

February 27, 2013

Dr. Daniel Bulinski
Superintendent of Schools
Governor Mifflin School District
10 South Waverly Street
Shillington, PA 19607
superintendent@gmsd.k12.pa.us

Re: Discriminatory Internet Filtering

Dear Dr. Bulinski:

We write on behalf of Maison Fioravante, a junior at Governor Mifflin Senior High School, concerning the discriminatory and unconstitutional configuration of Governor Mifflin School District's Internet filtering software from Smoothwall Ltd. After being blocked by the district's Smoothwall filter from accessing several educational resources about lesbian, gay, bisexual, and transgender ("LGBT") people, Maison posted a video about her experience and launched a petition to ask Governor Mifflin School District to stop blocking LGBT-supportive websites. Maison's petition has now been signed by over 3,200 people. <http://www.change.org/petitions/governor-mifflin-senior-high-school-end-the-blocking-of-lgbt-related-websites>.

As currently configured, your filtering software from Smoothwall engages in unconstitutional viewpoint discrimination by using a "sexuality" filter that blocks LGBT-supportive resources or expresses an LGBT-supportive message. This viewpoint discrimination is similar to the discriminatory Internet filtering that a federal court recently held unconstitutional in *Parents, Family, and Friends of Lesbians and Gays ("PFLAG") v. Camdenton R-III School District*, 853 F. Supp. 2d 888 (W.D. Mo. 2012). After the district court in that case issued a preliminary injunction ordering Camdenton R-III School District to stop engaging in viewpoint-discriminatory filtering, the school district ultimately entered into a settlement in which it not only changed the filter but also paid \$125,000 for plaintiffs' costs and legal fees, on top of the money the district had already paid to its own attorneys for defending the lawsuit.

As noted above, the "sexuality" filter appears to block only LGBT-supportive viewpoints. In addition to that filter, however, your software appears to use a second "intolerance" filter that blocks a wide swath of political and social advocacy – including anti-gay websites from National Organization for Marriage and the Family Research Council – simply because they express an

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“intolerant” viewpoint. The “intolerance” filter constitutes an independent violation of the First Amendment.

The ACLU respectfully requests that Governor Mifflin School District immediately reconfigure its Smoothwall filtering system so that it operates in a viewpoint-neutral manner or the District should find an alternate software vendor with a product that satisfies the requirements of both the Children’s Internet Protection Act (“CIPA”) and the First Amendment. Please contact us by Thursday, March 14, to advise us whether you will make the requested changes to the filter and if so, how you intend to do so.

I. Factual Background

While working on a project for her digital studio arts class about contemporary social issues, Maison was blocked by the district’s Smoothwall filtering program from accessing websites with statistics about LGBT people. When she tried to access the blocked sites, the Smoothwall software displayed a message on her computer screen stating: “This page has been blocked because the content has been deemed unsuitable by the administrator. This request was logged.” The screen also indicated that the website fell into the category of “sexuality” sites. Maison then tested the website for the Gay, Lesbian & Straight Education Network (glsen.org) and discovered that site was also blocked as a “sexuality” site. After a teacher intervened on her behalf, the district unblocked those two specific websites on her computer the next day, but the district did not unblock the websites for anyone else and did not unblock any other “sexuality” websites.

Maison posted an online video in which she described her experience with the “sexuality” filter and started a petition to ask Governor Mifflin School District to stop blocking LGBT sites for all students. In her petition Maison explained:

As an LGBT youth, I believe education about the LGBT community should be available to all students. With the internet being the number one resource in our schools, it is important to include educational websites and not block them. The use of LGBT resources allows not only LGBT students to access information pertaining to themselves, but those questioning their sexual identities, as well as allow for statistics and correct information for school projects. If Governor Mifflin Senior High School believes this information is too sensitive for the student body to see and/or use, they have a large situation of hypocrisy to deal with.

<http://www.change.org/petitions/governor-mifflin-senior-high-school-end-the-blocking-of-lgbt-related-websites>.

Maison subsequently tried to access other educational and informational websites about LGBT people, but again was blocked by the Smoothwall “sexuality” filter at every turn. The “sexuality” filter blocked Maison from accessing a wide range of sites about and supporting LGBT people that are not sexually explicit in any way, including: anti-bullying resources from the Safe Schools Coalition (safeschoolscoalition.org), political advocacy and resources from Freedom to Marry (freedomtomarry.org) and the Equality Federation (equalityfederation.org), legal resources from Lambda Legal (lambdalegal.org), and even websites for religious groups expressing support for and acceptance of LGBT people such as Affirmation: Gay & Lesbian Mormons (affirmation.org). The “sexuality” filter does not, however, block other viewpoints about homosexuality, including anti-gay viewpoints from organizations such as the Christian Coalition (cc.org), the Alliance Defending Freedom (telladf.org), and the Ruth Institute (ruthinstitute.org).

Although the “sexuality” filter blocks only LGBT-supportive viewpoints, it appears that some websites opposing legal protections for LGBT people are blocked by a separate filter for “intolerance.” The “intolerance” filter blocks websites from a wide array of organizations, including the National Organization for Marriage (nationformarriage.org), the Family Research Council (frc.org), and the American Family Association (afa.net).

Smoothwall does not publicly disclose what criteria it uses in labeling websites as “sexuality” or “intolerance.” In conjunction with this letter, we are submitting a “Right To Know” records request for more information about Smoothwall’s “sexuality” and “intolerance” filters and Governor Mifflin School District’s configuration of the Smoothwall software.

Based on the information currently available, however, Smoothwall’s “sexuality” filter appears to be similar to the system used by an open-source software program called “URL Blacklist.” Indeed, Smoothwall is a British company created by the same software developer who designed the open-source DansGuardian software program, which uses the “URL Blacklist” database to categorize and block websites. See <http://dansguardian.org/?page=smoothwall> (explaining the relationship between Smoothwall and DansGuardian) and <http://dansguardian.org/?page=blacklist> (referring DansGuardian users to URL Blacklist). As discussed below, a federal court recently held that the URL Blacklist “sexuality” category engaged in unconstitutional viewpoint discrimination against LGBT-supportive websites and that a public school district using URL Blacklist was therefore liable under the First Amendment.

URL Blacklist subsequently altered its categorization in an effort to fix that viewpoint discrimination but it appears that similar reforms have not been made by Smoothwall.

II. Legal Analysis

The First Amendment prohibits public schools and libraries from using web filtering software that is configured to discriminatorily block access to particular viewpoints. “[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).

These First Amendment rights apply just as strongly when students seek to access ideas through the Internet. CIPA requires that public schools and libraries receiving certain federal funding must use Internet filtering software to block access to website that would be obscene with respect to minors. But at the same time, schools also have a constitutional obligation to ensure that their filtering software has been configured in a viewpoint-neutral manner in accordance with the First Amendment. *See Bradburn v. N. Cent. Reg'l Library Dist.*, 231 P.3d 166, 180 (Wash. 2010) (holding that web filters for pornography are constitutional only if they are “viewpoint neutral” and “make no distinctions based on the perspective of the speaker”); *cf. United States v. Am. Library Ass’n (“ALA”)*, 539 U.S. 194 (2003) (plurality) (rejecting facial challenge to filtering system that blocked pornography on a viewpoint-neutral basis and not based on any viewpoint about sexuality).

When a school seeks to block library materials based on viewpoint, it must be able to demonstrate that allowing access to the websites would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *PFLAG*, 853 F. Supp. 2d at 899-900 (applying *Tinker* to viewpoint-based web filtering); *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003) (applying *Tinker* to removal of library book).

The “Sexuality” Filter

Public school students’ right to access ideas in a school library includes the right to access information about LGBT people and LGBT-supportive viewpoints. *See Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995) (holding that school could not remove romance novel about two

women from school library); *cf. 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).

A federal court recently reaffirmed these principles in *Parents, Family, and Friends of Lesbians and Gays (“PFLAG”) v. Camdenton R-III School District*, 853 F. Supp. 2d 888 (W.D. Mo. 2012). The court held that Camdenton R-III School District violated students’ First Amendment rights by using web filtering software with a “sexuality” filter that – by design placed informational and nonsexual LGBT websites together in the same category as sexually explicit content. The court ruled that that the filter engaged in unconstitutional viewpoint discrimination because it systematically placed websites that expressed positive viewpoints about LGBT people and their legal rights in the sexuality category. *Id.* at 891-92. The court held that this viewpoint discrimination distinguished the case from the viewpoint-neutral filtering of pornography upheld in *ALA*, and that the district could not demonstrate that blocking the websites was necessary to prevent “substantial disruption” under *Tinker*. *Id.* at 889-91.

The court further held that the school district had a constitutional responsibility to reconfigure the software to make it viewpoint neutral or to use a filtering software that did not engage in viewpoint discrimination. *Id.* at 893. The court specifically rejected the school district’s argument that it could avoid constitutional problems by unblocking LGBT-supportive websites on a case-by-case basis. The court explained that even if the district unblocked LGBT websites whenever a student requested access, the “sexuality” filter still violated the First Amendment by placing an unequal viewpoint-based burden on LGBT-supportive websites. *Id.* at 894-95. In addition, the “sexuality” filter imposed an unconstitutional stigma on LGBT supportive viewpoints, which itself violated the First Amendment. *Id.* at 895, 897-98.

Based on the information currently available to us, it appears that Smoothwall’s sexuality filter engages in the same viewpoint discrimination that the court held unconstitutional in *PFLAG*. As the *PFLAG* decision makes clear, in order to bring itself into compliance with the First Amendment Governor Mifflin should immediately reconfigure its “sexuality” filter so that it operates in a viewpoint-neutral manner or should find an alternate software vendor with a product that satisfies the requirements of both CIPA and the First Amendment. *Id.* at 899-900.

Allowing students equal access to LGBT-related websites is not just a legal duty. As Maison explains in the video accompanying her online petition, allowing access to LGBT resources also makes sense from a safety perspective, particularly in light of the epidemic of LGBT youth suicides and

bullying. Blocking 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).

The “Intolerance” Filter

The Smoothwall “intolerance” filter constitutes an independent violation of the First Amendment.

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Obviously, political speech involving a controversial topic such as homosexuality is likely to spur some debate, argument, and conflict. Indeed, the issue of equal rights for citizens who are homosexual is presently a topic of fervent discussion and debate within the courts, Congress, and the legislatures of the States . . . The nation’s high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.

Gillman ex rel. Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1374 (N.D. Fla. 2008).

Moreover, although the Supreme Court in *ALA* rejected a facial challenge to the use of viewpoint-neutral filters for pornography, that decision was based in part on the conclusion that libraries have traditionally used professional criteria to exclude pornography from their collections. *ALA*, 539 U.S. at 208. There is no similar tradition of libraries excluding materials because they deem the viewpoints to be “intolerant.” Rather, traditional library collection criteria require libraries to collect a wide range of viewpoints.

The “intolerance” filter does not appear to be narrowly tailored to block only websites that could be reasonably forecast to lead to substantial disruption and instead appears to block nonviolent websites simply because they express an “intolerant” viewpoint. Indeed, it does not appear that the “intolerance” filter has been configured with any attempt at satisfying *Tinker*’s requirements.

III. Conclusion

We respectfully request that Governor Mifflin School District take immediate steps to bring its filtering software into line with the First Amendment. Please contact us by March 14 to explain how you intend to address this important

issue. You may contact any of the signatories below at the respective fax, telephone or email addresses. If we do not receive a response by the appointed date we will construe the silence as a refusal of this request and will take necessary and appropriate legal action to protect our client's constitutional rights. We look forward to hearing from you by March 14.

Respectfully,

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