

February 11, 2021

Dear Principal or Superintendent:

You're being given this letter because your school or a school in your district may be prohibiting students from attending prom, homecoming, or similar school dances or events with what you view as a same-sex date. That could be two students who were assigned the same sex at birth, regardless of how they identify. Such a rule violates students' constitutional rights and must be rescinded immediately.



Any policy excluding "same-sex" couples from proms, homecoming, or other school dances or similar events 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 high school students successfully challenged their schools' bans 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.

In addition to violating students' free speech rights, 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 all couples and their relationships must be treated with equal respect and dignity. *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 that don’t limit a student’s ability to take a date to a school event based on the gender identity or expression of the student or the date. Please do not hesitate to contact the ACLU if you have any questions about this letter or wish to discuss it further. We can be reached at 212-549-2673.



Sincerely,

A handwritten signature in black ink that reads "James D. Esseks". The signature is written in a cursive style with a large, stylized "J" and "E".

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

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