



May 10, 2011

VIA FAX TO 817-215-0170
VIA EMAIL TO superintendent@nisdtx.org

Karen G. Rue, Ed.D.
Superintendent of Schools
Northwest Independent School District
P.O. Box 77070
Fort Worth, Texas 76177

Dear Dr. Rue:

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 Northwest ISD utilizes Internet filtering software provided by Fortiguard that improperly censors websites advocating the fair treatment of lesbian, gay, bisexual, and transgender (“LGBT”) persons. Based on our review of Fortiguard’s filtering system, it appears that these websites have been blocked because they have been categorized as “Homosexuality.” 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 “Homosexuality” must be disabled immediately.

I. Factual Background

As reflected in the attached exhibits, your filtering system currently blocks access to the Transgender Scholarship and Education Legacy Fund (“TSELF”) (tself.org) and the Gay, Lesbian, and Straight Education Network (“GLSEN”) (glsen.org). *See* Exhibits A and B (attached). According to Fortiguard’s website, both of these websites are categorized as “Homosexuality.” *See* Fortiguard URL Lookup, available online at <http://www.fortiguard.com/webfiltering/webfiltering.html#urllookup>. Fortiguard provides the following definition of the “Homosexuality” category:

Gay or Lesbian or Bisexual Interest. Sites that provide information about or cater to gay, lesbian, or bisexual lifestyles, including those that support online shopping, but excluding those that are sexually or issue-oriented. This category excludes sites that are sex oriented, which fall into Pornography.

See List of Fortiguard filter categories, at http://www.fortiguard.com/webfiltering/webfiltering_categories.html#cat1.

Northwest ISD does not have a legitimate pedagogical interest for blocking websites classified by Fortiguard as “Homosexuality.” The “Homosexuality” filter may be disabled without posing any risk of violating the Children’s Internet Protection Act (“CIPA”). As noted above, the “Homosexuality” category does not include “sites that are sex oriented, which fall into [the separate category of] Pornography.” The “Homosexuality” filter is thus designed specifically to target LGBT-related websites that do not contain sexually explicit content.

II. Legal Background

Your continued use of the “Homosexuality” 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 TSELF, GLSEN, and similar materials that are blocked by the “Homosexuality” 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 “Homosexuality” filter violates students’ First Amendment rights by engaging in unconstitutional viewpoint discrimination against LGBT viewpoints. The filter blocks students’ ability to access the website for GLSEN but not the websites for other student groups such as the Fellowship for Christian Athletes or the Key Club. Similarly, the Homosexuality filter blocks students from accessing information about scholarships for transgender students but not other types of scholarships at websites such as Scholarships.com. Moreover, even though the “Homosexuality” 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 “Homosexuality” does not block access to the websites for the National Association for Research

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>.

& Therapy of Homosexuality and People Can Change. *See* Fortiguard URL Lookup, available online at <http://www.fortiguard.com/webfiltering/webfiltering.html#urllookup>

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 "Homosexuality" 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 receives 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 Northwest 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 website for GLSEN provides 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 "Homosexuality" filter blocks access to GLSEN's website, students who seek to form GSAs in Northwest 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, as noted above, "Homosexuality" filter does not block access to the websites for the

Fellowship of Christian Athletes or the Key Club. 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 “Homosexuality” and provide students equal access to the websites for TSELF, GLSEN, 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 Northwest 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

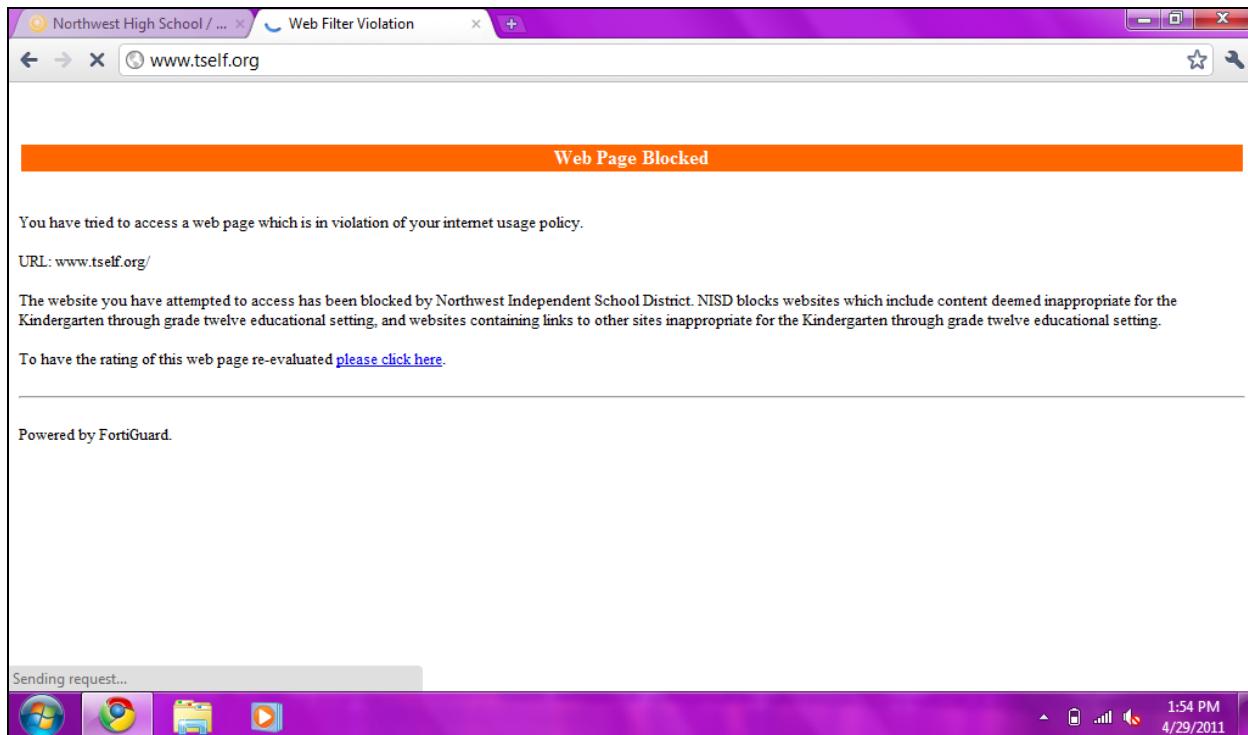


EXHIBIT B

