



May 10, 2011

VIA FAX TO 817-354-3309

VIA EMAIL TO buinger@hebisd.edu

Gene Buinger, Ed.D.
Superintendent
Hurst-Eules-Bedford Independent School District
1849 Central Drive
Bedford, Texas 76022

Dear Dr. Buinger:

We write on behalf of the American Civil Liberties Union (ACLU) and the American Civil Liberties Union Foundation of Texas (ACLU Foundation of Texas). The ACLU and the ACLU Foundation of Texas work daily in courts, legislatures and communities across the United States and Texas to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of Texas and the United States.

We have received complaints that Hurst-Eules-Bedford ISD utilizes Internet filtering software provided by M86 that improperly censors websites advocating the fair treatment of lesbian, gay, bisexual, and transgender ("LGBT") persons. As reflected in the district's response to a Public Information Act request, the filtering software at your school currently blocks such sites because they fall into the category of "Lifestyle." *See* Exhibits A and B (attached). On behalf of the ACLU and the ACLU Foundation of Texas, I am writing to inform you that this practice violates both the First Amendment and the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, and the filter for "Lifestyle" must be disabled immediately.

I. Factual Background

As reflected in the attached exhibits, your filtering system currently blocks access to websites categorized as "Lifestyle." *See* Exhibits A and B. According to M86, the "Lifestyle" category is designed to block "Lifestyle Sites that contain material relative to an individual's personal life choices. This includes sexual preference, cultural identity, or organization/club affiliations." *See* M86 Filter Categories, available online at <http://www.m86security.com/resources/database-categories.asp>. The "Lifestyle" filter blocks such websites even if they relate to politics or religion. *Id.* In response to a Public Information Act request, the school district has confirmed that the "Lifestyle" filter currently prevents students from accessing the website for Day of Silence (dayofsilence.org) and GSA Network (gsanetwork.org). *See* Exhibit A. As additional examples of "Lifestyle" websites, M86 lists the websites for Gay and Lesbian Alliance Against Defamation ("GLAAD"), the L.A. Gay and Lesbian Center, and Advocate magazine. *See* M86 Filter Categories, available online at <http://www.m86security.com/resources/database-categories.asp>.

Hurst-Euless-Bedford ISD does not have a legitimate pedagogical interest for blocking websites classified by M86 as “Lifestyle.” The “Lifestyle” filter may be disabled without posing any risk of violating the Children’s Internet Protection Act (“CIPA”). Sexually explicit materials covered by CIPA are already filtered through separate categories in M86’s software for “Adult Content.” See M86 Filter Categories, available online at <http://www.m86security.com/resources/database-categories.asp>. By contrast, the “Lifestyle” filter is designed specifically to target LGBT-related websites that do not contain sexually explicit content.

Your response to the public records request confirms that the “Lifestyle” filter was not identified by the software company as a filter necessary to comply with CIPA. See Exhibit B. Instead, it appears that the filter was specifically activated by Hurst-Euless-Bedford ISD. *Id.*

II. Legal Background

Your continued use of the “Lifestyle” filter violates your students’ rights under the First Amendment and the Equal Access Act and could give rise to legal liability.

A. The First Amendment

Your students have a First Amendment right to access GSA Network, Day of Silence, and similar materials that are blocked by the “Lifestyle” filter. “[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality) (internal quotation marks and citations omitted). Moreover, students’ First Amendment rights include the right to engage in speech, expression, and association concerning their sexual orientation and gender identity. “[S]tudents in public schools have the right to freedom of speech and expression. This is a broad right that would encompass the right of a high school student to express his sexuality.” *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001) (citation omitted); *accord Fricke v. Lynch*, 491 F. Supp. 381, 385 (D.R.I. 1980) (holding that First Amendment protects non-sexual expression of a student’s gay sexual orientation).

Your use of the “Lifestyle” filter violates students’ First Amendment rights by engaging in unconstitutional viewpoint discrimination against LGBT viewpoints. Even though the “Lifestyle” filter blocks students from accessing sites that express acceptance and tolerance towards LGBT individuals, the web filter does not block access to sites that condemn homosexuality and sites that urge LGBT persons to change their sexual orientation or gender identity through so-called “reparative therapy.”¹ For example, the Internet filter for “Lifestyle” does not block access to the American Family Association, the Family Research Council, Love

¹ “Reparative therapy” is a practice denounced as dangerous and harmful to young people by such groups as the American Psychological Association, the American Psychiatric Association, and the American Academy of Pediatrics. See *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* (2006), available online at <http://apa.org/pi/lgbt/resources/just-the-facts.pdf>.

God's Way, or People Can Change. See M86 Filter List Entry, available at <http://www.m86security.com/support/m86filtercheck.asp>

This viewpoint discrimination violates your students' First Amendment rights. When a school "permits the discussion of a topic from [one] perspective, it may not shut out speech that discusses the same topic from a [different] perspective." *Child Evangelism Fellowship of N.J. Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) (Alito, J.). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotation marks and citation omitted). Whether or not school administrators agree with the content of the censored websites, secondary school students are mature enough to understand that a school does not endorse or support speech to which it merely permits access on a nondiscriminatory basis. See *Bd. of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 226, 250 (1990) ("[T]he proposition that schools do not endorse everything they fail to censor is not complicated.").

B. The Equal Access Act

In addition to violating students' First Amendment rights, the "Lifestyle" filter also violates the Equal Access Act because it denies students who are seeking to form gay-straight alliances ("GSAs") equal access to school resources that are generally available to other non-curricular clubs. See 20 U.S.C. § 4071 *et seq.*; *Mergens*, 496 U.S. at 247; *SAGE v. Osseo Area Schools Dist.*, 471 F.3d 908 (8th Cir. 2006); *Gonzalez v. Bd. of Educ.*, 571 F. Supp. 2d 1257 (S.D. Fla. 2008). The Equal Access Act mandates that, when a public secondary school that received federal financial assistance permits even one non-curricular group to use school resources, it must permit all other non-curricular student groups to do so on equal terms. See *Mergens*, 496 U.S. at 237, 247 (requiring equal access to school newspaper, bulletin boards, public address system, and club fair); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003) (school violated Equal Access Act by denying GSA clubs equal access to school bulletin board and intercom).

The Equal Access Act requires that Hurst-Euless-Bedford ISD provide GSAs with equal access to all school resources -- including online resources -- that are made available to other non-curricular clubs. See *SAGE*, 471 F.3d at 912 (LGBT-related group must have "equal access to the same avenues of communication as other noncurriculum related groups") (emphasis in original). The websites for GSA Network and Day of Silence provide students with advice about how to establish a GSA at their school, suggestions for running an effective club, ideas regarding club activities, sample GSA club by-laws, and tips on how to work with teachers and administrators to address bullying and harassment in schools. But because the "Lifestyle" filter blocks access to those websites, students who seek to form GSAs in Hurst-Euless-Bedford ISD cannot access those online resources. By contrast, students seeking to establish or develop activities for other non-curricular clubs are able to access their clubs' websites through the school's computers. For example, the website for the Key Club is not blocked by the filter

because it is categorized as “Community Organizations,” not “Lifestyle.” This unequal treatment violates the Equal Access Act.²

III. Additional Considerations

Allowing students equal access to LGBT-related websites is not just a legal duty; it also makes sense from a safety perspective, particularly in light of the epidemic of LGBT youth suicides and bullying. Prohibiting access to LGBT websites is especially problematic because many students do not have computers or Internet access at home and can access the Internet only at school. As one court put it, “as any concerned parent would understand, this case [holding that members of the Gay-Straight Alliance must be permitted access to the school’s resources in the same way as other clubs], may involve the protection of life itself.” *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000).

We wish to emphasize that unblocking individual LGBT-related websites upon request is not an appropriate solution to this problem. It is unfair and burdensome to force students to seek special permission every time they wish to access a website that reflects LGBT-related viewpoints when, in contrast, students may freely access other viewpoints without seeking such permission. Such unequal burdens violate the Equal Access Act and the First Amendment. Moreover, in the particular context of LGBT-related websites, requiring students to make individualized requests is especially harmful and counterproductive because it would force some LGBT students to risk “outing” themselves by requesting that a website be unblocked. There is no reason why the burden should be placed on a vulnerable population to affirmatively request that school administrators unblock websites for LGBT-resources that they already have a legal right to access.

IV. Conclusion

Please contact us by **May 17, 2011** to indicate whether you intend to disable the filters for “Lifestyle” and provide students equal access to the websites for GSA Network, Day of Silence, and similar LGBT-related resources in accordance with your school district’s legal obligations under the First Amendment and the Equal Access Act. After being contacted by the ACLU and the ACLU of Texas Foundation, several other school districts in Texas and across the country have disabled similar anti-LGBT filters on their filtering software. We urge Hurst-Euless-Bedford ISD to do the same.

² Only a single decision has held that a school could deny equal access to a GSA in order to protect students’ “well being.” *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004). The *Caudillo* court reasoned that the school could legitimately exclude a GSA for including referrals to resources that purportedly fostered criminal conduct because at the time the underlying events in *Caudillo* occurred, the Supreme Court had not yet overturned Texas’ criminal prohibition on same-sex “sodomy.” *Id.* at 566-67. No court has ever cited approvingly to *Caudillo*, and the decision has been explicitly rejected on several occasions. *See, e.g., Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau County*, 602 F. Supp. 2d 1233, 1236 (M.D. Fla. 2009).

If you continue to censor these websites, you could be subject to legal liability and the expense of litigation, as the boards of education and superintendents of two Tennessee school districts that used a similar type of filtering software recently discovered. Ultimately, after being sued by the ACLU, both Tennessee school districts agreed to enter into a settlement agreement enforceable by the federal district court to stop blocking access of online information about lesbian, gay, bisexual, and transgender issues. *See Franks v. Metro. Bd. of Pub. Educ.*, No. 3:09-00446 (M.D. Tenn. 2009).

Sincerely,



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Enclosures:

EXHIBIT A

1. Please see attached spreadsheet titled 8e6 Rules and Groups on list of categories blocked by the 8e6 filter.
2. Please see list below
 - <http://dayofsilence.org> – blocked under lifestyle category
 - <http://thetrevorproject.org> – not blocked
 - <http://gsanetwork.org> – blocked under lifestyle category
 - <http://glsen.org> – not blocked
 - <http://www.itgetsbetter.org> – not blocked
3. Please see attached closed internet safety requests.
4. Please see attached spreadsheet titled 8e6 Rules and Groups on list of categories blocked by the 8e6 filter.
5. The decision to implement 8e6 as the district's filter was made in July 2007. No notes or communication exist on who made the decision to filter additional categories beyond basic CIPA compliance at that time.
6. Please see attached list of Internet Filtering Categories and explanation provided by 8e6.
7. Please see attached closed internet safety requests – this document contains e-mails to 8e6 pertaining websites to be blocked.
8. Please see attached service agreement/quote.

EXHIBIT B

8e6 Rules and Groups

v.4.0

12/10/2008

Cipa Modified Filter Level

Adult Content

Pass Allow Block

Child Pornography			X
Explicit Art			X
Obscene/Tasteless			X
Pornography/Adult Content			X
R-rated			X

Groups

Admin Building
Principles
Vice Principles
SRO Officers

CTAs

Techs

Bandwidth

Pass Allow Block

Image Server/Image Search Engines			X
Internet Radio			X
Peer-to-Peer (P2P) File Sharing			X
Video Sharing			X
VoIP			X
Web-based storage			X
Streaming Media	X		
Flash Video	X		
Generic Streaming Video	X		
Quicktime Video	X		
Real Time Streaming Protocol	X		
Windows Media Video	X		

Default is do nothing

Pass=Allow default action

Allow=Overrides Block

Block=Disallow web sites

= CIPA compliance minimum

= HEBISD Categories Blocked

=Override CIPA compliance

Business/Investments

Pass Allow Block

Employment	X		
Financial Institution	X		
General Business	X		
Online Trading/Brokerage			X
Real Estate	X		

Community/Organizations

Pass Allow Block

Community Organizations	X		
Local Community	X		

Education

Pass Allow Block

Education	X		
Educational Games	X		
Online Classes	X		
Reference	X		

Entertainment

Pass Allow Block

Art	X		
Comics	X		
Entertainment	X		

8e6 Rules and Groups
Cipa Modified Filter Level

v.4.0

12/10/2008

<u>Gambling</u>			X
<u>Humor</u>	X		
<u>Kids</u>	X		
<u>Movies & Television</u>	X		
<u>Music Appreciation</u>	X		
<u>Online Greeting Cards</u>			X
<u>Restaurants/Dining</u>	X		
<u>Theater</u>	X		
<u>Games</u>			X
<u>Games Patterns</u>			X
<u>Olympic News</u>	X		
<u>Olympic Streaming Video</u>	X		

Government/ Law/ Politics	Pass	Allow	Block
<u>Government</u>	X		
<u>Legal</u>	X		
<u>Military Appreciation</u>	X		
<u>Military-Official</u>	X		
<u>Political Opinion</u>	X		

Health/Fitness	Pass	Allow	Block
<u>Fitness</u>	X		
<u>Health/ Medical</u>	X		
<u>Holistic</u>	X		
<u>Self Help</u>	X		

Illegal/Questionable	Pass	Allow	Block
<u>Criminal Skills</u>			X
<u>Dubious/Unsavory</u>			X
<u>Hate & Discrimination</u>			X
<u>Illegal Drugs</u>			X
<u>School Cheating</u>			X
<u>Terrorist/ Militant/ Extremist</u>			X

Information Technology	Pass	Allow	Block
<u>Dynamic DNS Services</u>			X
<u>Freeware/Shareware</u>			X
<u>Information Technology</u>	X		
<u>Internet Service Providers</u>			X
<u>Portals</u>	X		
<u>Search Engines</u>	X		
<u>Web-based Newsgroups</u>			X

Internet Communication	Pass	Allow	Block
<u>Chat</u>			X

8e6 Rules and Groups
Cipa Modified Filter Level

v.4.0

12/10/2008

Message Boards			X
Online Communities			X
Web-based E-mail			X
Web logs/ Personal Pages			X
Web Based Productivity Apps	X		
Instant Messaging (IM)			X

Internet Productivity	Pass	Allow	Block
Adware			X
Banner/Web Ads	X		
Fantasy Sports	X		
Free Hosts			X
Remote Access			X
Web Hosts			X
Generic Remote Access			X
GoToMyPC			X
Remote Desktop			X
Virtual Network Computing			X
pcAnywhere			X

Internet/Intranet Misc.	Pass	Allow	Block
Domain Landing	X		
Edge Content Servers/Infrastructure	X		
Invalid Web pages	X		
Reviewed/ Miscellaneous	X		

News/Reports	Pass	Allow	Block
News	X		
Sports	X		
Weather/ Traffic	X		

Religion/Beliefs	Pass	Allow	Block
Paranormal			X
Religion	X		

Security	Pass	Allow	Block
Bad Reputation Domains			X
Botnet			X
Hacking			X
Malicious Code/Virus			X
Phishing			X
Spyware			X
Web-based Proxies/Anonymizers			X

Shopping	Pass	Allow	Block
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8e6 Rules and Groups
Cipa Modified Filter Level

v.4.0

12/10/2008

Online Auction			X
Shopping	X		

Society/ Lifestyles	Pass	Allow	Block
Alcohol			X
Animals/ Pets	X		
Books & Literature/ Writings	X		
Dating/Personals			X
Fashion	X		
Lifestyle			X
Recreation	X		
Self-Defense	X		
Social Opinion			X
Tobacco			X
Weapons			X

Travel/Events	Pass	Allow	Block
Tickets	X		
Travel	X		
Vehicles	X		

Custom Categories	Pass	Allow	Block
AdmPass	X		
AllowAlways		X	
BlockAlways			X
Ebay			X
File Extensions			X
Intranet/Internal Servers	X		
MySpace			X
Ultrasurf			X
WebProxies			X