

December 7, 2015

Dear Principal or Superintendent:

You have been presented with this letter because at least one of your schools may be prohibiting students from attending prom or similar school dances or events with a same-sex date. Such a rule violates the constitutional rights of your students and must be rescinded immediately.

Any policy excluding same-sex couples from proms, homecoming, or other school dances violates the right to free expression guaranteed by the First Amendment. This is not just the opinion of the ACLU. It was the conclusion of at least two federal courts in cases in which a gay high school student successfully challenged his or her school's ban on same-sex couples at prom. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980); *McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (N.D. Miss. 2010).

In *Fricke v. Lynch* the principal being sued testified in court that the school's prom policy was based on concern about possible disruption and violence at the prom in reaction to the participation of a gay couple. Despite being convinced that the principal's concern was sincere, the federal judge ruled that the Constitution required the school to take steps to protect the couple's free expression because "[t]o rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto', allowing them to decide through prohibited and violent methods what speech will be heard." *Fricke*, 491 F. Supp. at 387.

Three decades after *Fricke* was decided, a public school in Mississippi cancelled its prom rather than allow a student to bring a same-sex date. *McMillen v. Itawamba County School District*, 702 F. Supp. 2d 699 (N.D. Miss. 2010). In that case, a federal court determined once again that school policies that ban same-sex dates at the prom violate the right to free expression guaranteed by the First Amendment. The Court found that "this expression and communication of her viewpoint [bringing a same-sex date to prom] is the type of speech that falls squarely within the purview of the First Amendment... For all of the foregoing reasons, the Court finds that [the student's] First Amendment rights have been violated." The Court further held that the school district had violated the student's rights by cancelling the prom instead of allowing her to attend with her same-sex date. The school district ultimately had to pay more than \$116,000 in damages and attorneys' fees.

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In addition to violating students' free speech rights, a policy prohibiting same-sex couples from attending prom or school dances also violates students' rights under Title IX and the Equal Protection Clause. The Supreme Court has made clear that same-sex couples and their relationships must be treated with equal respect and dignity as the relationships of different-sex couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Unequal treatment of same-sex couples also constitutes impermissible sex discrimination under the Equal Protection Clause and antidiscrimination statutes like Title IX. *See Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP JCX, 2015 WL 1735191, at \*8 (C.D. Cal. Apr. 16, 2015) ("For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender [in violation of Title IX]."); *Lawson v. Kelly*, No. 14-522, 2014 WL 5810215, at \*8 (W.D. Mo. Nov. 7, 2014) (unequal treatment of same-sex couples is gender discrimination).

As a school administrator, you have a legal obligation to implement policies and procedures that do not limit a student's ability to take a date to a school event based on the gender of the student or the date. We can be reached at 212-549-2673.

Sincerely,



James D. Esseks  
Director  
ACLU Lesbian Gay Bisexual Transgender & HIV Project

Students and parents: Feel free to print and copy to use this letter as an advocacy tool in your own school.