students before concerts and rehearsals violates establishment clause).

[5] He told them during free time at the end of computer class; he did not disrupt instruction. A few minutes before the bell rang after instruction ended, Ms. Derdon said the students could have free time to do whatever they wanted. Thomas Aff., ¶ 15. One student got up and wrote on the board, without any objection from the teacher. *Id.* Then Thomas got up and wrote that he was made to read the Bible. *Id.*

"real" Thomas. *Id.*, ¶ 3. It is also important to him to be able to express his feelings about the fact that he was made to read the Bible in school and other discipline he believes was unfair and inappropriate. *Id.*, ¶ 18.

Thomas intends to discuss with other students his sexual orientation as well as the fact that he was made to read from the Bible and other matters of school discipline against him. *Id.*, ¶ 19. However, he is fearful based on the actions and statements of Ms. Blann, Ms. Derdon, Assistant Principal McGhee and Principal Allen that he will face further discipline – and even expulsion– if he does so. *Id.*

It is upsetting to Thomas to be treated this way by school officials and it interferes with his ability to concentrate on his school work. *Id.*, ¶ 20. Moreover, he has missed class time due to being suspended and being sent to the assistant principal's office because of the content of his speech. *Id.* As a result of all of this, some of his grades have dropped this term. *Id.* Moreover, his school record is tainted by disciplinary reports based on his exercise of his right to free expression. *Id.*

Plaintiffs have attempted to resolve this matter to no avail. Despite Thomas' parents' complaints to Assistant Principal McGhee and Principal Allen about the censorship of Thomas' speech, which they raised at two parent conferences (Delia Aff., ¶¶ 5 and 6), as well as a request to the Superintendent, the School District and the individual defendants have not agreed that school officials and teachers would not restrict Thomas' speech about his sexual orientation or about discipline that he has received from school officials. Letter from ACLU to Henderson, dated March 13, 2003 (Exhibit A, attached hereto); Letter from Henderson to ACLU, dated March 21, 2003 (Exhibit B, attached hereto). Plaintiffs' counsel have been in discussion with

the School District's counsel for several weeks, which included the exchange of exhibits A and B, however, the parties were unable to reach an agreement to resolve this matter. Plaintiffs therefore seek injunctive relief from this Court.

ARGUMENT

In the Eighth Circuit, four factors are considered in determining whether a preliminary injunction or temporary restraining order should issue:

> (1) probability of success on the merits; (2) the threat of irreparable harm; (3) the balance between this harm and potential harm to others if relief is granted; and (4) the public interest.

Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963, 966 (8th Cir. 1999).

A. The probability of success on the merits.

Plaintiffs will undoubtedly prevail on the merits of their First Amendment claim because the school's restriction on Thomas' freedom of speech is in clear violation of *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

In *Tinker*, the Supreme Court famously articulated the longstanding principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.[6] The Court also set forth the standard for

[6] The Court, harkening back to *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), explained the importance of protecting students' First Amendment rights:

> [Boards of Education have] important, delicate, and highly discretionary functions, but none that they may not preform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

evaluating school censorship of individual student speech. School prohibition of particular expression is only justified, the Court held, where the school can show that the forbidden expression would materially and substantially disrupt classwork or the operation of the school, or interfere with the rights of others. *Tinker*, 393 U.S. at 509, 514. The Court made it clear that the bar this sets for schools is a high one:

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. 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 . . . .
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> In order for . . . .school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker, 393 U.S. at 508-09.

Tinker addressed a school's ban on students wearing black armbands at school and even in the classroom to protest the Vietnam war. The Court held that despite the intense and emotional controversy at the school surrounding the war and dissent against it– a former student of the high school had been killed in the war– school authorities could not have reasonably anticipated that the protest expressed through black armbands would materially and substantially disrupt the operation of the school or interfere with the rights of others. *Tinker*, 393 U.S. at 514 ("They neither interrupted school activities nor sought to intrude on the school affairs or the lives of others. They caused discussion outside of the classroom, but no interference with work and no disorder.").

Tinker, 393 U.S. at 637, *quoting Barnette*, 319 U.S. at 637.

Here, the school's restrictions on Thomas' speech clearly fail under *Tinker*.[7] Thomas' speech about his sexual orientation during non-instructional time did not disrupt classwork or other school activities; nor did it interfere with the rights of others. Nor is there any basis to anticipate that such speech, itself, would be disruptive. *See Weaver v. Nebo Sch. Dist.*, 29 F. Supp.2d 1279, 1285 (D. Utah 1998) (holding that gagging lesbian teacher from speaking about her sexual orientation outside of the classroom violated her right to free speech because it did not materially or substantially disrupt the school). Similarly, Thomas' discussion of school discipline during non-instructional time was not itself substantially and materially disruptive of school activity. Thus, there is no justification for the infringement on Thomas' right to free speech.

While there was no disruption of class work or other school activities associated with Thomas' speech during non-instructional time, even if there had been, restrictions on his speech would only be justified if his speech itself, as opposed to the reactions of others to that speech, was disruptive. The Supreme Court has expressly rejected the notion that governments may restrict speech to avoid controversy or the reactions of others. *See, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund., Inc.*, 473 U.S. 788, 812 (1985); *Terminiello v. Chicago,* 337 U.S. 1 (1949).

The Supreme Court has ruled, time and again, that the First Amendment does not allow a

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[7] *Tinker* governs this case because that standard applies to a school's restrictions on student speech unless the speech can be attributed to the school (*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)), or is lewd or vulgar (*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)). Here, Thomas has been prohibited from speaking to other students during non-instructional time about his sexual orientation or discipline; thus, his speech cannot possibly be deemed to bear the imprimatur of the school. Nor is the restricted speech sexually explicit or profane.

heckler's veto. "[A]ny suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *U.S. v. Eichman*, 496 U.S. 310, 318 (1990). In *Terminiello,* 337 U.S. 1, the Supreme Court held Chicago had infringed Terminiello's right to free speech by charging him with disorderly conduct when over 1,000 protestors rioted in response to his speech. The Court explained that

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. at 4-5 (citations omitted); *see also Edwards v. South Carolina,* 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965).

Implicitly recognizing the problem of a heckler's veto in the context of school speech, the Court in *Tinker* was careful to focus on whether "*engaging in the forbidden conduct* [wearing black armbands to protest] would materially and substantially interfere with the requirements of appropriate discipline." *Id.* at 509 (emphasis added). The Court specified that the students' speech was protected because it was "entirely divorced from actually or potentially disruptive conduct *by those participating in it.*" *Id.* at 505-06 (emphasis added).

Indeed, in *Tinker*, the Court expressly rejected the avoidance of controversy as a basis to restrict student speech (*Id.,* at 509), and that case was explicitly premised on the Court's prior decisions prohibiting a heckler's veto. *Id.* ("Any departure 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, *Terminiello v. Chicago,* 337 U.S. 1 (1949) . . . ."). *See also Fricke v. Lynch*, 491 F. Supp. 381, 385, 387 (D.R.I. 1980) (principal's concern about other students' violent response if a same-sex couple were permitted to attend the high school prom did not allow couple's right to free expression to be infringed; "[t]o rule otherwise would completely subvert free speech in the school by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard.").

Because Thomas' speech, which occurred during non-instructional time, did not disrupt class work, other school activities or the operation of the school, the defendants' restrictions on his speech violate the 1st Amendment.

B. The threat of irreparable harm to movant.

The Supreme Court has held repeatedly that the "loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury and warrants a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Absent a preliminary injunction, Thomas will have to continue to go to school every day with the fear that if he is open about his sexual orientation he will be further disciplined. And requiring Thomas to censor himself to avoid discussion about or reflecting his sexual orientation is no simple task; nor is it without serious costs to him. Heterosexual teens, whether consciously or not, reveal their sexual orientation on a regular basis– e.g. girls referring to boyfriends or discussing which boys in school are cute, and boys saying the same about girls. Yet Thomas is

being told to refrain from engaging in the same kinds of typical teenage conversation because he is gay. Not only is this burdensome, but it also prevents Thomas from enjoying the full social interaction in which other students participate. And it requires him to be dishonest with his peers.

Moreover, if a preliminary injunction is not granted, Thomas will be irreparably harmed because the school's policy discriminates against him based on his sexual orientation. Penalizing the expression of gay identity denies equality for gay people just as it would deny religious equality to penalize Christians for wearing crosses or Jews for wearing yarmulkes. Nan Hunter, Identity, Speech, and Equality, 79 Va. L. Rev. 1695, 1718 (Oct. 1993).

In the absence of the injunctive relief sought, Thomas will also be irreparably harmed by being prohibited from discussing with his peers discipline he has received from school officials. This gag on Thomas' speech precludes him from answering the inevitable questions asked by peers upon the return to school after suspension; but more importantly, it prevents Thomas from sharing with other students his feelings about the appropriateness or fairness of being made to read the Bible and the other discipline he received. The ability to criticize government action, which is at the core of First Amendment liberties, must extend to students as well as adults, and necessarily requires the ability to identify the wrong against which one desires to speak.

Finally, injunctive relief is necessary to ensure that Thomas does not miss any more class time because of school officials' objections to his speech, and that he can concentrate on his studies rather than the unfair treatment he is receiving.

C. The balance of harms.

In contrast to Thomas' immediate and irreparable injury, neither defendants nor anyone else will suffer any injury if defendants are enjoined from prohibiting Thomas from speaking during non-instructional time about his sexual orientation or about school discipline he has received. Protecting Thomas' 1st Amendment rights will not cause anyone else harm since the *Tinker* standard allows defendants to silence Thomas or any other student if his or her speech itself substantially and materially disrupts school activity.

D. The public interest.

Just as constitutional violations constitute irreparable harm, they typically satisfy the public interest requirement. "[T]he public interest favors protecting First Amendment freedoms." *Iowa Right to Life Committee*, 187 F.3d at 970.

Moreover, allowing Thomas to speak openly about his sexual orientation will educate members of the school community about the fact that there are gay students in school. It will foster tolerance and understanding of lesbians and gay men as part of a diverse community. Silence and invisibility of gay people are what allow discrimination to persist. Hunter, 79 Va. L. Rev. at 1195. Allowing school officials to silence Thomas would shut off any dialogue about the existence of gay members of the community, and in particular, gay teens at school. It would allow them to create the false facade of a community in which gay people do not exist.

And of course it is in the public interest for the school community to know what sort of discipline is being imposed on students. Allowing school officials to continue to shroud their disciplinary actions in secrecy would preclude the community input that protects against

misconduct such as the unconstitutional actions taken against Thomas at Jacksonville Junior High School.

All four of the Eighth Circuit's factors favor preliminary injunctive relief, thus plaintiffs' motion should be granted.

Plaintiffs request a hearing on this motion on an expedited basis. Defendants are being served with the complaint and motion papers immediately.

Dated: April ___ , 2003

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