

*Sent by U.S. mail, electronic mail and facsimile transmission*

April 14, 2010

Mr. Steve Sorrells, Principal  
Greenbriar High School  
126 Cuniff Drive  
Greenbrier, TN 37073

Re: Protections against discrimination and censorship

Mr. Sorrells:

This letter seeks your cooperation in immediately remedying unlawful discrimination and censorship directed at a student enrolled in your school, freshman Cole Goforth. It is our understanding that Cole was threatened with discipline for wearing a t-shirt that said "I [love] Lady Gay Gay" and later told that he could not wear a t-shirt in support of equal marriage rights for same-sex couples because your interpretation of school policy considers the word "gay" and any pro-gay speech on student clothing to be "disruptive" and therefore subject to censorship. In addition, we understand that Cole experiences daily anti-gay harassment, and that the harassment is routinely ignored by teachers and administrators. As the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people and their allies, as well as people with HIV, Lambda Legal has extensive experience with issues related to students' rights, including their right to free speech and their right to an education free from discrimination. We write on behalf of Cole and his mother, Julie Gordon, to put the school on notice that these actions and inactions implicate constitutional violations for which individuals, as well as the institution, are liable.

According to our investigation, Cole was told by Assistant Principal Raines at the beginning of the school day on or about April 5, 2010 that he could not attend school wearing his "Lady Gay Gay" t-shirt, described above. It is our further understanding that Cole, after having missed school as a result of this directive from Ms. Raines, went to the school board with his mother and requested direction and explanation concerning this matter and the school rules regarding student expression. Apparently, the Director of Schools discussed the matter with you and communicated your decision to Ms. Gordon that Cole could not wear the "Lady Gay Gay" or any other shirt with the word "gay" on it to school because doing so would be inherently "disruptive," which decision was reiterated by Assistant Principal Freeman directly to Cole in response to his question

concerning whether he could, as a participant in this week's national Day of Silence<sup>1</sup> campaign, wear a t-shirt supporting the right of gay couples to marry.

Further, we have been informed that Cole experiences numerous daily anti-gay taunts and vile insults, contributing to blatant harassment that has been in the presence, and called to the attention, of teachers and administrators. Along with the repeated epithet "faggot" that is hurled at Cole on a daily basis, he is also often threatened with physical violence – indeed, his mother heard a student threaten to "beat the faggot's ass" on campus in the presence of school officials as recently as this past Wednesday. Students also use vulgar sexual comments to insult and intimidate Cole, such as "you like to take it up the ass," "you're gay because your daddy raped you," and numerous other graphic sexual comments. In addition, teachers have contributed to the creation of a hostile environment by, among other comments and conduct, telling Cole that they "disagreed with his lifestyle" and that his sexual orientation is contrary to their religious beliefs. We understand that, instead of disciplining the harassers or otherwise taking steps to ensure a safe and equal learning environment for Cole, he and his mother have been told by teachers and administrators that he is "over the top"; that he "needs to tone it down"; that there is "not much we can do"; that he just has "to take it"; that he and his clothing "would be fine in California, but not here"; that he "should expect this since [he] is in a small town"; and that he "brought [the harassment] on himself by coming out [as gay]."

For reasons explained in this letter, the restrictions on speech described above and the failure to provide Cole with a safe learning environment implicate violations of his constitutional rights and federal law.

### ***Restrictions on Student Speech***

The Supreme Court has long recognized that public school students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" <sup>2</sup> Under the First Amendment, schools may not restrict student speech merely to avoid controversy or to avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint." <sup>3</sup> Nor may schools suppress or discriminate against student speech simply because they disapprove of or disagree with the speaker's ideas. <sup>4</sup>

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<sup>1</sup> Day of Silence is an annual student-led action in which students from around the country remain silent for all or part of the school day to bring recognition to daily harassment, violence and discrimination faced by LGBT youth. See <http://www.dayofsilence.org/index.cfm>

<sup>2</sup> *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>3</sup> *Tinker*, 393 U.S. at 509; see also *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2000); *Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937, 941 (E.D. Ky. 2006) ("The private, noncurricular speech of students is entitled to almost blanket constitutional protection.") affirmed by *Morrison v. Bd. of Educ.*, 521 F.3d 602 (6th Cir. 2008).

<sup>4</sup> See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); see also *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002).

The Constitution allows schools to control student speech only in very narrow circumstances, none of which are present here. For example, the Constitution allows schools to censor speech expressed in an obscene, lewd or profane manner, as well as speech encouraging illegal drug use.<sup>5</sup> Constitutionally permissible also is a limitation on expression where students or members of the community would reasonably perceive a student's speech as representing the school's own speech – provided, however, that the limits imposed on the speech are “reasonably related to legitimate pedagogical concerns.”<sup>6</sup> Federal courts have also refused to extend the First Amendment's protections to abusive, harassing, or intimidating speech at school.<sup>7</sup>

With respect to the purported reason to censor Cole's pro-gay speech announced here – “disruption” – the Supreme Court has allowed restrictions on student speech only where school officials have *reasonably* concluded that the speech will “‘materially and substantially disrupt the work and discipline of the school.’”<sup>8</sup> A school may not simply assume, however, that disruptions will occur; rather, the school must justify restrictions on speech by showing *facts* that reasonably lead it “to forecast substantial disruption of or material interference with school activities.”<sup>9</sup> Accordingly, the school may not censor a student simply because it believes that some students or community members hearing the speech will respond in a disruptive manner.<sup>10</sup> If students who oppose the speaker's message disrupt the school, the school must direct its disciplinary measures at those students, not at the speaker.<sup>11</sup> In the words of one federal court, the First Amendment “does not tolerate mob rule by unruly school children.”<sup>12</sup>

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<sup>5</sup> *Morse*, 551 U.S. at 405; *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

<sup>6</sup> *See Id.*

<sup>7</sup> *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (“Although name-calling is ordinarily protected outside the school context, students cannot hide behind the First Amendment to protect their ‘right’ to abuse and intimidate other students at school.” (alteration, citation and internal quotation marks omitted)), *vacated on other grounds*, 127 S. Ct. 1484 (2007).

<sup>8</sup> *Morse*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 513); *Barr*, 538 F.3d at 564; *Morrison*, 419 F. Supp. 2d at 941 (“Further limiting the restriction of speech is the requirement that there be a specific fear of significant disruption.”).

<sup>9</sup> *Pinard v. Clatskanie School Dist.* 6J, 467 F.3d 755, 768 (9th Cir. 2006) (citation and internal quotation marks omitted). To the extent that Cole's involvement in an altercation in the week prior to this censorship is held out as justification for denying him the right to wear a t-shirt with the word “gay” on it, a federal court would not be likely to allow such a disconnected event to justify violating a student's constitutional rights in this way. The altercation was completely unrelated to pro-gay speech or sexual orientation and simply can not form the legal basis to presume that a pro-LGBT t-shirt would cause “material and substantial disruption” sufficient to justify banning such non-lewd expression.

<sup>10</sup> *See Morrison v. Bd. of Educ.*, 521 F.3d 602, 623 (6th Cir. 2008)

<sup>11</sup> *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (“Speech cannot be . . . punished or banned, simply because it might offend a hostile mob.”); *see also Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (“Assuming arguendo that the anti-GSA faction at BCHS was sufficiently disruptive to ‘materially and substantially interfere with the requirements of appropriate discipline,’ Defendants are not permitted to restrict Plaintiffs’ speech and association as a means of preventing disruptive responses to it. The Court further finds that the ‘heckler's veto’ rule does not limit Defendants’ authority to maintain order and discipline on school premises or to protect the well-being of students and faculty. . . . *Tinker* and *Terminiello* are designed to prevent

As the Supreme Court explained, the mere fact that a particular issue may be controversial or politically sensitive does not permit school authorities to censor “silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [the speakers themselves].”<sup>13</sup> Nor may other students’ response to free speech be a justification for censorship. In *Hill v. Colorado*, 530 U.S. 703, 735 (2000), the Supreme Court rejected the notion of a “Heckler’s Veto,” which would allow “a single, private actor to unilaterally silence a speaker.” The same is true in an educational environment, where student expression that does not substantially disrupt school activities should be a subject of discussion and debate, not censorship, and where the appropriate action is to discipline harassers and hecklers, not speakers.

As set forth above, recognition of students’ rights to speak and to remain free of discrimination based upon their pro-LGBT expression accords with firmly established law. Indeed, the most recent decision to look specifically at the question of whether a school may constitutionally discipline a student for their pro-LGBT expression at school unequivocally ruled that it may not do so. In *Gillman v. School Board for Holmes County, Florida*, a school for grades six through twelve had prohibited students from wearing messages at school such as “Gay? Fine by Me,” “I Support My Gay Friends,” and “I Support Equal Marriage Rights.”<sup>14</sup> The court held that the restrictions violated the Constitution. It was “extraordinary,” the judge commented, that the school would ban speech “that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness and support for . . . a marginalized group [and] for a fellow student.”<sup>15</sup>

### ***Anti-gay Harassment***

It is now well-established that under the Equal Protection Clause of the Constitution school officials have an *obligation* to treat students equally and to respond appropriately to peer-on-peer harassment regardless of a student’s sex or sexual orientation. In the groundbreaking case brought by Lambda Legal in 1996, *Nabozny v. Podlesny*, where, not unlike here, the principal told the student and his mother that he should expect to be harassed if he was going “to act so gay” in response to his reports of harassment, the Seventh Circuit concluded that it was “unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation.”<sup>16</sup> Since the

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Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner.”) (citing *Tinker*, 393 U.S. at 509).

<sup>12</sup> *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D.R.I. 1980).

<sup>13</sup> *Tinker*, at 580; see also *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3rd Cir.

2001)(“[T]inker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.”)

<sup>14</sup> *Gillman ex rel. Gillman v. School Bd. for Holmes County, Fla.*, --- F.Supp.2d ----, 2008 WL 2854266, \*1 (N.D. Fla. July 24, 2008).

<sup>15</sup> *Id.* at \*9.

<sup>16</sup> *Nabozny v. Podlesny*, 92 F3d. 446 (7th Cir 1996).

Nabozny case, many cases have been brought and won by LGBT students, or those harassed based on their perceived LGBT identity, based on school officials' willful ignorance of known acts of anti-gay harassment.<sup>17</sup> See enclosure, *The Costs of Ignoring Anti-Gay Harassment*.

Title IX also places an affirmative obligation on school officials to avoid a hostile environment "based on sex" and the Department of Education has made clear that harassment directed at a gay or lesbian student is "based on sex" where the hostility is a reaction to a student's gender expression and/or through the use of sexual slurs and sexual comments, as happened here.<sup>18</sup>

### **Conclusion**

We will expect that Cole and his mother's complaints about these incidents and threats will be met with swift and effective action that will send a message to the perpetrators, and to the student body, that anti-gay language, threats and harassment will not be tolerated in Greenbriar High School. We intend to monitor the situation to ensure that Cole's complaints are appropriately addressed and that he may access his education on an equal basis with other students.

Concerning the expressive rights described herein, please advise us as to whether Cole and other students may participate in Day of Silence activities on April 16, 2010 by wearing non-vulgar, non-obscene, non-lewd t-shirts expressing support and/or

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<sup>17</sup> See e.g., *Flores v. Morgan Hill Unified School Dist.*, 324 F. 3d 1130 (9th Cir. 2003) (upholding suit by students, who were, or were perceived by other students to be, lesbian, gay, or bisexual, against school administrators for failure to respond to complaints of student-to-student anti-homosexual harassment); *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003) (denying summary judgment to school officials where student plaintiff "provided evidence that he and his mother repeatedly reported the harassment and beatings to Conroy and Wilson, and that, despite their knowledge of the alleged abuse, neither took any meaningful action to protect plaintiff or discipline the perpetrators."); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000) (holding that a student who was harassed and beaten on the basis of his perceived sexual orientation could proceed with an equal protection claim).

<sup>18</sup> See Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) which forbids creating a hostile climate based on sex; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (holding school responsible for allowing sexually harassment); Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties Title IX* (sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance."); Commitment to Resolve, OCR No. 06971182, (1998) (where school-wide apathy to obvious homophobic harassment led to U.S. Dept. of Education intervention). In January 2010, the Justice Department stepped in where a student sued his school based on anti-gay harassment. According to news reports, "Federal lawyers argued that Title IX does not only protect students from gender discrimination. They said the law also covers discrimination based on gender expression" and helped broker a settlement in the case. See "N.Y. School District Settles With Justice Dept. On Gay Student's Suit," available at <[http://www.npr.org/blogs/thetwo-way/2010/03/ny\\_school\\_district\\_settles\\_wit.html](http://www.npr.org/blogs/thetwo-way/2010/03/ny_school_district_settles_wit.html)>.

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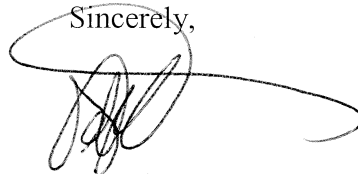
acknowledgement of LGBT rights and identity. Should you believe that t-shirts with the word “gay” in them or otherwise expressing support for LGBT rights are somehow “materially and substantially disruptive,” please provide us with a list of incidents that you feel evidence this conclusion. Also, please advise us as to whether Cole’s student records will reflect disciplinary action taken against him for an unexcused absence as a result of the censorship of his “Lady Gay Gay” t-shirt on April 06, 2010.

Since time is of the essence with respect to Day of Silence activities and the expressive rights at issue here are straightforward, **please provide us these answers by telephone, email or facsimile transmission by 5pm, April 15, 2010** in order for us to determine whether federal litigation will be necessary to vindicate Cole’s freedom of expression rights.

Finally, we trust that you are aware that the First Amendment forbids retaliation against students in response to their assertion of their rights – including this letter written on their behalf.<sup>19</sup> We will be in close contact with Cole and his allies to ensure that no such intimidation, or chilling effect on their constitutional rights, occurs.

Should you wish to discuss this matter, please do not hesitate to contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to read "Beth Littrell", with a long horizontal flourish extending to the right.

Beth Littrell, Esq.

cc: Daniel Whitlow  
Stoney Crockett  
Allan B. Heard

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<sup>19</sup> See *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir.1996) (“[G]overnment action which chills constitutionally protected speech or expression contravenes the First Amendment.”). “[T]hreats accompanied by a ‘chilling effect’ that deny or hinder the exercise of a constitutional right have been deemed cognizable.” *Sterling v. Borough of Minersville* 232 F.3d 190 (3rd Cir. 2000) (holding officials liable for threatening to reveal citizen’s sexual orientation to family members); see also *Citizens Action Fund v. City of Morgan City*, 154 F.3d 211, 216 (5th Cir.1998) (“[t]hreats of unconstitutionally enforcing laws against individuals can lead to a chilling effect upon speech, silencing voices and opinions which the First Amendment was meant to protect.”).