

June 8, 2011

**Via Fax and Overnight Delivery**

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Dear Ms. Bayha:

As part of its “Don’t Filter Me” initiative, the American Civil Liberties Union (“ACLU”) has received complaints from students across the country that their school districts have improperly configured software provided by Blue Coat to block access to websites categorized by Blue Coat as “LGBT.” In the past three months alone, the ACLU has contacted school districts in New Jersey, Texas, and Virginia asking the districts to deactivate their Blue Coat “LGBT” filters. After discovering that the “LGBT” filter serves no legitimate pedagogical purpose, each of these school districts agreed to do so.

Most recently, the ACLU and the ACLU of Georgia sent a demand letter to Gwinnett County Public Schools shortly after the school district installed Blue Coat software on its computer system. Before the school district installed Blue Coat’s software, students at Gwinnett County Public Schools had been able to access educational LGBT resources, such as the website for the It Gets Better Project and the Georgia Safe Schools Coalition. But once the school district started using Blue Coat, these websites were blocked as “LGBT.” In response to this letter, officials from the district have told the media that they activated the filter in order to comply with their obligations to block sexual material pursuant to the Children’s Internet Protection Act (“CIPA”).

The response from Gwinnett County Public Schools reflects a disturbing trend that we have seen with Blue Coat customers across the country. Despite the fact that the “LGBT” filter is not designed to block adult content, public schools have activated the “LGBT” filter on their Blue Coat software in the mistaken belief that the “LGBT” filter blocks pornography and sexually explicit materials.

We call on Blue Coat to take prompt action to address this recurrent and widespread problem. At a minimum, Blue Coat should make clear to all its customers that the software’s filter for “LGBT” content is not designed to block sexual or pornographic material and is not required by CIPA. We also

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UNION FOUNDATION  
LESBIAN GAY BISEXUAL  
TRANSGENDER &  
AIDS PROJECT

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NEW YORK, NY 10004-2400  
T/212.549.2627  
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WWW.ACLU.ORG/LGBT

SAN FRANCISCO OFFICE:  
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strongly urge Blue Coat to eliminate the “LGBT” filter entirely and provide its customers with viewpoint-neutral categories that do not single out “LGBT” viewpoints for special treatment.

### **Blue Coat’s “LGBT” Filter Is Designed to Block Non-Sexual LGBT Content.**

The filtering software you provide to public schools includes an option to filter content that is labeled by Blue Coat as “LGBT.” According to your website’s explanation of each category, the LGBT category is defined as:

Sites that provide information regarding, support, promote, or cater to one’s sexual orientation or gender identity including but not limited to lesbian, gay, bisexual, and transgender sites. *This category does not include sites considered sexually gratuitous in nature that would typically fall under the Pornography category.*

See Blue Coat Categories at [www.bluecoat.com/doc/10826](http://www.bluecoat.com/doc/10826) (emphasis added).

As reflected in the definition of the “LGBT” category, the “LGBT” filter does not block any sexual or pornographic content. Instead, it blocks access to a wide array of valuable educational resources and support sites for LGBT youth, including the website for the It Gets Better Project, the Georgia Safe Schools Coalition, the Human Rights Campaign, and Parents, Families, and Friends of Lesbians and Gays (“PFLAG”).

Disturbingly, the “LGBT” filter appears to be designed specifically to target websites for student gay-straight alliances (“GSAs”). The websites for GSA Network, and the Gay Lesbian and Straight Education Network (“GLSEN”) are identified on your website as examples of the type of content the “LGBT” filter is designed to target.

Even worse, the “LGBT” filter only blocks websites that provide support for LGBT students or express tolerance for LGBT people -- not websites that condemn homosexuality or urge LGBT persons to change their sexual orientation or gender identity through so-called “reparative therapy.”<sup>1</sup> For

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<sup>1</sup> “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

example, the LGBT filter does not block the website for National Association for Research & Therapy of Homosexuality (which is categorized as “Reference”) or the website for People Can Change (which is categorized as “Health”) or the website for Exodus International (which is categorized as “Religion”). See Blue Coat Web Page Review, at <http://sitereview.bluecoat.com/sitereview.jsp>.

### **Any Public School Using the “LGBT” Filter Is Violating the Law.**

Blue Coat advertises that its software enables public school customers to comply with CIPA’s legal requirements. But CIPA is not the only law that public schools are required to follow. By including an “LGBT” filter in the filtering software, Blue Coat is exposing its public school clients to significant legal liability for violating the First Amendment and the Equal Access Act, 20 U.S.C. § 4071, *et seq.*

The First Amendment requires that when a public school blocks student access to speech, it must do so in a viewpoint-neutral manner. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) (Alito, J.).

Any public school that activates Blue Coat’s “LGBT” filter is engaging in unconstitutional viewpoint discrimination. The “LGBT” filter is specifically designed to block websites that “support,” “promote,” or “cater to” the viewpoints and needs of LGBT people, but not to block access to viewpoints that condemn homosexuality or oppose legal protections for LGBT people. There is no legitimate reason for any public school to engage in that sort of viewpoint discrimination.

The “LGBT” filter also causes public secondary schools to violate the Equal Access Act, 20 U.S.C. § 4071, *et seq.* The Equal Access Act requires public secondary schools to provide GSAs with “equal access to the same avenues of communication as other noncurriculum related groups.” *SAGE v. Osseo Area Schools Dist.*, 471 F.3d 908 (8th Cir. 2006) (emphasis in original); accord *Westside Cmty. Schools v. Mergens*, 496 U.S. 226, 247 (1990). The websites for GSA Network and GLSEN 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 Blue Coat's LGBT filter blocks access to those resources for GSAs while allowing students in other non-curricular clubs, such as the Key Club, to freely access their clubs' websites. This unequal treatment violates the Equal Access Act.

Providing students viewpoint-neutral 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).

### **Blue Coat Bears Responsibility for the Harm Caused By Its Software.**

Blue Coat has known about the widespread misuse of its software since at least 2009, when the ACLU and ACLU of Tennessee sued two school districts in Tennessee that had improperly enabled the "LGBT" filter on their software. Yet, Blue Coat has done nothing to prevent the same misuse from continuing in school districts across the country.

Blue Coat bears a large share of responsibility for causing this illegal censorship to occur. Most public schools have no desire to discriminate against websites such as GSA Network, GLSEN, or the Human Rights Campaign. In the majority of cases, these websites are being blocked only because school officials do not understand the "LGBT" filter and mistakenly believe the filter is designed to target pornography. By creating a viewpoint-discriminatory filter and failing to provide adequate customer education, Blue Coat is causing schools to censor websites that they would not otherwise choose to block. Instead of serving the educational needs of your clients, the "LGBT" filter functions as a "booby trap" that unnecessarily exposes public schools to liability for violating their students' constitutional rights.

In addition to its moral obligation to its customers and the students they serve, Blue Coat also has a legal obligation not to jointly participate in conduct that violates the Constitution. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Dennis v. Sparks*, 449 U.S. 24 (1980); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). If Blue Coat knows that one of its public school clients has activated the "LGBT" filter, Blue Coat has actual knowledge that a constitutional violation is occurring, and also has a legal duty not to participate in that violation.

### **Blue Coat Should Institute the Following Reforms.**

At a minimum, Blue Coat has an obligation to promptly contact Gwinnet County Public Schools -- and any other public school using the “LGBT” filter -- and explain clearly and explicitly that the filter does not block sexual content and is not required by CIPA. Blue Coat should also warn its customers that the “LGBT” filter is not viewpoint neutral and could expose public schools to legal liability. This information should be prominently displayed in any publication discussing the definition of the filter categories and in any documents discussing schools’ legal obligations under CIPA.

In light of the widespread problems caused by the “LGBT” filter, we also urge Blue Coat to discontinue the “LGBT” filter entirely and provide its public school clients with the viewpoint-neutral filtering that the Constitution requires. There is no reason why websites cannot be categorized based on their content -- such as history, social organization, advocacy group, etc -- instead of being singled out for special treatment based on their “LGBT” viewpoint. After some of its own customers were contacted by the ACLU, the Lightspeed Systems company recently announced that it would remove its “education.lifestyles” filter, which was designed to block educational LGBT content, and instead recategorize those websites under generally applicable and viewpoint-neutral categories. We urge Blue Coat to take similar steps to better serve the interest of its customers.

Sincerely,

Joshua Block  
Staff Attorney  
ACLU Lesbian Gay Bisexual Transgender & AIDS Project