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Via Facsimile to 501-748-9370 and U.S. Mail

May 11, 2011

John Bacon
Chief Executive Officer
eStem Public Charter Schools
123 W. 3rd Street
Little Rock, AR 72201

Dear Mr. Bacon:

The American Civil Liberties Union Foundation ("ACLU") and the ACLU of Arkansas Foundation are non-profit organizations that work to protect constitutional rights and civil liberties, including the rights of public school students. We have received a complaint that eStem Public Charter Schools ("eStem") 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 attached Exhibits, 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 Arkansas, 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 removed 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.* The attached exhibits demonstrate that the "Lifestyle" filter currently prevents students from accessing the website for Day of Silence (dayofsilence.org) and GSA Network (gsanetwork.org). See Exhibits A and B. 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>.

eStem 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 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.

II. 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, 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.").

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>.

III. 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 eStem 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 at eStem 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.

IV. 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.

V. Conclusion

Please contact us by May 23, 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, several other school districts across the country have disabled similar anti-LGBT filters on their filtering software. We urge eStem to do the same.

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,

A handwritten signature in cursive script that reads "Holly Dickson". The signature is written in dark ink and is positioned above the printed name.

Holly Dickson

EXHIBIT A

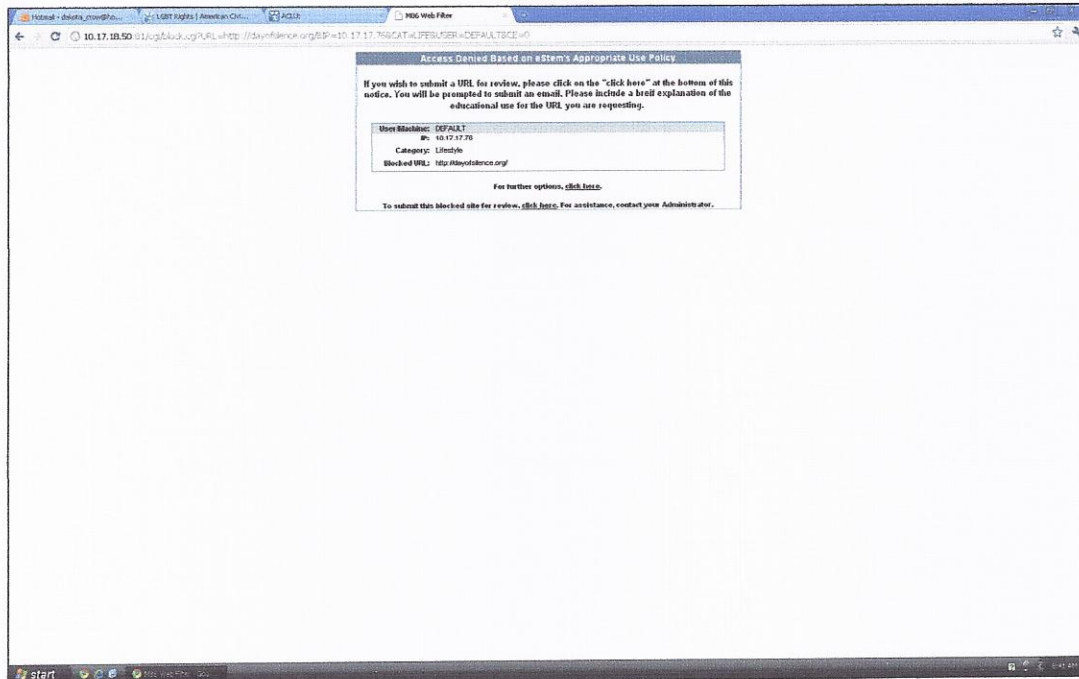


EXHIBIT B

