

May 20, 2009

Rodger Dohm (President)
Dan Lopez
Dawn Perfect
Luan Rivera
Bob Stoodly
Board of Trustees
Ramona Unified School District
720 9th Street
Ramona, CA 92065

Re: Infringement of student free speech rights

Dear Board Members,

We write to express our grave concern over the decision by Superintendent Robert Graeff and Principal Theresa Grace to censor a presentation on Harvey Milk by Natalie Jones, a sixth grader at Mt. Woodson Elementary School in the Ramona Unified School District. The censorship violated Natalie's free speech rights and cannot be justified by the district's erroneous interpretation of the board's policies and relevant statutes on parental notice and permission. Although we hope by writing this letter to avoid unnecessary litigation, the district must take immediate action to remedy the wrong to the student, as well as provide us with sufficient assurance that this kind of incident will not happen in the future.

Factual Background

Natalie Jones is currently enrolled in the Independent Research Project Class at Mt. Woodson Elementary School. The class—available only to advanced placement or “Excel” students—required each student to select a person or topic to research independently. Having selected a person or topic, each student then prepared a report and final presentation in PowerPoint on such person/topic.

At the beginning of the Spring 2009 semester, Natalie chose to report on Harvey Milk, a San Francisco Supervisor who was the first openly gay elected official in the United States. At various points in the semester, Natalie turned in a description of her

project, a draft report, and a final report on Harvey Milk (on which she received a score of 49 out of a possible 50) without incident.

However, on Wednesday, April 22, 2009, the day before Natalie was scheduled to show her final presentation to the rest of the class, she was called into the principal's office. We understand Natalie was informed that the subject of her project was "sensitive" and that she would not be allowed to show her final presentation to the rest of her class, as all her classmates had done.

We also understand that over the next few days, Superintendent Graeff and Principal Grace reiterated their concerns about Natalie's presentation to Natalie's mother, Bonnie Jones, and informed her that Natalie could only show her presentation to those of her classmates whose parents had signed a permission form, sent to each classmate's parents along with a notice describing the presentation. Superintendent Graeff and Principal Grace explained that in requiring parental notification and permission to view Natalie's presentation they were relying on Board Policy 6142.1. That policy is entitled "Family Life/Sex Education" and provides in relevant part:

At the beginning of the school year, parents/guardians shall be notified in writing about any instruction in which human reproductive organs and their functions, processes, or sexually transmitted diseases are described, illustrated, or discussed. In addition, before any instruction on family life, human sexuality, AIDS or sexually transmitted diseases is given, the parent/guardian shall be provided with written notice explaining that the instruction will be given and stating the parents/guardian's right to request a copy of Education Code 51201.5 and 51553. This notification shall inform parents/guardians that they may request in writing that their child not attend the class. No student shall attend such instruction if the school receives this request.

At the parent's/guardian's request, any student may be excused from any part of family life/sex education instruction.

For grades K-8, a signed permission form must be received before the student receives the instruction. Upon written request, the student will be excused from all or part of the family life/sex instruction and alternative study arrangements will be made with no penalty.

On April 28, 2009, Principal Grace sent a letter to parents of students in Natalie's class, including Natalie's mother, asking them to sign a permission form for their child to view Natalie's "Harvey Milk presentation," which had been rescheduled for Friday, May 8, **during lunch recess.**

The letter (a copy of which is enclosed) explained that "a student" had selected Harvey Milk for the independent research project, that Mr. Milk was a San Francisco Supervisor and the first openly gay elected official in the U.S., and that while he was in office "he championed the rights of minorities and sponsored the Gay Rights Act and

founded the first gay rights parade.” The letter then went on to say that “[w]e understand that this is a sensitive topic. In order to respect the rights of all of our students and their parents, we are requesting permission from a parent or guardian of our thirteen 6th grade Excel students before these students are allowed to see the Harvey Milk presentation.” To our knowledge, the district imposed no such requirement on the presentation of any of Natalie’s classmates, nor did the district exclude any of her classmates from giving a presentation during the regular class period.

Natalie gave her presentation (a copy of which is enclosed) at the lunch recess on Friday, May 8, but less than half of the students in the class attended. As described in Principal Grace’s letter, the presentation simply sets out the basic facts of Mr. Milk’s life, his political career, and his tragic death by assassination in 1978.

Legal Analysis

The “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Healy v. James*, 408 U.S. 169, 180 (1972). In the curricular context, the First Amendment demands that any censorship of student speech must be “reasonably related to a legitimate pedagogical concern.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). And restrictions on such speech that discriminate based on viewpoint are “prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests.” *Peck v. Baldwinville Central Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (emphasis in original) (school’s censorship of religious themes on poster student prepared for environmental studies class could constitute viewpoint discrimination); *see also Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991).

California law protects curricular student speech even more strongly, and strictly limits the degree to which school officials may censor student publications. Under Education Code section 48907, “[p]upils of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to . . . the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities.” Educ. Code § 48907(a). Section 48907 exempts only speech “which is obscene, libelous, or slanderous” or “so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.” Educ. Code § 48907(d).

Here, the refusal to allow Natalie to present her PowerPoint presentation on Harvey Milk to her entire class during the regular class period violates both the First Amendment and section 48907. Under the First Amendment, it is doubtful at best that censorship of a presentation about the life of an important figure in California history could be “reasonably related to a legitimate pedagogical concern.” In any event, the school’s decision to single out Natalie’s presentation seems to have turned on the viewpoint it presents. Classmates of Natalie conducted research projects and gave

presentations on political topics (World War II) or historical figures (certain baseball players), yet only Natalie, who selected a gay historical figure who worked politically to achieve equality for gay and lesbian Californians, was denied the ability to present her project to her class.

Apart from the First Amendment, the censorship clearly violated section 48907. Nothing in Natalie's PowerPoint presentation is remotely obscene, libelous, or slanderous, or incites unlawful acts or substantial disruption. The sole basis cited in Principal Grace's April 29 letter for the limitations put on Natalie's presentation is the purportedly "sensitive" nature of the subject. Section 48907 expressly prohibits such censorship. The statute "mandates that a school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption." *Smith v. Novato Unified Sch. Dist.*, 150 Cal.App.4th 1439, 1457 (2007). A school "may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance." *Id.* Natalie's presentation does not come close to satisfying either condition. Indeed, it is far more measured in content and manner than the controversial student editorial held to be protected speech in *Smith*. The district therefore violated Natalie's free speech rights under both state and federal law.

The district cannot justify this censorship by invoking policies and statutes on parental notice and permission. The district wrongly conflated a presentation on a gay politician who advocated for gay and lesbian civil rights with sex education. Under Board Policy 6142.1, which Superintendent Graeff and Principal Grace cited as requiring them to send the April 29 letter, parents may excuse their children from certain curricula, namely "family life/sex education instruction." The policy refers to specific provisions of state law, which allow parents to opt their children out of "instruction on health" and "comprehensive sexual health and HIV/AIDS prevention and education." See Educ. Code §§ 51240, 51938.

It should go without saying that merely identifying a person as gay, or straight, is not the same thing as providing health or sex education. Both the Board Policy and the Education Code also make clear that "instruction on health" and "comprehensive sexual health and HIV/AIDS prevention and education" are specific courses of instruction. Portions of those courses of instruction should, and presumably do, address sexual orientation. But the mere description of someone as gay or lesbian in other contexts—such as a historical or civil rights context—is not a health or sex education lesson covered by the policy or relevant statutes. For the same reason, a discussion of a heterosexual relationship in a literary context—such as in a class on Shakespeare's *Romeo and Juliet*—is not a sex education lesson.

Moreover, the district's application of Board Policy 6142.1 to Natalie's presentation is simply wrong on the face of the policy. The policy explicitly sets forth the "course content" of the "family life/sex education" curricula for each grade level in the district. For the sixth grade, the content is specified as follows: adolescence, male and

female reproductive system, human reproduction, and sexually transmitted diseases. Of course, Natalie's presentation on Harvey Milk addressed none of these topics, and the district therefore misused the policy to justify requiring parental consent for Natalie's classmates to see her presentation and sending the April 29 letter.

Conclusion

It is astonishing to us in this day and age that Harvey Milk, as an openly gay politician and long-term advocate for the civil rights of gay and lesbian Californians, could be deemed a topic too "controversial" or "sensitive" for discussion in a Sixth Grade class in this State. If Senate Bill 572 is enacted this year, May 22 will be officially recognized as "Harvey Milk Day" in the State of California, and public schools and other educational institutions will be encouraged to conduct suitable commemorative exercises on that date.

Indeed, your own Parent Handbook states: "America is a pluralistic society with people of various beliefs (political, religious, social, etc.) co-existing and participating in government and society. Students should be knowledgeable about America's and the world's cultural commonalities and differences." Natalie's presentation was not only entirely consistent with this policy, but it in fact promoted it.

In any event, regardless of whether a topic is "sensitive" or "controversial," the overarching function of our schools is to teach our young people how to think critically, perhaps especially about "controversial" or "sensitive" topics. As the Supreme Court so eloquently stated many years ago: "The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of idea which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal quotations omitted).

We are writing to request the following, in the hope of avoiding unnecessary litigation in this matter:

- The district, Superintendent Graeff, and Principal Grace should apologize in writing to Natalie, and send a letter reflecting such apology to all the parents who were sent Principal Grace's April 29 letter;
- Natalie should be given the opportunity to give her PowerPoint presentation to all the other members of her independent research project class;
- The Board should clarify in writing that the parental notification and permission portion of Board Policy 6142.1 only applies to the curricula identified as "course content" for "Family Life/Sex Education instruction" in Board Policy 6142.1; and
- The Board should provide us with assurance that incidents such as this will not happen in the future.

Please contact us within five days—or no later than **May 26, 2009**—to discuss whether it will be possible to resolve this matter without litigation. Failure to respond within that time may lead to litigation, seeking appropriate remedies and an award of attorney fees and costs. Though we hope litigation will be unnecessary, we are prepared to take whatever legal action is necessary to defend Natalie's legal rights.

Very truly yours,

Elizabeth Gill
Staff Attorney
LGBT & AIDS Project

David Blair-Loy
Legal Director
ACLU Foundation of
San Diego & Imperial Counties

cc: Natalie Jones, Parent (via e-mail)
Robert W. Graeff, Superintendent, Ramona Unified School District
(via fax and U.S. mail)
Theresa Grace, Principal, Mt. Woodson Elementary School
(via fax and U.S. mail)