



AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC
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Re: Banning Same-Sex Couples from School Dances

Dear Superintendent:

Recently, the American Civil Liberties Union of Utah Foundation, Inc. (“ACLU”) received information that a student was asked to leave her school’s homecoming dance because she was there with a female date. I am writing to you now because any rule, policy, or practice that forbids students from attending school dances with same-sex dates is unconstitutional, and must cease or be rescinded immediately. It is my sincere hope that by addressing this issue now, we will be able to avoid costly litigation should we learn of any future instances of LGBT students being turned away from school functions. It is in this spirit of cooperation that I urge you to contact each of the school principals in your district to inform them that policies of LGBT exclusion must be abandoned immediately.

Any policy excluding same-sex couples from proms or other school dances violates the right to free expression, and the right of free association guaranteed by the First Amendment, as well as Constitution’s promise of Equal Protection. This is not just the opinion of the ACLU. It was the conclusion of both federal courts that evaluated the constitutionality of a public 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). Copies of these decisions have been enclosed here for your consideration.

Whether based on prejudice or not, it is unconstitutional to exclude same-sex couples from school dances. 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. The Court was convinced of the sincerity of the principal’s concern but nevertheless ruled that the Constitution required the school to take steps to protect the couple’s free expression rather than to stifle it. “To rule otherwise would completely subvert free speech in the schools by granting other students a ‘heckler’s veto’, allowing them to decide through prohibited violent methods what speech will be heard,” wrote the Court.

Coming two decades after *Fricke* was decided, a public school in Mississippi cancelled the prom rather than allow a student to bring a same-sex date. In the highly publicized case that resulted, a federal court ultimately 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. *McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (N.D. Miss. 2010). 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 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. This case resulted in a judgment entered against the school, as well as more than \$116,000 in damages and attorneys’ fees.

As mentioned above, in addition to violating free speech rights, a policy prohibiting same-sex couples from attending prom or school dances violates equal protection too. The U.S. Supreme Court has ruled that policies by public entities (like public schools) that are based upon animosity or prejudice towards gay people violate or commitment to equal rights guaranteed to all Americans by the Fourteenth Amendment. *Romer v. Evans*, 517 U.S. 620 (1996).

Again, it is in the spirit of cooperation that I write to you now. I am hopeful that you will agree that abandoning any policies of LGBT exclusion is necessary and that you will take measures to communicate that directive to school principals within your School District. With this hope in mind, I thank you for your attention to this issue, and request that you write back to me with an official response. Litigation over this issue would be unfortunate, costly, and is completely avoidable if we can resolve these matters now. Finally, please do not hesitate to contact me if you have any questions about this letter or if we can be of any assistance to you. I can be reached at (801) 521-9862 x108 or jcohn@acluutah.org.

Sincerely,

Joseph Cohn*
Interim Legal Director
ACLU of Utah

w/enclosures

* Not a Member of the Utah Bar; Member of the PA and NJ Bars