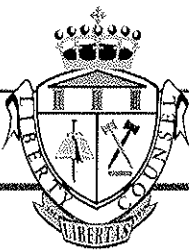


LIBERTY COUNSEL



Post Office Box 540774
Orlando, FL 32854-0774
Telephone: 800•671•1776
Facsimile: 407•875•0770
www.LC.org

1015 Fifteenth St. NW, Suite 1100
Washington, DC 20005
Telephone: 202•289•1776
Facsimile: 202•289•7474

Post Office Box 11108
Lynchburg, VA 24506-1108
Telephone: 434•592•7000
Facsimile: 434•592•7700
liberty@LC.org

Reply to: Virginia

January 23, 2012

Via U.S. Mail and Facsimile (715) 526-6072

Mike Eidahl, President
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

Jim Heinz, Member
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

John Granchay, Vice-President
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

Ken Shingler, Member
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

Jay Jones, Treasurer
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

Julia Van Dyck, Member
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

Al Heins, Member
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

Marcia Yeager, Member
Board of Education
Shawano School District
218 County Road B
Shawano, WI 54166

RE: Unconstitutional Censorship of Private Student Speech

Dear President Eidahl and Board Members:

Liberty Counsel writes on behalf of Brandon Wegner, who has been subjected to unconstitutional viewpoint discrimination by Shawano School District ("District") for expressing his views on the issue of homosexual adoption as part of an editorial column in the school newspaper that included both viewpoints on the issue. I write to demand

that the District immediately apologize for its unconstitutional and irrational censorship of Mr. Wegner's column, and to demand that the District take steps to amend its unconstitutional policies and provide assurances that it will no longer subject students to censorship for expressing their sincerely-held and constitutionally protected religious beliefs.

By way of introduction, Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on religious liberties issues. We have offices in Florida, Virginia, Texas, Washington D.C., and Jerusalem, Israel and hundreds of affiliated attorneys across the nation, including Wisconsin. Liberty Counsel specializes in constitutional litigation, including the First Amendment rights of students on public school campuses. We have had particular success in vindicating the rights of those students who have been subjected to actions such as those of the District.

I understand the following facts to be true. Brandon Wegner is a fifteen-year-old student in the District who serves as a contributor for "The Hawk's Post," the Shawano Community High School Newspaper. The Hawk's Post is a student newspaper and is written as part of "Introduction to News Writing" and "Advanced News Writing." According to the Shawano Community High School Course Description Book, these courses are "a must" for students with an interest in journalism. Additionally, this book states that the goal of these courses is to teach students to write "different types of news stories to contribute to The Hawk's Post," and "keep the school community informed through the publication of the school newspaper." The Hawk's Post recently published an opinion column featuring two students with opposing viewpoints on the subject of homosexual adoption. Mr. Wegner expressed his sincerely-held religious beliefs that children should be raised in a home with a mother and a father, that children raised in that environment have the best opportunity for success, and that homosexual adoption should be prohibited. He supported his opinions with citations to various authorities and sources, including verses from the Bible.

Another student, Maddie Marquardt, the Copy Editor of The Hawk's Post, supported the opposing viewpoint in her column, and argued that homosexual couples should be able to adopt because the foster care system is broken and children need a two-parent home. The opinion column was published in the Green Bay Press Gazette. A homosexual parent in the District was offended that Mr. Wegner believes homosexuality to be a sin, and that those practicing it should not be able to adopt children. He wrote a formal complaint to the District asserting that Mr. Wegner's opinion constituted hate speech and would "cause kids to commit suicide". After receiving the complaint, the District issued a written statement quoted in USA Today apologizing for Brandon's opinion column and stating that "[o]ffensive articles cultivating a negative environment of disrespect are not appropriate or condoned by the Shawano School District." The statement continued, "We sincerely apologize to anyone we may have offended and are taking steps to prevent items of this nature from happening in the

future.” Additionally, Superintendent Todd Carlson stated in an interview that the article “probably did not go along with the policies in the district” and that Mr. Wegner’s portion column was “bullying.”

In addition to the public statements expressing disapproval with the protected speech of Mr. Wegner, certain District officials also made inappropriate statements that are quite disturbing. Principal Zwirschitz told Mr. Wegner that “in a public school, you can’t use the Bible as a source, because we can’t impose our religious beliefs on other people.” He further told Mr. Wegner that “the school newspaper is not the place to be talking about your religious beliefs at your age.” Principal Zwirschitz told Mr. Wegner that since the article was starting controversy, that “now because of this article, you can’t write about religion, politics, and social issues in the school paper.” Principal Zwirschitz also stated to Mr. Wegner that since it would be impermissible for Brandon to “go through the hallways or cafeteria and scream these things about homosexuals; if you did that, you would be suspended for bullying, so I don’t see why you should be able to do this in the school newspaper.” Principal Zirschwitz then required Mr. Wegner and the rest of the newswriting class to physically remove the page containing his article from every copy of the newspaper before allowing it to be distributed to the school (despite the fact that the article had gone out publically in the paper).

Superintendent Carlson also expressed official disapproval of Mr. Wegner’s column in a meeting he held with Mr. Wegner on January 12, 2012. Mr. Carlson told him that the column “went against the bullying policy”, and asked him if he “regretted” writing it. When Mr. Wegner stated that he did not regret writing it, and that he stood behind his beliefs, Superintendent Carlson told him that he “had got to be one of the most ignorant kids to try to argue with him about this topic”, that “we have the power to suspend you if we want to” and that the column had “personally offended me, so I know you offended other people!”¹

District Policy 443.10, “BULLYING,” states that “[b]ullying includes aggressive or hostile behavior that is intentional and involves an imbalance of power between the bully and the bullied.” It continues by stating that “[b]ullying can include . . . notes, phone calls or electronic messages that are offensive, hurtful . . . insulting or degrading.” The Policy states that the District will take appropriate action against those it finds in violation of this Policy. District Policy 447, “STUDENT CONDUCT/DISCIPLINE,” however, states that the District “shall not discriminate in standards and rules of behavior or disciplinary measures” on the basis of “religion” or “creed.” Additionally, District Policy 411, NOTICE OF NONDISCRIMINATION, provides that “[t]he District

¹ Although the District now denies that these statements were made, Liberty Counsel believes they are provable in court, should it become necessary. Further, the statements reported in the press corroborate our recitation in this letter. In any event the Superintendent’s meeting with Brandon without his parents violated District policy. If the District had followed policy, Brandon’s parents would have been present to verify his version of the facts.

shall also provide for the reasonable accommodation of a student's sincerely held religious beliefs with regard to examinations and other academic requirements." Finally, District Policy 440, STUDENT RIGHTS AND RESPONSIBILITIES, states that "[t]eachers and students should promote tolerance for the views and opinions of other, as well as the right of an individual to form and hold different opinions or beliefs." These policies do not provide support for the District's actions here.

The actions taken by the District to censor only the religious speech of students in the District while allowing opposing viewpoints on the same topic is simply unconstitutional. Even in a non-public forum, such as a school newspaper, any government restriction on constitutionally protected speech must be reasonable in light of the purposes served by the forum and *viewpoint neutral*. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Additionally, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Also, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

Here, by suppressing only the religious viewpoint against homosexual adoption in a forum that permitted discussion of the subject, the District engaged in unconstitutional viewpoint discrimination. The District has chosen to censor and reprimand only one speaker, and it has done so only because of the viewpoint expressed and because those holding an opposing viewpoint found the religious perspective offensive. The Constitution simply does not permit District officials to engage in this selective prohibition of only one viewpoint on a subject on which it allows students to express their opinion in a newspaper column. "If there is but one star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in matters of politics, nationalism, religion, or other matters of opinion or force citizens by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Administrator Carlson and other District officials have violated this fundamental constitutional principle by censoring and rejecting only one viewpoint on the issue of homosexual adoption. In effect, the District has said to those students who hold sincere religious beliefs, "your views are not welcome on this subject." The Constitution forbids such a message.

Not only do the statements of Principal Zirschwitz and Superintendent Carlson and the District's actions represent unconstitutional viewpoint discrimination, but the District has endorsed an unconstitutional heckler's veto. It is patently unconstitutional to punish individuals engaging in activities protected by the First Amendment merely

because it might cause others to become angry or restless. *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). "A heckler's veto is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience." *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007). Indeed, "[t]he first amendment knows no heckler's veto." *Lewis v. Smith*, 253 F.3d 1077, 1081-82 (8th Cir. 2001). After the dueling articles in The Hawk's Post were published in the local newspaper, the District received a public comment by a homosexual parent in the District who found it offensive and thought the student's article should be censored. Merely because certain members of the community find something offensive does not permit the government to censor that speech. "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Mr. Wegner was expressing his sincerely-held religious views that homosexual parents should not be able to adopt. He wrote his article as a part of a discussion involving both viewpoints on the subject of homosexual adoption. Nowhere did Mr. Wegner call for homosexuals to be killed or even name a single homosexual individual. He cited and quoted verses from the Bible in support of his argument, but never called for any specific actions based on those verses. No objective person could perceive Mr. Wegner's column as a threat. Therefore, it is simply unconstitutional to censor his viewpoint merely because there were some members of the community who happened to disagree with him. Additionally, Policy 443.10 specifically endorses a heckler's veto by subjecting students in the District to sanction for "bullying" if their words or messages are deemed "offensive." A policy that specifically endorses a heckler's veto cannot stand.

It is simply irrational to vehemently reject and subject Mr. Wegner to shame and public humiliation for his opinion, especially in light of the language of District Policy 440. "Teachers and students should promote tolerance for the views and opinions of others, **as well as for the right of an individual to form and hold different opinions or beliefs.**" Is this policy only applicable to opinions and beliefs with which the District and every member of the community agree? Does "tolerance" only extend to non-religious viewpoints? From Superintendent Carlson's statements and the District's official statement, it appears that tolerance only extends to what the District views as acceptable. While Mr. Carlson asserted that Mr. Wegner's opinion column did not conform to the policies of the District, even if true, it was the District, not Mr. Wegner, that was in violation of its policies. Asserting that the sincerely-held religious belief of a student in the District is a form of bullying because he expressed his views on homosexual adoption is absurd. His opinion column is not directed at any individual in an attempt to intimidate or threaten them. He did not call for homosexuals to be killed. He was merely engaging in a discussion on the subject of homosexual adoption and

expressing his belief that it should not be allowed. The District is blatantly violating the right of Mr. Wegner to hold different beliefs and is in violation of its own Policy.

Not only were the District's actions toward Mr. Wegner unconstitutional, but the very policies that Superintendent Carlson referred to in his interview are unconstitutional. The First Amendment prohibits government policies that are vague. A law is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that [students] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). The District's policies "must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to take." *Id.* at 393. "Precision of regulation" is the touchstone of the First Amendment. *NAACP v. Button*, 371 U.S. 415, 435 (1963). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine insures that "all be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Here, Policy 443.10 provides that "[b]ullying can include . . . notes, phone calls or electronic messages that are offensive, hurtful . . . insulting or degrading." These terms are not defined anywhere in the Policy, and students are left to guess at whether their statements will subject them to sanction for violation of this Policy. By what standard will the District measure "offensive" speech? How is a student to know that his speech is permitted in the District? The very fact that these questions exist suggests that the District's policies are unconstitutional.

The District's failure to express the correct Constitutional position on student speech when it had the opportunity to do so has created a chilling effect on free speech, and has caused Mr. Wegner to be publicly vilified and held up to scorn, both nationwide, and in the student community in Shawano School District. The actions taken by District officials and the District's unconstitutionally vague policies have unnecessarily exposed the District to liability for civil rights violations. Post-hoc justifications attempting to cast the District's viewpoint discrimination and unconstitutional censorship as concern over "turmoil and disruption" in the school cannot stand.

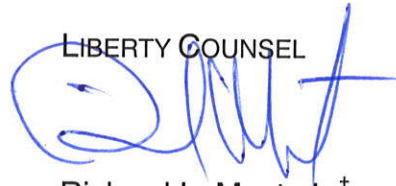
Liberty Counsel stands ready to vindicate the constitutional rights of students in the Shawano School District to express their sincerely-held religious beliefs and to do so without fear of unconstitutional sanction from District officials. The District simply cannot prescribe what shall be permissible thoughts and beliefs in the school. I therefore ask that you respond to this letter **within five (5) days** and provide written assurances that the District will 1) take no punitive action against Brandon Wegner, 2) that the District will issue an apology to Brandon Wegner for its unconstitutional and irrational actions, 3) that it will take immediate steps to amend its unconstitutionally vague policies, 4) that it will no longer suppress the sincerely-held religious beliefs of students in the District and 5), that the District will allow the complete and unaltered

President Eidahl and Members of the Board of Education
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article on homosexual adoption to be distributed at Shawano Community High School. If I do not receive such a response, then I will be forced to conclude that the above-mentioned positions are an accurate reflection of the positions held by the Shawano School District, and will take all appropriate measures to vindicate the rights of my client.

I look forward to your prompt response.

Sincerely,

LIBERTY COUNSEL

Richard L. Mast, Jr.[†]

CC – Via Email

Todd Carlson, Superintendent, Shawano School District
carlsot@ssd.k12.wi.us

Scott Zwirschitz, Principal, Shawano Community High School
zwirscs@ssd.k12.wi.us

[†] Licensed in Virginia.