

April 12, 2012

Dear Principal or Educator,

One or more of your schools may have a policy prohibiting students from wearing clothing or accessories with slogans or symbols expressing support for acceptance and fair treatment of lesbian, gay, bisexual, or transgender (LGBT) people (e.g., a t-shirt with the slogan "Gay, Fine By Me," or a rainbow wristband or sticker). On behalf of the American Civil Liberties Union Foundation (ACLU), I'm writing to inform you that any such rule violates important federal constitutional rights of students and must be rescinded immediately.

The U.S. Supreme Court, as long ago as 1969, ruled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (upholding rights of high school and middle school students to wear black armbands to exhibit their disapproval of the Vietnam War). As long as it is 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. There is nothing obscene, violent or disruptive about a student peacefully displaying his or her support for fairness and equality for LGBT people.

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 you persist in a policy of censorship. In *Gillman*, the school board banned students from displaying rainbows, pink triangles, and pro-gay slogans such as "Gay Pride," "I Support My Gay Friends," "Pro-Gay Marriage," and "Sexual Orientation is not a Choice. Religion, however, is." In striking down the ban, 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 1st and 14th Amendments. The court also awarded the students \$325,000 for their legal fees and expenses.

As in the many cases like this that we've handled, Holmes County school officials claimed that censorship was necessary to prevent disruption of the work of the school. Following the standard articulated

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in *Tinker* that the speech ban must be justified "by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (393 U.S. at 509), the federal judge in *Gillman* rejected the school board's argument. The judge noted, in fact, that the "vast majority of episodes involving the speech at issue were indistinguishable from the typical background noise of high school." *Gillman*, 567 F. Supp. 2d at 1373.

The United States Supreme Court in *Tinker* acknowledged that a protest against the Vietnam War in a high school would be politically controversial, especially because a former student at the high school had recently been killed in the war. But the Court went on to explain why school officials' fear of a disturbance caused by people expressing an unpopular viewpoint was 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, 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 508-509.

School officials, when challenged on their ban of pro-LGBT expression, sometimes try to defend themselves by claiming that this expression is sexually suggestive and conjures images in children's minds of people engaging in sexual acts. That's what the school officials in the *Gillman* case argued, but the court rejected it as "an obvious mis-characterization of the speech." 567 F.Supp.2d at 1377. Instead, the court found that the principal had banned the students' speech because of his personal disagreement with its message, which he may not lawfully do. *Gillman*, 567 F. Supp. 2d at 1376.

To comply with the law, you must ensure that your policy permits students to express their support for the respect, equal treatment, and acceptance of LGBT people.

Please do not hesitate to contact me at the ACLU LGBT Project if you have any questions about the above or if we can be of any assistance to you. We can be reached via e-mail at lgbthiv@aclu.org.

Sincerely,

A handwritten signature in black ink that reads "James D. Esseks".

James D. Esseks
Director

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