AMERICAN CIVIL LIBERTIES UNION of PENNSYLVANIA
ACLU FOUNDATION

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February 1, 2010

By tele-fax
724-785-6988

Dr. Philip J. Savini, Jr.
Superintendent, Brownsville Area School District
1025 Lewis Street
Brownsville, PA 15417

RE: Suspension of teacher Ginger D'Amico

Dear Dr. Savini:

The American Civil Liberties Union of Pennsylvania ("ACLU") has been retained to represent Ms. D'Amico in challenging the District's decision to suspend her over a bachelorette party held during non-school hours in her home and photos from that party that another employee published briefly on Facebook. The ACLU believes that the District's decision to punish Ms. D'Amico for constitutionally-protected activity in the privacy of her own home amounts to unconstitutional retaliation. Because the harm to Ms. D'Amico is ongoing, we are asking that you decide by noon on Wednesday, February 3, whether you will reconsider the suspension.

When government seeks to punish public employees who engage in constitutionally-protected activities "on their own time on topics unrelated to their employment," the government's justification must be "far stronger than mere speculation" that it will have some adverse effect on the workplace.[1] Many court decisions have declared unconstitutional government employers' efforts to punish private, off-duty, constitutionally-protected activities (often sexual activity) that supervisors may disapprove of or believe to be immoral.[2]

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[1] *See City of San Diego v. Roe*, 543 U.S. 77, 80 (2004), citing *United States v. National Treasury Employees' Union*, 513 U.S. 454, 465 (1995).

[2] *See, e.g., Via v. Taylor*, 224 F. Supp. 2d 753, 762 (D. Del. 2002); *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985); *Wilson v. Taylor*, 733 F2d 1539 (11th Cir. 1984); *Thorne v. City of El-Segundo*, 726 F.2d 459 (9th Cir. 1983); *Swope v. Bratton*, 541 F. Supp. 99 (W.D. Ark. 1982);

In this case, Ms. D'Amico opened her home to host a bachelorette party for a co-worker. Someone else arranged for the presence of a "male stripper," which, as the Pittsburgh Post-Gazette noted in an editorial, is not unusual at such parties.[3] More importantly, such entertainment is constitutionally protected.[4] And because the activity occurred inside Ms. D'Amico's home the constitutional protection is enhanced.[5] The Supreme Court affirmed long ago that people have significant privacy protection to select the entertainment for inside the home: "the State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch."[6]

Given that Ms. D'Amico's choice of entertainment was not only lawful, but constitutionally-protected and occurred inside the home, the School District must be able to make a significant showing of disruption in the school to justify the suspension. To the extent there has been any disruption, it was negligible and in any event cannot be attributed to Ms. D'Amico. She did not publicize the photos and, indeed, asked that they be taken down immediately upon learning that another employee had posted them. And to the extent anyone else saw or learned of the photos – beyond the handful of people on the other employee's Facebook page who had access to the site and could see the photos – it is because of the District's actions, for which Ms. D'Amico cannot be held responsible. Therefore, the District does not have sufficient cause to

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Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979); *Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977); *Major v. Hampton*, 413 F. Supp. 66, 71 (E.D. La. 1976) ("The Constitution prevents the discharge of an employee merely because his personal conduct during off-duty hours incurs the disapproval of his supervisor").

[3] *See Not Their Party: Private Behavior is no Business of School District,* Pittsburgh Post-Gazette, January 27, 2009 (accessible at http://community.post-gazette.com/blogs/finepoint/archive/2010/01/27/not-their-party-private-behavior-is-no-business-of-school-district.aspx).

[4] *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981) (entertainment, including nude entertainment, is protected by First Amendment).

[5] *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("adults may choose to enter upon [private sexual] relationship in the confines of their homes and their own private lives"); *Wilson v. Layne*, 526 U.S. 603, 609-10 (1999) ("house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose").

[6] *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (obscenity is criminalized outside the home but person cannot be punished for mere possession inside the home).

override Ms. D'Amico's constitutional rights and thereby justify the suspension.

We respectfully request that the District notify us in writing by noon on Wednesday, February 3, whether it will reconsider Ms. D'Amico's suspension. If the District fails to respond by the deadline we will construe the silence as a refusal of this request. The ACLU is prepared to petition a federal judge to protect Ms. D'Amico's constitutional rights. If the ACLU is forced to file suit, please be advised that we will seek damages for the harm inflicted on Ms. D'Amico – she has already been forced to seek stress-related medical treatment – and attorneys' fees for prosecuting the action.[7] You can fax a letter to 412-681-8707. Or if you would like to discuss this matter please contact me at 412-681-7864. If I am not in the office, please ask the receptionist to locate me and I will call you back. Thank you.

Respectfully,

Witold J. Walczak
Legal Director

cc: Hon. R.W. Brashear (President, School Board; by fax, 724-785-4333)
James Davis, Esq. (Solicitor; by fax, 724-437-1208)

[7] The last time the ACLU sued the District, in 1994, the federal court not only issued an injunction but the case resulted in the District paying nearly $40,000 in attorneys' fees. *See Foster v. Brownsville Area Sch. Dist*, CA-94-1463 (discrimination under IDEA). Fee rates are significantly higher today than they were sixteen years ago.