

January 25, 2012

Ms. Laura McBride
Principal
Brookwood High School
15981 Hwy. 216
Brookwood, AL 35444

Dr. Frank Costanzo
Superintendent
Tuscaloosa County Schools
2314 9th Street
Tuscaloosa, AL 35401

Dear Principal McBride and Superintendent Costanzo:

We have been notified that Brookwood High School (BHS) recently prohibited a student, Elizabeth Garrett, from wearing a sweatshirt expressing acceptance of gay people. In a separate incident earlier this school year, Elizabeth was also told that students cannot attend prom with a same-sex date. On behalf of the Southern Poverty Law Center, which has been retained to investigate Elizabeth's claims, I'm writing to inform you that unless you discontinue the practices of prohibiting Elizabeth, or any other student, from wearing pro-gay clothing or attending school events with a date of the same sex, the SPLC will bring an action to end those misguided practices.

Background

Elizabeth is a student at BHS and is gay. On January 5, 2012, Elizabeth wore a "hoodie" sweatshirt that displayed the slogan "Warning, This Individual Infected With 'The Gay,' Proceed with Caution." She wore the sweatshirt because it makes a statement in support of gay people in a humorous way. Her intent is to communicate that gay people should be accepted and respected.

The day Elizabeth entered BHS wearing the hoodie, Assistant Principal Thad Fitzpatrick instructed her to take it off. She asked why and he said it would be "distracting." Assistant Principal Fitzgerald insisted that she remove the hoodie, although it was a cold day and she had no other jacket. He released her to class only after verifying she had placed the sweatshirt inside her backpack.

On another occasion this school year, Mr. Fitzgerald informed Elizabeth that same-sex couples are not permitted to attend the school prom together. The prom is set for this May. Elizabeth has plans to attend the prom with another female BHS student and it is important for her to express the message that same-sex couples deserve the same right to go to the prom.

BHS Policies Violate Fundamental Rights

BHS's censorship of Elizabeth's speech and its refusal to permit same-sex dates to the prom violate both the First and Fourteenth Amendments and must immediately cease. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (Fourteenth Amendment protects against government discrimination based on sexual orientation.). The U.S. Supreme Court has emphasized that students do not "shed their constitutional

rights to freedom of speech or expression at the schoolhouse gates.” *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969) (upholding rights of high school and middle school students to wear black arm bands to protest the Vietnam War).

Indeed, schools cannot prevent students from wearing expressions like the one on Elizabeth’s hoodie. In *Gillman v. School Bd. for Holmes Cnty.*, 567 F. Supp.2d 1359 (N.D. Fla. 2008), a school board banned students from wearing pro-gay symbols or slogans such as “I Support My Gay Friends” and “Sexual Orientation is not a Choice. Religion, however, is.” In striking down the ban, the court held that such slogans are “not vulgar, lewd, obscene, plainly offensive, or violent, but [are] pure, political . . . express[ions of] tolerance, acceptance, fairness, and support” for a marginalized group. *Id.* at 1370. The court ruled that by banning such slogans, the school board violated the students’ free speech rights under the First Amendment and discriminated against their viewpoint in violation of the Fourteenth Amendment. The court also ordered the school board to pay \$325,000 for the students’ legal fees and expenses. *Id.* at 1364; *see also Fricke v. Lynch*, 491 F. Supp. 381, 385 (D.R.I. 1980) (holding that the First Amendment protects non-sexual expression of a student’s gay sexual orientation).

The school’s prevention of same-sex couples from attending prom is similar to a case decided by a federal court in Mississippi, *McMillen v. Itawamba Cnty. School Dist.* There, a female high school student asked to bring a same-sex date to prom and to wear a tuxedo. 702 F. Supp.2d 699 at 701 (N.D. Miss. 2010). The school informed the student that the two girls could not attend prom or slow dance together because it could “push people’s buttons.” *Id.* The school also told her that all girls must wear dresses. *Id.* After the school district received a letter informing it that these policies were unlawful, it elected to cancel the prom. The court held that the student’s effort to “communicate a message by wearing a tuxedo and to express her identity through attending prom with a same-sex date” was “the type of speech that falls squarely within the purview of the First Amendment,” *id.* at 705. The court also concluded that the district had violated her First Amendment rights under “clearly established case law” by its actions, including the cancellation of the prom. *Id.* at 704;¹ *see also Fricke*, 491 F. Supp. 381 (school paid more than \$116,000 in damages and attorneys’ fees for denial of students’ First Amendment right to bring a same-sex date to a school dance).

No Valid Reason to Deny Elizabeth’s Rights

Elizabeth, and all other students at BHS, have the right to express their views freely, so long as their expression does not “materially and substantially disrupt the work and discipline of the school.” *Tinker*, 393 U.S. at 513. A school administrator’s fear of disruption must have a genuine basis in fact and be reasonable – “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 508. Instead, “there must be demonstrable factors that would give rise to a reasonable forecast . . . of ‘substantial and material’ disruption of school activities before expression may be constitutionally restrained.” *Holloman ex. rel. Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004). The

¹ The court declined to order a preliminary injunction only because the district promised that a privately sponsored prom would go forward where all students would be welcome. *Id.* at 705. When in fact the private prom excluded the student, she sued again, and the district agreed to a substantial settlement. *See* ACLU Press Release, *Victory for Constance McMillen!* (July 20, 2010), at www.aclu.org/blog/lgbt-rights/victory-constance-mcmillen.

Supreme Court has explained:

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 508-09. If there are students who will react disruptively to Elizabeth's speech or her attending prom with a girl, BHS has a duty to punish the disruptive students, not to prohibit Elizabeth's speech. "If a student's conduct traverses the threshold of acceptable heated exchange into the realm of material and substantial disruption, the law requires school officials to *punish the disruptive student, not the student whose speech is lawful.*" *Gillman*, 567 F. Supp.2d at 1374 (emphasis added); *see also Holloman*, 370 F.3d at 1275 (To curtail a student's freedom of expression because of potential disruptive behaviors by other students "is to sacrifice freedom upon the altar of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob."). If the denial of Elizabeth's rights to freedom of expression were out of concern that other students would behave disruptively, your school has allowed those disruptive students to exercise a "heckler's veto" over Elizabeth's free speech rights. The First Amendment does not permit such an outcome.

Conclusion

Please confirm in writing by 5 p.m., Wednesday, February 1, 2012 that you have rescinded your unlawful policies, Elizabeth and all other students within the District may wear slogans and other similar expressions of support for gay and transgender people, and students may participate in school events such as prom with a same-sex date. Without prompt and meaningful action to remedy the constitutional violations suffered by our client and to compensate her for the harm caused by BHS, we intend to file a federal lawsuit seeking full redress, including but not limited to injunctive and declaratory relief, damages, and attorneys' fees and expenses.

Thank you for your careful attention to this important matter.

Sincerely,



Sam Wolfe
Staff Attorney, LGBT Rights Project

cc: Dr. John Hinton, President, Tuscaloosa County School System Board of Education
Mr. Gary Bonner, Board Member
Rev. Schmitt Moore, Board Member
Mr. James Barnett, Board Member
Mr. Mark Nelson, Board Member
Mr. Joe Boteler, Board Member
Mr. Bill Copeland, Board Member