



August 8, 2011

Via US Mail and Email (oroberts@ouhsd.org)

Dr. Oran Roberts
Superintendent
Oroville Union High School District
2211 Washington Ave.
Oroville, CA 95966

Re: District Should Reactivate Its Lifestyle Web Filter Immediately

Dear Dr. Roberts:

It has come to our attention that the ACLU threatened to sue the Oroville Union High School District (“the District”) over its activation of the “Lifestyle” filter on web filtering software it purchased from M86. It is our understanding that the District has disabled the Lifestyle filter. Please be aware that **the District’s disabling of the Lifestyle filter makes sexually explicit materials available to students and may place the District in violation of the Children’s Internet Protection Act.** In fact, by disabling the Lifestyle filter, the District may be opening itself up to civil and criminal liability for allowing students to access Internet materials that are harmful to minors. We also write to explain that disabling the Lifestyle filter is not required by the legal precedents cited in the ACLU’s letter. These issues are discussed in more detail below.

Disabling the Lifestyle Filter Will Make Sexually Inappropriate Material Available to Students

M86 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.m86security.com/support/m86filtercheck.asp>. Using this tool, we determined that disabling the Lifestyle filter results in unblocking at least the following sexually inappropriate websites: queerty.com, daily.gay.com, and qrd.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 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

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 can access now that you have disabled the Lifestyle filter.

At daily.gay.com, students can access an article dedicated to male athletes' genitalia, complete with inappropriate pictures. See <http://daily.gay.com/lifestyle/2010/03/franknbeans-friday-.html>. The intro to the pictures states that it is a "straight-up, gratuitous glorification of the beloved boy body parts." *Id.* Students can also access an article glorifying men's buttocks, once again complete with inappropriate pictures (some nude). See <http://daily.gay.com/lifestyle/2010/04/franknbeans-friday-bringing-up-the-rear.html>. In addition, students can access an inappropriate picture of Adam Levine, singer for Maroon 5 and judge on the hit reality TV show *The Voice*, which depicts him naked with a woman's hands covering his genitalia. See http://daily.gay.com/hot_topics/2011/01/photo-of-the-day-touch-a-touch-a-touch-me.html. Students can access many more sexually explicit articles and pictures at daily.gay.com.

Finally, at qrd.org, the website for Queer Resources Directory, students can access an article titled "Have Better Sex Forever." The article contains highly inappropriate sexual content that should not be available to students at your school. See <http://www.qrd.org/qrd/health/have.better.sex.forever-09.98>. Other sexually inappropriate articles unsuitable for minors can also be accessed at this site.

It goes without saying that our nation's public school districts should not permit minors access to this type of sexually inappropriate internet content. And 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 Lifestyle filter blocks students from accessing. Given the highly inappropriate sexual materials students are able to access due to the disabling of this filter, it was at least irresponsible, and in our view reckless, for the ACLU to demand that you do so. The District should act quickly to protect its students from inappropriate sexual materials on the Internet, and immediately reactivate the Lifestyle filter.

Disabling the Lifestyle Filter 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 also has placed the District at risk of 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, California law criminalizes the distribution of “harmful matter” to minors. Cal. Penal Code § 313.1. “Harmful matter” under California law is defined similarly to “harmful to minors” under CIPA. Cal. Penal Code § 313.

The websites highlighted above contain content that likely meets CIPA’s “harmful to minors” and California’s “harmful matter” definitions. Accordingly, by unblocking the Lifestyle filter, the District could be in violation of federal and state law, and be opening itself to civil and criminal liability for allowing minors access to materials that are harmful to minors.

Ultimately, though, the question of whether the Lifestyle filter blocks materials that violate federal and state law should not be the decisive factor in whether the District reactivates the filter. Rather, the District should be concerned, first and foremost, with protecting students from sexually inappropriate internet materials. Given the sexually explicit materials students can access with the Lifestyle filter disabled, the District should immediately reactivate the filter, regardless of whether those materials actually violate the law.

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

Reactivating the Lifestyle filter would be consistent with the well-established legal doctrine 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 also 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 reactivated the Lifestyle filter because of disagreement with the religious, social, or political message on websites blocked by this filter, and that this disagreement was the *decisive* factor in reactivating the filter. *Pico*, 457 U.S. at 871. In addition to being a very demanding standard, it is obvious that disagreement with any religious, social, or political message is not the reason for reactivating 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 a lawsuit challenging the District's reactivation of the Lifestyle filter is thus slim.

The ACLU's First Amendment Argument Is Mistaken

In its letter, the ACLU claims that the District's use of the Lifestyle filter violates 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 disabling the Lifestyle filter is necessary 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 extraordinary for the ACLU 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 LGBT-related websites upon request is not an appropriate solution to this problem." First, the only solution the ACLU offers — disabling the Lifestyle filter — allows students to access highly inappropriate sexual materials. Unfortunately, it appears that the District took this approach, which, for the reasons discussed above, is something it should immediately rectify.

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 reactivate the Lifestyle filter. As shown above, disabling this filter allows students within your District access to inappropriate and pornographic sexual materials on the Internet, a situation which must be immediately remedied. Indeed, the District could be found civilly and criminally liable for allowing students access to such materials. Further, reactivating the Lifestyle filter will not violate students' First Amendment or Equal Access Act rights, but rather fits well within the District's broad discretion over curricular matters.

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 M86 filters that block websites pertaining to sex or sexuality, which include, at the

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.

very least, Lifestyle, R Rated, Explicit Art, Obscene/Tasteless, Pornography/Adult Content, and Child 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 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 M86 filters mentioned above, and any additional filters it believes effectuate this policy.

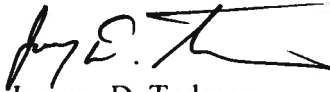
Parents expect schools to be places where their children will learn knowledge, information, and skills that will make them productive members of our society as adults, not places where they can access inappropriate sexual material on the Internet. We hope that the District will act in the best interests 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 Oroville Union High School District Board of Education, via email

MODEL ANTI-BULLYING POLICY

I. PURPOSE

The Oroville Union High 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.*