



August 8, 2011

Via US Mail and Email (beverly.griffin@lrsd.org)

Dr. Morris Holmes
Superintendent
Little Rock School District
810 West Markham Street
Little Rock, AR 72201

Re: ACLU's Web Filtering Demands

Dear Dr. Holmes:

It has come to our attention that the ACLU has threatened to sue the Little Rock School District ("the District") over its activation of the "Advocacy Groups," "Homosexuality," "Abortion," and "Sexual Education" filters on web filtering software it purchased from Fortiguard. In its letter, the ACLU demands that the District disable each of these filters or face a federal civil rights lawsuit. It is our hope that this letter will assist you in understanding why the District should not comply with the ACLU's demands.

Most importantly, we want you to know that disabling Fortiguard's "Homosexuality" and "Sex Education" filters will provide students access to websites that contain sexual content inappropriate for minors. In our view, some of the content that would be available by the disabling of these filters is pornographic in nature. In addition, disabling these filters may result in a violation of the Children's Internet Protection Act (CIPA) and open the District to civil and/or criminal liability for allowing students to access Internet materials that are harmful to minors.

Further, activating the "Advocacy Groups," "Homosexuality," "Abortion," and "Sexual Education" filters, or any other filter for that matter, likely does not violate the Equal Access Act or First Amendment rights of students. A public school district's decisions regarding what web content to make available to students are curricular decisions, and the case law is clear that public school districts have broad authority over curricular matters.

Disabling the "Homosexuality" and "Sex Education" Filters Will Make Sexually Inappropriate Material Available to Students

Fortiguard has a URL search tool on its website that allows you to search websites to determine whether they are blocked, and if so by which filter(s). See <http://www.fortiguard.com/webfiltering/webfiltering.html>. Using this tool, we determined that disabling the "Homosexuality" and "Sex Education" filters would result in unblocking at least the following sexually inappropriate websites: gaydatingtips.com, gayquestions.com/hc3.asp, lifelube.org, queerty.com, sexetc.org, and bitheway.org. Due to the sexually inappropriate nature of the materials available on these websites, we have not attached copies of their pictures or content to

this letter. Instead, we provide the below descriptions. You can independently confirm the sexually inappropriate nature of these websites by visiting them yourself.

At gaydatingtips.com, students would immediately see an advertisement for a see-through boxer for men. The advertisement includes a picture of a male model wearing the see-through boxers with his hand down the front of the boxers to cover his genitalia. Also at this site, students can access numerous articles containing material of a sexual nature that is highly inappropriate for students. Consider the article at this link, <http://www.gaydatingtips.com/2010/03/5-tips-to-get-things-spicy.html#more>, which provides (according to the article) five “quick recipes for hot gay sex.”

At <http://gayquestions.com/hc3.asp>, students will immediately view several highly inappropriate pictures of a sexual nature, one of which depicts two naked men apparently engaged in a sexual act. They also can use a search tool that allows them to search for answers to their questions. Underneath the search box is a sexually inappropriate statement suggesting what the search tool can be used to find.

At lifelube.org, students can access a “Sex & Drugs” information page. The introductory paragraph on this page states that the provided resources will enable them to “have the kind of hot, delicious sex we want and feel good about the day after.” See http://www.lifelube.org/sex_drugs.php. Under the heading “Online/Offline Resources – Sex,” see http://www.lifelube.org/sex_resources.php, the website provides a list of resources that deal with highly inappropriate sexually topics and content.

At queerty.com, students can access a slew of inappropriate sexual materials. Among many others, students can access a description and pictures of science fiction inspired sex toys, see <http://www.queerty.com/finally-toys-for-people-who-want-to-have-sex-with-gryphons-faerie-dragons-and-waterhorses-20110712/>, and an article containing sexually-charged pictures accompanied by a pornographic description. See <http://www.queerty.com/ex-morning-goods-model-josh-peters-was-sick-of-fags-looking-at-him-20110206/>.¹

Students will also be able to access [Sexetc.org](http://sexetc.org), which, unbelievably, is a website containing articles about myriad sexual topics written by teenagers. At this website, students can access an article about masturbation written by a 15 year old, see http://www.sexetc.org/story/guys_health/5310, an article debunking ten myths about sex written by a 16 year old, see <http://www.sexetc.org/story/sex/2225>, and an article about orgasms written by a 17 year old, see <http://www.sexetc.org/story/sex/2203>. They can also access “how to” articles for sexual acts. See <http://www.sexetc.org/faq/sex/730>.

Finally, at <http://bitheway.org/>, students will be bombarded with links to various sexually-charged websites. Each link is accompanied by a sexually explicit description of what type of information can be found at the website.

¹ We apologize profusely for the highly inappropriate language contained within the URLs from the queerty.com website. But we wanted to provide you with specific links to the types of inappropriate sexual materials your students will be able to access if you comply with the ACLU’s demands and disable the “Homosexuality” and “Sex Education” filters.

It goes without saying that our nation's public school districts should not permit minors access to this type of sexually inappropriate internet content. Yet this is exactly what the ACLU is demanding by threatening to sue the District unless it disables the "Homosexuality" and "Sex Education" filters. Further, the websites highlighted above, which we found during a short period of research, likely only scratch the surface of the kinds of sexually inappropriate material the "Homosexuality" and "Sex Education" filters block students from accessing. Given the highly inappropriate sexual materials students will be able to access if these filters are disabled, it is at the very least irresponsible, and in our view reckless, for the ACLU to demand that you disable them.

Disabling the "Homosexuality" and "Sex Education" Filters Could Result In A Violation Of CIPA And State Law Regarding Access To Materials That Are Harmful To Minors

Bowing to the ACLU's demands may result in the District violating federal law, if it receives funding pursuant to the Children's Internet Protection Act (CIPA). This Act prohibits libraries receiving CIPA funds from allowing students under the age 17 to access internet content that is "harmful to minors." CIPA defines "harmful to minors" as follows:

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that--

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

20 U.S.C. § 9134(f)(7)(B).

Similarly, state law criminalizes the distribution to minors of sexual materials that are harmful to minors. See A.C.A. § 5-68-502 (making it unlawful to "[s]ell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor with or without consideration any material that is harmful to minors").

The websites highlighted above contain content that likely meets the "harmful to minors" definition under CIPA and state law. Accordingly, unblocking the "Homosexuality" and "Sex Education" filters could place the District in violation of these laws. It could also open the District to civil suits for allowing minors access to materials that are harmful to minors.

In its letter, the ACLU claims that the District can comply with CIPA by activating the "Adult Materials," "Nudity and Risqué" and "Pornography" filters. This is mistaken. According

to Fortiguard, each of these filters targets “[m]ature content websites (18+ years and over).” See http://www.fortiguard.com/webfiltering/webfiltering_categories.html#cat5. But CIPA requires the blocking of more than just “18+ years and over” sexual content. It requires the blocking of sexual content that is inappropriate for *minors* as well. The ACLU is simply wrong that the District can discharge its duties under CIPA by activating Fortiguard’s “mature content” filters. Indeed, as shown above, the “Homosexuality” and “Sex Education” filters block many websites that likely contain sexual content that violates CIPA.

Ultimately, though, the question of whether disabling the “Homosexuality” and “Sex Education” filters will result in federal and state law violations should not be the touchstone for how the District responds to the ACLU’s demands. Rather, the District should be concerned, first and foremost, with protecting students from sexually inappropriate internet materials. Given the sexually explicit materials students will have access to if the District disables the “Homosexuality” and “Sex Education” filters, the District should not acquiesce to the ACLU’s demands, regardless of whether those materials violate the law.

The School District Has Broad Authority Over What Materials Students May Access On The Internet

It is well-settled law that public school districts have broad authority to determine their curriculum. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (“States and local school boards are generally afforded considerable discretion in operating public schools”); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (“[T]he curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere”).

It is equally well-settled that a public school district’s decisions over what materials are available to students within their libraries are curricular decisions to which the courts owe substantial deference. *Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (applying the principle that “local school boards have broad discretion in the management of school affairs” in the library context); *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972) (same).

Importantly, for our purposes here, the Supreme Court has recognized that the “Internet is simply another method for making information available in a school or library.” *United States v. American Library Ass’n*, 539 U.S. 194, 207 (2003) (citation omitted). Put simply, the Internet “is ‘no more than a technological extension of the book stack.’” *Id.* (citation omitted). Thus, the same deference owed a public school district’s decisions over what material to make available in its library also must be applied to its decisions regarding what material is accessible via the Internet.

Looking at the case law in the best light for a potential ACLU plaintiff, to prevail the plaintiff would have to show that the District prohibited access to websites blocked by the “Homosexuality” and “Sex Education” filters because of disagreement with their religious, social, or political message, and that this disagreement was the *decisive* factor in refusing to grant access to these websites. *Pico*, 457 U.S. at 871. This is a very demanding standard.

Further, the ACLU's letter makes no claim whatsoever that the District acted based on this type of disagreement, let alone that this was the decisive factor in its decision-making. It is obvious that disagreement with any religious, social, or political message is not the reason for the filter, but rather protecting children from harmful and age-inappropriate material on the Internet.

In sum, the District has broad discretion in determining what materials will be accessible to students in its libraries and through its Internet terminals. Further, a student seeking access to a particular website faces a very difficult and high standard of proof to prevail. The likelihood that the ACLU would prevail in its threatened lawsuit is thus slim.

The ACLU's First Amendment Argument Is Mistaken

In its letter, the ACLU claims that the District's web filtering practices violate the First Amendment's prohibition on content- and viewpoint-based exclusions from private speech forums. But the Supreme Court expressly rejected the application of First Amendment forum analysis to "a public library's exercise of judgment in selecting the material it provides to its patrons." *American Library Ass'n*, 539 U.S. at 205. As the Court said, "[F]orum analysis and heightened judicial scrutiny . . . are . . . incompatible with the broad discretion that public libraries must have to consider content in making collection decisions." *Id.* The discretion that makes the public forum doctrine inapplicable to a public library's material selection decisions is doubly important here, since this situation involves both a library and the broad discretion public school districts enjoy over curricular matters.

The bottom line is that the ACLU has little say-so in how a school district wields its discretion in filtering Internet content. Web filtering is not a precise business. Web filtering companies create filtering categories and do their best to properly classify websites into those categories. School districts purchase a company's product and, employing the well-established discretion they have over curricular matters, activate filters they believe are consistent with their curricular goals. As the Second Circuit aptly observed in the analogous book selection context:

It is predictable that no matter what choice of books may be made . . . , some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars.

Presidents Council, Dist. 25, 457 F.2d at 291-92. The ACLU envisions a world where they can change a school district's curriculum by filing lawsuits every time their Internet search results in a pop-up window that says "This website is blocked." The federal courts have emphatically rejected this approach precisely because it would invite an endless stream of lawsuits challenging public school curricular decisions. These concerns are highly relevant here.

The ACLU's Equal Access Act Argument Is Mistaken

As with its First Amendment analysis, the ACLU's Equal Access Act analysis is also off base. *See* 20 U.S.C. § 4071. Assuming the District has triggered the Act, it requires that all noncurriculum-related clubs receive equal access to the benefits the District provides to such clubs. Thus, the Act only applies to Internet usage if the District provides noncurriculum-related clubs access to the Internet as a benefit of recognition. This is highly unlikely. The benefits of recognition typically include a meeting space and access to a few channels of communication. *See Board of Educ. of Westside Community Sch. v. Mergens By and Through Mergens*, 496 U.S. 226, 247 (1990) (noting that, in addition to meeting space, the Act also required equal access to other benefits of recognition, which at the school in question included access to the "school newspaper, bulletin boards, the public address system, and the annual Club Fair"). In most circumstances, Internet access will not be a specific benefit of club recognition. Rather, Internet access is made available to students through computer terminals at a school's library. The Act is not triggered simply because the Key Club's national website is not blocked by the District's web filters. To violate the Act, the District must provide Internet access as a benefit of recognition and then deny Internet access to a club based on the content of its speech.

Put simply, the Act allows the District to define the scope of benefits available to student clubs. If the District does not provide Internet access as a benefit of recognition, the ACLU should not force it to do so through Equal Access Act litigation.

The ACLU's References To Bullying And Suicide Of Students Who Identify As Gay, Lesbian, Bisexual, Or Transgendered Are Unfortunate Scare Tactics

The ACLU states that the District should disable the "Homosexuality," "Advocacy Groups," "Abortion," and "Sex Education" filters because of the "epidemic of LGBT youth suicides and bullying." This is an unfortunate scare tactic. The letter does not identify any instances of bullying or suicide at schools within the District.

Even if the ACLU could identify specific examples of bullying of students who identify as gay, lesbian, bisexual, or transgendered, the answer to such a problem is not disabling Internet filters that would allow students to access sexually inappropriate materials. Indeed, it is quite a stretch to claim that the District's web filtering policies have anything whatsoever to do with bullying. Rather, the answer to problems with bullying is to address the bullying.

Bullying is not unique to students who identify as homosexual, bisexual, or transgendered. The bully is an equal opportunist. Accordingly, anti-bullying policies should broadly prohibit bullying against all students, while at the same time protecting the First Amendment rights of all students. We have attached ADF's Model Anti-Bullying Policy to this letter, which attempts to strike the proper balance between stopping bullying and protecting students' rights. The District is welcome to use it as a model for adopting, or updating an already existing, anti-bullying policy.

As to the relationship between bullying and suicide, Dr. Ritch C. Savin-Williams, professor of developmental psychology at Cornell University and director of its Sex and Gender

Lab, recently gave an interview to the New York Times in which he explained that recent studies have found that “the risk factors for suicide are identical for gay and straight youth.” Jane E. Brody, *Gay or Straight, Youths Aren’t So Different*, NYTimes.com, <http://www.nytimes.com/2011/01/04/health/04brody.html>, Jan. 3, 2011. These risk factors include “prior mental illness, depression, bipolar disorder, dysfunctional families, breakups in relationships, suicide in the family and access to means.” Notably missing from this list: bullying. As Dr. Savin-Williams remarked, “whether there’s a direct link between bullying and suicide among gay teens has not been shown.”

In fact, rather than bullying, researchers are finding that tactics like those used here by the ACLU are what actually contribute to student suicides. Ann Haas, research director for the American Foundation for Suicide Prevention, has recently warned that there is a significant risk when the media and groups like the ACLU push the notion that bullying of students who identify as gay, lesbian, bisexual, or transgendered has led to an “epidemic” or “rash” of suicides. Rather, she says, the serious mental health issues that underlie most suicides is what should be stressed. A recent article reported on Dr. Haas’ research as follows:

“We know quite a bit about what kinds of media stories can encourage copycat suicides,” Haas says. Stories depicting the person who’s died by suicide as very sympathetic can inadvertently encourage vulnerable young people to identify with him or her.

“There’s an identification there that could lead you to feel, well, ‘My goodness, this person was feeling the same thing that I’m feeling, and he took his life.’ It kind of normalizes suicide,” she says. “It presents it as . . . an understandable if not socially acceptable response to a problem. If a story is presented from the viewpoint of the mental disorders that commonly lead to suicide, it’s much less likely to have that kind of identification that leads young people to copy the behavior”

....

Words like “epidemic” and “rash” to describe an increase in suicides can also lead to copycat behavior, Haas says.

See <http://beta.news.yahoo.com/blogs/upshot/expert-says-media-dangerously-ignore-mental-illness-coverage.html>. The ACLU’s attempt to get the District to change its web filtering practices by claiming that there is an “epidemic” of suicides among students (allegedly) being bullied because they identify as gay, lesbian, bisexual, or transgendered is irresponsible at best.

The bottom line is that bullying and suicide are problems faced by all students. Thus, the District should address these problems in a way that benefits all students equally, not just those students who advance the ACLU’s narrow political agenda. Aren’t all students entitled to the tools, skills, and support needed to rebuff bullies or avoid suicidal thoughts and actions?

As a final note, there are at least three problems with the ACLU's position that "unblocking individual websites upon request is not an appropriate solution to this problem." First, the only solution the ACLU offers — disabling the "Homosexuality" and "Sex Education" filters — would allow students access to highly inappropriate sexual materials. This obviously is not a viable option. Second, if unblocking individual websites upon request was enough to satisfy the First Amendment where adults were being blocked from viewing constitutionally protected speech at public libraries, *see American Library Ass'n*, 539 U.S. at 209, then it is more than sufficient to satisfy any First Amendment concerns (if there are any) regarding a student's ability to access blocked websites at his school's library. Third, it is not clear at all that the First Amendment requires that public schools allow students to ask for an individual site to be unblocked. As the Supreme Court has repeatedly held, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and they "must be 'applied in light of the special characteristics of the school environment.'" *Morse v. Frederick*, 551 U.S. 393, 396-397 (2007) (citations omitted). Given the substantial discretion public school districts have over curricular decisions (including what materials to make available via their libraries and the Internet), it is unlikely that a court would find that the First Amendment requires students to be provided an unblocking option.²

Conclusion and Suggested Actions

The District should not comply with the ACLU's demand to disable the "Homosexuality," "Sex Education," "Advocacy Groups" and "Abortion" filters. As shown above, disabling the "Homosexuality" and "Sex Education" filters will allow students to use District computers to access inappropriate and pornographic sexual materials on the Internet. This is reason enough to tell the ACLU "No" regarding these filters. And disabling all four of these filters falls well within the District's broad discretion over curricular matters. The ACLU's First Amendment and Equal Access Act claims miss the mark entirely.

To minimize further attacks against the District's web filtering practices, and to provide greater protection for students from inappropriate sexual materials on the Internet, we also suggest that the District consider creating a new web filtering category called "Inappropriate Materials for Minors," or something similar (we understand that schools who buy web filtering software gain administrative access to tailor the software to their particular needs). The District could use this filter to block access to all websites dealing with sex or sexuality (and other topics they may wish to block access to), regardless of whether they address these issues from a heterosexual, homosexual, bisexual, or transgendered perspective. One way to do this would be to lump all Fortiguard filters that block websites pertaining to sex or sexuality, which include, at the very least, "Homosexuality," "Sex Education," "Adult Materials," "Nudity and Risque," and "Pornography," into this new category.

If the District does not have the financial or personnel means to take the above action, it could alternatively adopt an official policy governing Internet usage. This policy could, among

² It should be kept in mind that there is a vast difference between the school's own speech, which it has complete control over, and private student speech, which is protected under the First Amendment. The web filters fall under the former.

other things, state that students will not be able to use school computers to access websites pertaining to sex or sexuality, and that the District will activate appropriate web filters to effectuate this policy. The District could then activate the Fortiguard filters mentioned above, and any additional filters it believes effectuate this policy.

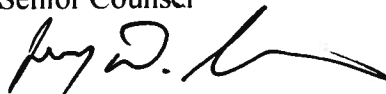
Parents expect schools to be places where their children will learn knowledge, information, and skills that will make them productive members of our society as adults, not places where they can access inappropriate sexual material on the Internet. We hope that the District will act in the best interests of its students and their parents, and not in furtherance of the ACLU's radical sexual agenda.

Thank you for your attention to this very important matter. Please feel free to call ADF to discuss any questions you may have.

Sincerely,



David A. Cortman
Senior Counsel



Jeremy D. Tedesco
Legal Counsel

Enc: ADF's Model Bullying Policy

cc: Members of the Little Rock School District Board of Education, via email

MODEL ANTI-BULLYING POLICY

I. PURPOSE

The Little Rock School District (the “District”) recognizes that a safe and civil environment in school is necessary for students to learn and achieve high academic standards. The District finds that bullying, like other disruptive or violent behavior, is conduct that disrupts both a student’s ability to learn and a school’s ability to educate its students in a safe environment.

II. DEFINITIONS

A. “Bullying” means systematic, repeated, or recurrent conduct committed by a student or group of students against another student that causes measurable physical harm or emotional distress. Verbal expression, whether oral, written, or electronic, is included within the definition of “bullying” only to the extent that (1) such expression is lewd, indecent, obscene, advocating for illegal conduct, intended to incite an immediate breach of peace, or the severe and pervasive use of threatening words that inflict injury; or (2) District administrators or officials reasonably believe that such expression will cause an actual, material disruption of school work.

B. “School Premises” means any building, structure, athletic field, sports stadium or other real property owned, operated, leased or rented by the District or one of its schools, including, but not limited to, any kindergarten, elementary, secondary, or vocational-technical school.

C. “School-Sponsored Functions or Activities” means a field trip, sporting event, or any other function or activity that is officially sponsored by the District or one of its schools.

D. “School-Sponsored Transportation” means a motor vehicle owned, operated, leased, rented or subcontracted by the District or one of its schools.

III. PROHIBITION

The District prohibits all bullying on school premises, at school-sponsored functions or activities, or on school-sponsored transportation.

IV. REPORTING

Any student who believes he or she has been or is currently the victim of bullying should immediately report the situation to the school principal or assistant principal. The student may also report concerns to a teacher or counselor who will be responsible for notifying the appropriate school administrator.

Every student is encouraged, and every staff member is required, to report any situation that they believe to be bullying behavior directed toward a student. Reports may be made to those identified above.

All complaints about bullying behavior that may violate this policy shall be promptly investigated.

If the investigation finds an instance of bullying behavior has occurred, it will result in prompt and appropriate disciplinary action. This may include up to expulsion. Individuals may also be referred to law enforcement officials.

The complainant shall be notified of the findings of the investigation, and as appropriate, that remedial action has been taken.

Retaliation against any person who reports, is thought to have reported, files a complaint, or otherwise participates in an investigation or inquiry concerning allegations of bullying is prohibited and will not be tolerated. Such retaliation shall be considered a serious violation of Board policy and independent of whether a complaint is substantiated. Suspected retaliation should be reported in the same manner as bullying. Making intentionally false reports about bullying for the purpose of getting someone in trouble is similarly prohibited and will not be tolerated. Retaliation and intentionally false reports may result in disciplinary action as indicated above.

V. INTERPRETATION

This policy shall not be interpreted to infringe upon the First Amendment rights of students, and is not intended to prohibit expression of religious, philosophical, or political views, provided that such expression does not cause an actual, material disruption of the work of the school.

Disclaimer: *This model policy is intended to be used and applied only as a guide for legislators, educators, administrators, and concerned parents to develop appropriate policies related to student harassment and bullying. The Alliance Defense Fund does not represent or warrant that this model policy addresses all of the facts and circumstances of any particular situation. The model policy should not be applied uniformly without reviewing the specific nature of the facts and circumstances before you, and gathering independent legal advice in that regard. Changes to the language of the model policy may be necessary to address other laws or policies, or any particular facts and circumstances, or to comply with applicable statutes, regulations, rules, or other laws unique to any given situation.*