



April 22, 2016

Rick Lahn, Superintendent
Morris Area School District #2769
201 South Columbia Avenue
Morris, MN 56267
rlahn@morris.k12.mn.us

VIA Email and U.S. Mail

Dear Superintendent Lahn,

AMERICAN CIVIL
LIBERTIES UNION OF
MINNESOTA
2300 MYRTLE AVENUE
SUITE 180
SAINT PAUL, MN 55114
T/651.645.4097
F/651.647.5948
support@aclu-mn.org
www.aclu-mn.org

The ACLU-MN was distressed to learn that the Morris School District has imposed a ban on both the official t-shirts worn by the school's Morris Area Gay-Straight Alliance student group (GSA), and on t-shirts with the phrase "Loud and Proud". The ban was apparently in response to acts of bullying that occurred on the day that the GSA and allied students were observing the Day of Silence. We respectfully urge you to reverse the ban and instead take steps to address the acts of bullying that occurred.

According to information that we have received, a group of students, mainly younger, female students, wore their GSA t-shirts to school on April 15th and participated in a nationwide event known as the Day of Silence. The purpose of commemorating the Day of Silence is to call attention to anti-LGBT name-calling, bullying and harassment in schools and to illustrate the silencing effect that such harassment has on LGBT students and students perceived to be LGBT. The GSA t-shirts have text on the front and back that reads:

FRONT
#LookBeyond
Stereotypes
Labels
Differences

BACK
To see the real person
Morris Area Gay/Straight Alliance

The message, encouraging students to transcend their differences, aligns well with the school's anti-bullying curriculum. On the same day, a group of mainly older male students, wore t-shirts bearing the message "Loud and Proud". The t-shirt's message was likely intended to express disagreement with the message being expressed by students observing silence that day. GSA students have reported being yelled at, harassed and intimidated by students wearing "Loud and Proud" t-shirts.



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It is our understanding that school officials took no steps to intervene to stop incidents of bullying when they occurred on the Day of Silence. It was only after the parent of a GSA student spoke at a School Board meeting to report what had occurred that the school took any steps to address the issue. While we understand that an investigation is underway, the school's decision to ban constitutionally protected student speech by both the perpetrators and victims of bullying is both a heavy-handed and inappropriate response.

It is well settled that students do not shed their constitutional rights at the schoolhouse gate. As the U.S. Supreme Court held in *Tinker v. Des Moines Independent School District*, schools must be able to justify censorship of student speech by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. 503, 509 731 (1969). The Court went on to hold that "...where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.*

It is clear that harassment and intimidation of students based on their actual or perceived sexual orientation is troublesome and school officials have a legal obligation to address harassment of members of a protected class when it creates a hostile school environment. But it does not follow that the bullying that took place on the Day of Silence rose to the level of "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school." If anything, the harassment that took place was a direct result of the failure of school officials to ensure that students observing the Day of Silence would be treated with respect and dignity. Had school officials communicated that expectation to other students in advance of the Day of Silence, the harassment and intimidation that occurred may have been averted. The school should not use its own abdication of its responsibility to prevent harassment as a justification for censorship of student speech. The censorship in this instance may have actually increased the likelihood of harassment. It is our understanding that on the day the ban was announced, students on at least one school bus were loudly chanting "Loud and Proud" on the ride home.

Even if the incidents of harassment could be considered to have materially and substantially interfered with discipline in the operation of the school, it was not the t-shirts themselves that led to the harassment. It is likely that the same incidents would have occurred even if students were not wearing the banned t-shirts. Students have a First Amendment right to participate in the Day of Silence.¹ The t-shirts that the GSA wore to commemorate the Day of Silence bore a message of respect for all students that, far from being contrary to the school's

¹ See *Hatcher ex rel. Hatcher v. DeSoto Cty. Sch. Dist. Bd. of Educ.*, 939 F. Supp. 2d 1232, 1239 (M.D. Fla. 2013), *aff'd sub nom. Hatcher ex rel. Hatcher v. Fusco*, 570 F. App'x 874 (11th Cir. 2014) (Plaintiff stated First Amendment claim when school disciplined her for wearing non-vulgar t-shirt and remaining silent at school).

educational mission, directly reinforced school policies of inclusion. The “Loud and Proud” t-shirts worn by other students could be interpreted as either expressing disapproval of the Day of Silence or as phrase expressing support for LGBT students along the lines of “LGBT Pride” or “Out and Proud”. In either case, the phrase “Loud and Proud” does not include vulgar, derogatory or offensive terms. The American Flag and pickup truck on the t-shirt are also not vulgar, derogatory or offensive images. There is simply nothing about the t-shirts themselves that is reasonably likely to cause a materially or substantial disruption of the educational process or school activities.² Your recent quote in the Morris Tribune seems to acknowledge that fact, noting that “[t]hey have every right to wear those shirts — when they came into the building they weren't violating any of the school rules...The problem was not the t-shirts they were wearing ... it was the behavior of some of the students wearing the t-shirt that we had issue with.”

The School District’s own policy recognizes that political messages such as those expressed on the two banned t-shirts are protected speech that may not be censored. Policy 504 specifically states:

The intention of this policy is not to abridge the rights of students to express political, religious, philosophical, or similar opinions by wearing apparel on which such messages are stated. Such messages are acceptable as long as they are not lewd, vulgar, obscene, defamatory, and profane or do not advocate violence or harassment against others.

Morris Area School District Policy #504 Part II(D) (*emphasis added*).

The District’s decision to ban the two t-shirts is, therefore, in direct contradiction with its written policy.

We are also troubled by the fact that the school chose to ban both t-shirts as opposed to focusing on the t-shirts worn by the students who were the main perpetrators of the harassment. Censoring the non-vulgar speech of GSA students based on the theory that other students might harass them in violation of school policy amounts to an unconstitutional “heckler’s veto” of their speech.³ It is ironic

² See e.g. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 676 (7th Cir. 2008) (“As one would expect in a school the size of Neuqua Valley High School, there have been incidents of harassment of homosexual students. But it is highly speculative that allowing the plaintiff to wear a T-shirt that says “Be Happy, Not Gay” would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere.”)

³ In addition, the 8th Circuit upheld a ban on confederate flag attire over the plaintiff’s objection that it would constitute an unconstitutional viewpoint based restriction on speech. *B.W.A. v. Farmington R-7 School Dist.*, 554 F.3d 734 (2009). See also *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1184-85 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 127 S. Ct. 1484, 167 L. Ed. 2d 225 (2007) (upholding school’s ban on student t-shirt bearing messages such as “HOMOSEXUALITY IS SHAMEFUL”), *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir.2004) (noting *Tinker* “applies to school regulations directed at specific student viewpoints”); *Scott v. Sch. Bd. of*

that the school is censoring victims of harassment who were merely illustrating how anti-LGBT name-calling, bullying and harassment in schools has a silencing effect on LGBT students and students perceived to be LGBT.

We respectfully urge you to reverse your decision to ban the GSA and Loud and Proud t-shirts. We applaud the District's expressed desire to keep students safe and secure at school. We believe that the school can maintain a safe and secure environment without violating students' right to free speech.

Sincerely,



Charles Samuelson
Executive Director

Alachua Cty., 324 F.3d 1246 (11th Cir. 2003) (upholding ban on Confederate flag where school officials presented evidence of racial tensions at the school); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (same).