



C. Ray Drew, Executive Director • Mark Silverstein, Legal Director

November 15, 2010

Dr. Bradley Schoeppey  
Superintendent, District 49  
10850 E. Woodmen Road  
Falcon, CO 80831

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*Re: Kate Cohn*

Dear Superintendent Schoeppey,

Falcon High School, a school in District 49, is prohibiting a student from wearing clothing expressing support for acceptance and fair treatment of lesbian, gay, bisexual, or transgender (LGBT) people. On behalf of the American Civil Liberties Union Foundation (ACLU) of Colorado, I am writing to inform you that this prohibition violates important federal constitutional rights of the student and must be rescinded immediately.

Kate Cohn is a senior at Falcon High School. On November 2, 2010, election day, Kate wore a t-shirt to school with the words “marriage is so gay” written across the front of the shirt. She wore this t-shirt to make a silent, peaceful political statement in support of the rights of LGBT individuals to marry. This issue is close to Kate’s heart and she considers herself a civil rights activist on behalf of the LGBT community. Kate attended one uneventful class on November 2, during which time her t-shirt caused no disturbance or tumult amongst the students. After the class, Assistant Principal Susan Thomas noticed Kate’s shirt and asked her to show the shirt to Principal Mark Carara. Principal Carara viewed the shirt, and immediately told Kate she had to change her shirt because it was offensive and violated the school’s dress code banning apparel that is potentially disruptive to the academic environment. Later in the day, while speaking with Kate’s parents, Principal Carara explained his ban of Kate’s t-shirt by comparing the shirt to apparel that promotes drug or alcohol use. As you may know, District 49 has publicly ratified Principal Carara’s decision to censor Kate’s speech.<sup>1</sup>

The content-based nature of Principal Carara’s prohibition of the t-shirt was highlighted when, only a few days ago, another student at Falcon High School, a friend of Kate’s, wore a shirt exhibiting a message protesting abortion. The shirt displayed a large peace sign across the chest, with a baby inside the peace sign. Under the peace sign was the following message: “Give peace a chance, or at least a nine-month cease fire.” No Falcon High School administrator requested Kate’s friend remove her shirt.

<sup>1</sup> See [http://www.kktv.com/news/headlines/School\\_Objects\\_to\\_Teens\\_Shirt\\_106664378.html](http://www.kktv.com/news/headlines/School_Objects_to_Teens_Shirt_106664378.html).

While the message on Kate's t-shirt elicited little response from Falcon High School students, the school's silencing of Kate's speech has caused quite a disruption. In a recent protest at school, several students donned sticky notes over their heart stating: "I support Kate Cohn" or "I do not support gay marriage, but I support Kate Cohn." Additionally, eighty-one students have signed a letter protesting the school's silencing of Kate's message.

The U.S. Supreme Court, as long ago as 1969, ruled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (upholding rights of high school and middle school students to wear black armbands to exhibit their disapproval of the Vietnam War). As long as it is neither obscene nor threatening, a student's speech may be lawfully proscribed only if it would substantially disrupt the work of the school or interfere with the rights of others. *Tinker*, 393 U.S. at 509, 513. There is nothing obscene, violent or disruptive about a student peacefully displaying his or her support for fairness and equality for LGBT people.

A recent ACLU case of *Gillman v. School Board for Holmes County, Florida*, 567 F.Supp.2d 1359 (N.D. Fla. 2008) is a good example of what might transpire in court if Falcon High School persists in its censorship of Kate's speech. In *Gillman*, the school board banned students from displaying rainbows, pink triangles, and pro-gay slogans such as "Gay Pride," "I Support My Gay Friends," "Pro-Gay Marriage," and "Sexual Orientation is not a Choice. Religion, however, is." In striking down the ban, the federal judge ruled that the school board had violated the students' right to free speech and had discriminated against their viewpoint, in violation of the 1st and 14th Amendments to the United States Constitution. The court also awarded the students \$325,000 for their legal fees and expenses.

As in many cases like this, Falcon High School officials are claiming that censorship is necessary to prevent disruption of the work of the school. Following the standard articulated in *Tinker* that the speech ban must be justified "by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (*Tinker*, 393 U.S. at 509), the federal judge in *Gillman* rejected the school board's argument. The judge noted, in fact, that the "vast majority of episodes involving the speech at issue were indistinguishable from the typical background noise of high school." *Gillman*, 567 F.Supp.2d at 1373. Similarly, in the instant case, given the student body's minimal reaction to Kate's message (particularly when compared with its more significant reaction to the school's silencing of Kate's message), a court would almost certainly find that the school's decision to prohibit Kate from wearing her t-shirt in support of gay marriage cannot be justified under the United States Constitution.

Further, Falcon High School has a constitutional duty to tolerate some discomfort and unpleasantness to protect student speech. The United States Supreme Court in *Tinker* acknowledged that a protest against the war in Vietnam in a high school would be politically controversial, especially because a former student at the high school had

recently been killed in the war. But the Court went on to explain why school officials' fear of a disturbance caused by people expressing an unpopular viewpoint was not enough to overcome the right to freedom of expression:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

*Tinker*, 393 U.S. at 508-509.

To comply with the law, you must ensure that Falcon High School permits students to quietly and peaceably express their support for the respect, equal treatment, and acceptance of LGBT people. Every day that passes during which Falcon High School forbids Kate to speak on this issue of great political import that rests close to her heart, Kate suffers irreparable injury. *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (“[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). To prevent further injury to Kate through the continued squelching of her First Amendment freedoms, Falcon High School must immediately rescind its ban of Kate's t-shirt.

Please contact our office by **Friday, November 19, 2010**, to inform us whether or not District 49 intends to comply with the United States Constitution, and allow Kate Cohn to wear her “marriage is so gay” t-shirt to school. If we do not hear from you by that date, we will presume that Falcon High School's ban of Kate's t-shirt is still in effect, and will consider appropriate next steps against the district.

Sincerely,



Rebecca T. Wallace  
Staff Attorney, ACLU of Colorado

cc Principal Mark Carara  
Falcon High School  
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