



November 2, 2011

VIA E-MAIL, FACSIMILE, AND U.S. MAIL

Dr. Robert M. Tomback
Superintendent
Harford County Public Schools
102 South Hickory Avenue
Bel Air, MD 21014-3731

Joseph A. Schmitz
Executive Director of High School Performance
Harford County Public Schools
102 South Hickory Avenue
Bel Air, MD 21014-3731

President Mark M. Wolkow and
Other Members of the Board of Education of Harford County
Harford County Public Schools
102 South Hickory Avenue
Bel Air, MD 21014-3731

Re: Censorship of Scene in Bel Air High School Student Play

Dear Dr. Tomback, Mr. Schmitz, President Wolkow, and Other Members of the Board of Education of Harford County:

We write on behalf of Bel Air High School students in the Bel Air Drama Company (BADC) and the American Civil Liberties Union of Maryland to urge you to reverse the decision to remove a scene from BADC's upcoming performance of *Almost, Maine*, by John Cariani. We understand that Mr. Schmitz recently decided that BADC could not perform a scene from the play, entitled "They Fell." In the removed scene, two male characters reveal their romantic love for each other. It is the only portrayal of same-sex love in the play; it is also the only portion of the play that BADC was required to remove from its production. Mr. Schmitz's decision to censor the play to eliminate representation of same-sex love and gay identity is unlawful and we demand that the decision to remove the scene be reversed.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506 (1969). The decision to prevent the students of BADC from performing "They Fell" violates their First Amendment rights and is, therefore, unlawful. The censorship here would only pass constitutional muster if the removed scene was 1) lewd or vulgar; 2) capable of inciting a disturbance, or 3) if the decision to ban the scene was motivated by a legitimate pedagogical concern.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND FOUNDATION

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 610
TAKOMA PARK, MD 20912
T/240-274-5295

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
SARA N. LOVE
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

C. CHRISTOPHER BROWN
GENERAL COUNSEL

See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker*, 393 U.S. at 685. None of these exceptions to the free speech rights of students applies here.

There is nothing lewd or vulgar in “They Fell.” The scene features two male characters who discover they are in love with each other and humorously share that discovery.¹ There are no references to sexual activity, nor do the characters engage in any sexually suggestive behavior in the scene. By contrast, characters in scenes portraying heterosexual romance kiss and reference sexual conduct. If the motivation for censoring the play were fear of lewdness, there is no reason “They Fell” would be targeted and the rest of the play left intact.

Vulgar speech is not synonymous with unpopular or controversial speech. See *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 159 (D. Mass. 1994) (“A school committee may not ban speech other than that reflecting the dominant or most comforting ethos.”). Nor is mere acknowledgement of the existence of homosexuality lewd. See, e.g., *Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008) (noting that students’ use of the term “gay pride” was not “vulgar, lewd, obscene, plainly offensive, or violent,” but instead was “pure, political, and expresse[d] tolerance, acceptance, fairness, and support for . . . a marginalized group . . .”). Therefore, the lewd or vulgar speech exception to students’ free speech rights does not protect the censorship in this case.

Similarly, there is nothing in “They Fell” that would be likely to incite a disturbance in the school. To justify censorship of student expression, the fear of disruption must be “a real or substantial threat of actual disorder, as opposed to the mere possibility of one.” *Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004). “Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker*, 393 U.S. at 508. As the Supreme Court has made clear, “school officials cannot suppress expressions of feelings with which they do not wish to contend.” *Id.* at 511.

Although school officials may exercise some degree of editorial control over *Almost, Maine*, to the extent that it is a school-sponsored production, any editorial action taken must be “reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273. The only conceivable reason “They Fell” was removed from BADC’s performance, while the rest of the play was left completely intact, is fear of the expression of same-sex love or gay identity. Many of the scenes in *Almost, Maine* feature characters falling in love. The only difference between “They Fell” and these similar scenes is the gender of the characters involved. Fear of students portraying gay characters or a same-sex romance is not a legitimate pedagogical concern; instead, it is simply animus against gay individuals and their relationships. Regardless of individual school

¹ A performance of “They Fell,” by students at William Woods University, can be viewed at <http://www.youtube.com/watch?v=mTg8LSxfXTo>.

administrators' personal feelings about same-sex relationships or gay rights, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds that idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Courts throughout the country have held that homophobia is not a legitimate basis for curtailing student expression. *See, e.g., McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 704 (N.D. Miss. 2010) (deciding that school district had violated student's First Amendment rights by denying her request to bring same-sex date to prom); *Gillman*, 567 F. Supp. 2d at 1379 (holding that school officials violated First Amendment by prohibiting students from expressing support for gay rights); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001) (finding that student's First Amendment rights were violated when school officials prevented him from openly stating that he was gay). *Hazelwood* does not provide a safe harbor for restricting BADC students' free speech rights, as there simply is no legitimate pedagogical reason for targeting "They Fell" for removal from the play.

Furthermore, the decision to eliminate only "They Fell" from the play constitutes impermissible viewpoint discrimination. Although several scenes in the play portray characters falling in love, only the scene featuring characters of the same sex falling in love was removed. Thus, the basis for removing "They Fell" from the performance was not the subject matter of the scene, which is shared with scenes throughout the play, but the gay perspective expressed in that scene. Such viewpoint discrimination, "an egregious form of content discrimination," is "presumed impermissible." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829-30 (1995). The Supreme Court has warned that when a school "targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. Accordingly, several courts have held that *Hazelwood's* "legitimate pedagogical concern" exception does not offer constitutional protection to schools engaging in viewpoint discrimination. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632 (2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir.1991); *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989). Given that the decision to prohibit BADC from performing "They Fell" impermissibly discriminates based on the gay viewpoint expressed in that scene, the decision is in clear violation of the First Amendment.

In addition to running afoul of the First Amendment, the censorship here violates the terms of the play's licensing agreement and thus violates federal copyright law. To produce plays without violating copyright law, schools must obtain and comply with the play's performance rights. *See Bagdadi v. Nazar*, 84 F.3d 1194, 1199 (9th Cir. 1996). The performance rights for *Almost, Maine* are held by Dramatists Play Service, Inc. (DPS). *Licensing Info, Almost, Maine*, <http://www.almostmaine.com> (last visited Oct. 31, 2011). One of the terms and conditions on the application for nonprofessional stage performance rights states: "The play(s) must be presented only as published in the Dramatists Play Service,

Inc. authorized acting edition, *without any changes, additions, alterations or deletions to the text and title(s).*” *Application for Nonprofessional Stage Performance Rights*, DPS, <https://www.dramatists.com/cgi-bin/db/secure/autonpa.asp> (last visited Oct. 31, 2011) (emphasis added). In the “Frequently Asked Questions” section of the DPS website, the restriction on deleting any portion of the play is emphasized:

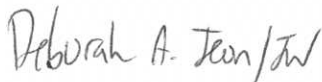
[Q:] What do you mean the play must be presented “without any changes, alterations or deletions”?

[A:] That is the first condition on all of our licenses for a reason. The plays we publish are protected by Federal copyright law, which prohibits anyone from making unauthorized changes to a script or from producing the play without obtaining permission.

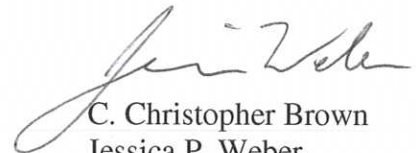
Frequently Asked Questions, DPS, <http://www.dramatists.com/faqsmanager/applications/faqsmanager/index.asp?ItemID=8> (last visited Oct. 31, 2011). If “They Fell” is omitted from BADC’s performance of *Almost, Maine*, therefore, the school will be in violation of the terms of its licensing agreement with DPS and thus in violation of federal copyright law.

For these reasons, we ask that you allow BADC to perform *Almost, Maine* in full, without removal of the “They Fell” scene. The cast has rehearsed the scene and is prepared to perform the complete play. As *Almost, Maine* is set to open on November 10, 2011, we ask that you respond in writing by **noon on Monday, November 7, 2011**, to let us know whether you will reverse the decision to unlawfully prohibit BADC from performing the play in its entirety. We hope that this issue can be resolved amicably without resorting to legal means.

Sincerely,



Deborah A. Jeon
Legal Director
ACLU of Maryland



C. Christopher Brown
Jessica P. Weber
Brown, Goldstein &
Levy, LLP

cc: Patrick P. Spicer, General Counsel (Harford County Public Schools) (via e-mail)
Stephen C. Bounds, Esq. (Maryland Association of Boards of Education) (via e-mail)
Elizabeth M. Kameen, Esq. (Maryland State Department of Education) (via e-mail)