



April 15, 2009

VIA FACSIMILE AND U.S. MAIL

Dr. James McIntyre
Knox County Schools Superintendent
912 S. Gay Street
P. O. Box 2188
Knoxville, TN 37901-2188

Dr. Jessie Register
Metro Nashville Public Schools,
Director
2601 Bransford Ave.
Nashville, TN 37204

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
OF TENNESSEE

P. O. BOX 120160
NASHVILLE, TN 37212

Phone: (615) 320-7142
Fax: (615) 320-7260
www.aclu-tn.org

Tennessee Schools Cooperative
c/o Dr. Lyle C. Ailshie
Greeneville City Schools, Director
129 West Depot Street
Greeneville, TN 37743
Fax: 423.638.2540

Dear Sirs,

We have been informed by students and staff members that your school districts and many others throughout the state of Tennessee utilize internet filtering software that improperly censors websites advocating the fair treatment of lesbian, gay, bisexual, and transgender (LGBT) persons. According to information we have obtained through the Open Records Act, approximately 107 school districts (or approximately 80% of Tennessee public school districts) use filtering software provided the Education Networks of America ("ENA") through a contract with an entity or group called the "Tennessee Schools Cooperative." This filtering software unlawfully blocks protected speech under the following category:

LGBT

Sites that provide information regarding, support, promote, or cater to one's sexual orientation or gender identity including but not limited to lesbian, gay, bisexual, and transgender sites. This category does not include sites that are sexually gratuitous in nature which would typically fall under the Pornography category. Examples: glsen.org, gsanetwork.org, hrc.org

See ENA Website, <http://www.ena.com/help/BlueCoat/TN/>.

As the description makes clear, the “LGBT” category is not intended to block pornographic or obscene sites, which school districts might legitimately argue is required by CIPA, the federal statute cited as one basis for the filtering product. Rather, this category intentionally singles out and blocks content that is protected speech under both the federal and state constitutions. *See Gillman v. School Board for Holmes County*, 567 F. Supp. 2d 1359 (N.D.Fla. 2008) (holding that school district improperly censored political speech involving the rights of gay, lesbian, bisexual, and transgender persons); *Fricke v. Lynch*, 491 F. Supp. 381, 385 (D.R.I. 1980) (holding that First Amendment protects non-sexual expression of a student’s gay sexual orientation). The sites that are improperly blocked under the “LGBT” category include those of nationally respected organizations such as Parents, Family, and Friends of Lesbians And Gays (PFLAG), the Human Rights Campaign (HRC), Marriage Equality USA, the Gay Lesbian Straight Education Network (GLSEN), the Gay and Lesbian Alliance Against Defamation (GLAAD), and Dignity USA (an organization for LGBT Catholics).

Moreover, the filtering scheme engages in impermissible viewpoint discrimination by blocking sites that express acceptance and tolerance towards LGBT individuals but permitting sites that condemn homosexuality and sites that urge LGBT persons to change their sexual orientation or gender identity through so-called “reparative therapy”.¹ These websites include the sites for the National Association for Research and Therapy of Homosexuality, People Can Change, The Americans For Truth Against Homosexuality, and the Traditional Values Coalition. This explicit viewpoint discrimination further violates the right to free speech. *See Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that school districts may not ban information available in a school library based on the “dislike [of] the ideas” in the censored materials); *Gillman*, 567 F.Supp.2d at 1378 (holding that school officials may not ban speech based on hostility towards its message).

The filtering scheme also violates the Equal Access Act because it prevents student “gay-straight alliance” (“GSA”) clubs equal access to school resources and privileges generally available to student non-curricular clubs. 20 U.S.C. § 4071 *et seq.*; *see also Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *SAGE v. Osseo County Schools Dist.*, 471 F.3d 908 (8th Cir. 2006). Because the GSA club is not permitted to utilize school resources to access educational and political websites relevant to the club’s mission and activities, a limitation that does not appear to apply to other non-curricular student clubs, the filtering scheme violates the Equal Access Act. *See Boyd County High Sch. Gay Straight Alliance v. Board of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Gonzalez v. Board of Educ.*, 571 F.Supp.2d 1257 (S.D.Fla. 2008). Moreover, blocking websites that advocate tolerance for LGBT persons while at the same permitting websites that condemn homosexuality may be part of a broader atmosphere of intolerance or harassment against LGBT students. *See Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (holding that discrimination on the basis of sexual orientation violates the right to equal protection); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (holding that exempting only peaceful labor picketing from a general prohibition against picketing near schools violates equal protection).

¹ “Reparative therapy” is a practice denounced as dangerous and harmful to young people by such groups as the American Psychological Association, the American Psychiatric Association, the American Medical Association, and the American Academy of Pediatrics.

According to legal counsel at ENA, the decision to block the LGBT category belongs to the individual school districts and/or to the school districts through the Tennessee Schools Cooperative. It is also our understanding from the state Department of Education that each school district has a choice in which filtering software it utilizes. Accordingly, we are writing to request that your school districts and the Tennessee Schools Cooperative cease—by the beginning of the 2009-2010 school year—blocking websites covered under the LGBT category or any other category that blocks non-sexual websites advocating the fair treatment of LGBT persons. Please let us know by **no later than April 29, 2009** in writing whether you will agree to end this unlawful censorship or we will have no choice but to seek other remedies, including filing a lawsuit for injunctive and declaratory relief and attorneys fees and costs.

We look forward to working together with you resolve this issue. School libraries serve a unique purpose for students as “a place dedicated to quiet, to knowledge, and to beauty.” *Brown v. Louisiana*, 383 U.S. 131 (1966). It is within a school library that students “can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.” *Pico*, 457 U.S. at 869 (citation omitted). By censoring information that is central to discourse about one of the most important political and social debates of our time, the filtering scheme not only violates the law but does a disservice to the education of your students.

Sincerely,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION



Tricia Herzfeld, Staff Attorney, ACLU of Tennessee
Christine P. Sun, Senior Counsel, ACLU LGBT Project
Catherine Crump, Staff Attorney, ACLU Foundation
Chris Hansen, Senior Staff Attorney, ACLU Foundation

cc: Joan Bertin, National Coalition Against Censorship
Knox County School Board of Education
Metro Nashville Public Schools Board of Education
Greenville City Schools Board of Education