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Marion A. Bolden, Superintendent
Newark Public Schools
2 Cedar Street
Newark, NJ 07102

Dear Superintendent Bolden:

We understand that East Side High school officials blacked out a picture of a gay student kissing his boyfriend from the 2007 school yearbook, while pictures of heterosexual couples kissing were permitted.

I am writing to inform you that such action violated the New Jersey Law Against Discrimination (LAD) and the constitutional right of the student, Andre Jackson, to equal treatment and free speech. The school should immediately re-issue the yearbook to all students with the original photograph in place.

In passing the LAD, New Jersey sought to "eradicate the cancer of discrimination." Ellison v. Creative Learning Center, 383 N.J.Super. 581 (2006). New Jersey governmental entities, including schools, "are, of course, bound by the LAD." Dale v. Boy Scouts of America, 160 N.J. 562, 593, overturned on other grounds, 530 U.S. 640 (2000). As such, they are prohibited from withholding or denying benefits or privileges "to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person." N.J.S.A. 10:5-12.

By blacking out the gay student's picture from the yearbook, when photos of heterosexual students kissing were permitted, school officials denied Andre Jackson a privilege based upon sexual orientation and thereby violated New Jersey's anti-discrimination statute.

The actions taken by the school in this instance also violated the state and federal constitutions. Courts have already held that disparate treatment of gay or lesbian students violates those students' constitutional right to equal protection and free speech. See, e.g., Fricke v. Lynch, 491 F.Supp. 381 (D.R.I. 1980) (holding that a school official violated the Constitution when he prohibited a student from attending the prom accompanied by a same-sex date); Henkle v. Gregory, 150 F.Supp.2d 1067 (D.Nev. 2001) (finding that it is well-established that the free expression to which a student is constitutionally entitled includes expression involving issues of sexual orientation; school officials are not immune from liability when they censor such expression). The New Jersey Supreme Court in fact recently explained that students, including LGBT students, have as much right to be free from discrimination in their schools as adults have to be free from

discrimination in the workplace. L.W. v. Toms River Regional Schools Bd. of Ed., 189 N.J. 381 (February 21, 2007).

Treating same-sex couples differently from heterosexual couples not only disregards the fundamental guarantees of the Constitution and the laws of the State of New Jersey but also sends a dangerous message to the student body. Denying a same-sex couple the right to express themselves in a similar manner as heterosexual couples sends a message to the student body that same-sex relationships are unacceptable and undeserving of respect, and that lesbian, gay, bisexual or transgender students are undeserving of equal treatment. By making such a statement, it does a disservice to the best interests of the school community.

The message that LGBT students are unacceptable and undeserving serves to justify peer harassment, one of the most serious concerns schools face today. Student harassment impairs the ability of students to learn, and students who are harassed may perform poorly in class, abandon a school activity or even suffer physical injury. The harm is no less when a student is harassed because he or she is LGBT.

Student harassment based upon sexual orientation is not only egregious; it is systemic. In a recent survey, 42% of LGBT students reported physical harassment because of their sexual orientation or gender identity. Indeed, the New Jersey Supreme Court recently made clear that a school that does not stop student harassment based upon sexual identity or gender orientation risks liability. L.W. v. Toms River Regional Schools Bd. of Ed., *supra*. See also Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996). It is therefore imperative that schools discourage harassment and encourage tolerance and respect for LGBT peers.

The acts against this student not only perpetuate destructive and hurtful stereotypes, but they teach students the wrong message about America's crowning principle, free speech. Our courts have time and time again affirmed that the government must not censor, particularly when in the context of a public forum for free speech, such as the paid tributes in the yearbook. Americans believe in the marketplace of ideas and so should the Newark Public Schools.

I urge you to consider this information and take the necessary steps to remedy these ill-conceived and discriminatory actions.

Sincerely,



Ed Barocas
Legal Director

Cc: Dr. Mario Santos, Principal