



## OPEN LETTER TO LOUISIANA SCHOOL ADMINISTRATORS CONCERNING SCHOOL DANCES

April 4, 2017

By e-mail or fax

Dear Educator:

You may already know that school officials may not deny students the right to attend school dances simply because they choose to dress in a manner that officials deem appropriate only for students of another sex, or because they choose to bring a date of the same sex as themselves. This office has sent letters to that effect for several years, and we hope that you have committed to ensure that all students in your district are given the legal rights they are entitled to under the law. This letter is to clarify the law and to advise you that schools may not discriminate against gay, lesbian, transgender, or gender queer students in the area of school dances or any other activities.

Any policy excluding same-sex couples from proms, homecoming, or other school dances violates the right to free expression guaranteed by the First Amendment. This is not just the opinion of the ACLU. It was the conclusion of at least two federal courts in cases in which a gay high school student successfully challenged his or her school's ban on same-sex couples at prom. In *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980), a school policy against same-sex dates was based on a concern that it might be disruptive to others. The court ruled that the school has an obligation to protect the same-sex couple from any such disruption, because "to rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard."

Several years ago a student in Mississippi successfully sued her school for denying her the right to bring another girl as her prom date and to wear a tuxedo. *McMillen v. Itawamba County School District*, 702 F.Supp.2d 699 (N.D. Miss. 2010). In that case, a federal court determined once again that school policies that ban same-sex dates at the prom violate the right to free expression guaranteed by the First Amendment. The court found that "this expression and communication of her viewpoint [bringing a same-sex date to prom] is the type of speech that falls squarely within the purview of the First Amendment... the Court finds that [the student's] First Amendment rights have been violated." The school district ultimately had to pay more than \$116,000 in damages and attorneys' fees. Similarly, several years ago a student here in Louisiana sought ACLU assistance when her school initially refused to allow her to attend her prom wearing a tuxedo.

Moreover, the U.S. Supreme Court has ruled that a policy based on nothing more than animosity or prejudice toward gays and lesbians violates the Equal Protection Clause of the Fourteenth Amendment. *Romer v. Evans*, 517 U.S. 620 (1996); *see also U.S. v. Windsor*, 133 S. Ct. 2675, 2694 (2012) (striking down discrimination in marriage because "the principal purpose is to impose inequality, not for other reasons like governmental efficiency.")

In the recent Supreme Court decision *Obergefell v. Hodges*, the Court said, "They [same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right." In short, schools may not discriminate against same-sex couples, who are entitled to be treated no differently from their opposite-sex peers. *Obergefell*, 135 S. Ct. 2584 (2015). Unequal treatment of same-sex couples also constitutes impermissible sex discrimination under the Equal Protection Clause and antidiscrimination statutes like Title IX. *See Videckis v. Pepperdine Univ.*, 100 F.Supp. 3d 927, 936 (C.D. Cal. Apr. 16, 2015) ("For example, a

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policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender [in violation of Title IX.]); *Lawson v. Kelly*, 58 F.Supp. 3d 923 (W.D. Mo. Nov. 7, 2014) (unequal treatment of same-sex couples is gender discrimination).

With respect to attire to be worn at school dances, Title IX and the Equal Protection Clause prohibit schools from discriminating on the basis of sex, including discrimination based on gender stereotypes. See *Glenn v. Brumby*, 663 F.3d 1312, 1913-20 (11th Cir. 2011); *Sturgis v. Copiah Cnty. Sch. Dist.*, 2011 WL 4351355, at \*4-5 (S.D. Miss. Sept. 15, 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 150-52 (N.D.N.Y. 2011). Schools may impose a reasonable gender-neutral requirement of attire for school events. But schools cannot rely on stereotypes that require boys to wear tuxedos or suits and girls to wear dresses.

Under the First Amendment students have a right to express their gender nonconformity or gender identity through their dress and appearance. See *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003); *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. 2000) (preliminarily enjoining school officials from disciplining transgender student for wearing girls' clothes or accessories), *aff'd Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000). Prohibiting a female student from wearing a tuxedo (or, conversely, prohibiting a male student from wearing a dress) violates not only the laws against sex discrimination but also the First Amendment's right to free expression. See *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001).

In light of the clear law protecting students' rights to bring dates of their choosing—and ultimately to marry who they choose—and to wear attire typical of either gender, I trust that students in your district will have a safe and happy prom season free from unlawful discrimination.

Sincerely,



Marjorie R. Esman  
Executive Director