



May 18, 2011

VIA FACSIMILE AND U.S. MAIL

Dr. Oran Roberts
Superintendent
Oroville Union High School District
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Dear Dr. Roberts:

As part of its “Don’t Filter Me” initiative, the American Civil Liberties Union (“ACLU”) has received complaints from students across the country that their school district’s filtering software has been configured to improperly censor websites advocating the fair treatment of lesbian, gay, bisexual, and transgender (“LGBT”) persons or reflecting the viewpoints of LGBT people. We have found that the software provided by filtering companies frequently includes an “anti-LGBT” filter that is designed specifically to block access to LGBT-related materials that would not otherwise be blocked as sexually explicit or pornographic.

We have received complaints that Oroville Union High School District has activated the “Lifestyle” filter on its software provided by M86 Security. The “Lifestyle” filter is designed to discriminate against LGBT viewpoints and does not serve a legitimate pedagogical purpose. Regardless of whether the “Lifestyle” filter was activated intentionally or unintentionally, your continued use of the “Lifestyle” filter violates federal and state law. On behalf of the ACLU and the ACLU of Northern California, we are writing to alert you to this problem and request that the filter for “Lifestyle” be removed immediately.

We are sharing a copy of this letter with the press in order to raise awareness about this issue. In some cases, we have discovered that school districts have been blocking websites without even realizing that the anti-LGBT filter had been activated. We hope that by promptly disabling the “Lifestyle” filter, your school district will set a positive example and prompt other school districts to make sure that “anti-LGBT” filters have not been activated on their own filtering software.

NANCY PEMBERTON, CHAIRPERSON | SUSAN MIZNER, JAHAN SAGAFI, FARAH BRELVI, ALLEN ASCH, VICE CHAIRPERSONS | DICK GROSBOLL, SECRETARY/TREASURER
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ALLEN HOPPER, NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL

I. Factual Background

As reflected in the attached exhibits, the M86 filtering software used by the Oroville Union High School District has been configured to improperly deny students access to websites for, among other things, GSA Network (gsanetwork.org), Campus Pride (www.campuspride.org), Day of Silence (www.dayofsilence.org), the National Youth Advocacy Coalition (www.nyacyouth.org), the Safe Schools Coalition (www.safeschools.org), and the National Gay and Lesbian Task Force (www.nglftf.org). See Exhibits A through G (attached). When a student attempts to access these websites, the computers in your district display a message stating: "Internet access to the requested website has been denied based on your user profile and organization's Internet Usage Policy." The message further states that the websites have been categorized as "Lifestyle."

According to M86, the "Lifestyle" category is designed to block "Lifestyle Sites that contain material relative to an individual's personal life choices. This includes sexual preference, cultural identity, or organization/club affiliations." See M86 Filter Categories, available online at <http://www.m86security.com/resources/database-categories.asp>. The "Lifestyle" filter blocks such websites even if they relate to politics or religion. *Id.* Additional examples of "Lifestyle" websites include the Gay and Lesbian Alliance Against Defamation ("GLAAD"), the L.A. Gay and Lesbian Center, and Advocate magazine. See M86 Filter Categories, available online at <http://www.m86security.com/resources/database-categories.asp>.

Oroville Union High School District does not have a legitimate pedagogical interest for blocking websites classified by M86 as "Lifestyle." The "Lifestyle" filter may be disabled without posing any risk of violating the Children's Internet Protection Act ("CIPA"). Sexually explicit materials covered by CIPA are already filtered through separate categories in M86's software for "Adult Content." See M86 Filter Categories, available online at <http://www.m86security.com/resources/database-categories.asp>. By contrast, the "Lifestyle" filter is designed specifically to target LGBT-related websites that do not contain sexually explicit content. Your continued use of the "Lifestyle" filter violates your students' rights under federal and state law and could give rise to legal liability.

II. Freedom of Speech

Your students have a right under the First Amendment and the California Constitution to access GSA Network, Campus Pride, Day of Silence, and similar materials that are blocked by the "Lifestyle" filter. "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality) (internal quotation marks and citations omitted). Moreover, students' First Amendment rights include the right to engage in speech, expression, and association concerning their sexual orientation and gender identity.

“[S]tudents in public schools have the right to freedom of speech and expression. This is a broad right that would encompass the right of a high school student to express his sexuality.” *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001) (citation omitted); *accord Fricke v. Lynch*, 491 F. Supp. 381, 385 (D.R.I. 1980) (holding that First Amendment protects non-sexual expression of a student’s gay sexual orientation).

California law protects student speech even more strongly. Under Education Code Section 48907, “[p]upils of the public schools shall have the right to exercise freedom of speech . . . whether or not the . . . means of expression are supported financially by the school or by use of school facilities.” Educ. Code § 48907(a). Section 48907 exempts only speech “which is obscene, libelous, or slanderous” or “so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.” Educ. Code § 48907(d).

Your use of the “Lifestyle” filter violates students’ free speech rights by engaging in unconstitutional viewpoint discrimination against LGBT viewpoints. Even though the “Lifestyle” filter blocks students from accessing sites that express acceptance and tolerance towards LGBT individuals, the web filter does not block access to sites that condemn homosexuality and sites that urge LGBT persons to change their sexual orientation or gender identity through so-called “reparative therapy.”¹ For example, the Internet filter for “Lifestyle” does not block access to the American Family Association, the Family Research Council, or People Can Change. *See* M86 Filter List Entry, available at <http://www.m86security.com/support/m86filtercheck.asp>.

This viewpoint discrimination violates your students’ rights under the First Amendment and the California Constitution. When a school “permits the discussion of a topic from [one] perspective, it may not shut out speech that discusses the same topic from a [different] perspective.” *Child Evangelism Fellowship of N.J. Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) (Alito, J.). “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotation marks and citation omitted). Whether or not school administrators agree with the content of the censored websites, secondary school students are mature enough to understand that a school does not endorse or support speech to which it merely permits access on a nondiscriminatory basis. *See Bd. of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 226, 250 (1990) (“[T]he proposition that schools do not endorse everything they fail to censor is not complicated.”).

¹ “Reparative therapy” is a practice denounced as dangerous and harmful to young people by such groups as the American Psychological Association, the American Psychiatric Association, and the American Academy of Pediatrics. *See Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* (2006), available online at <http://apa.org/pi/lgbt/resources/just-the-facts.pdf>.

Apart from the First Amendment and the California Constitution, the censorship of LGBT websites also clearly violates Section 48907 of the California Education Code. Section 48907 mandates that a school may not censor student speech “simply because it presents controversial ideas and opponents of the speech are likely to cause disruption.” *Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1457 (2007). A school “may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance.” *Id.* None of the websites blocked by the M86 filter for “Lifestyle” comes close to satisfying either condition. The district’s censorship of these websites plainly violates students’ speech rights under both federal and state law.

III. The Equal Access Act

In addition to violating students’ free speech rights, the “Lifestyle” filter also violates the Equal Access Act because it denies students who are seeking to form gay-straight alliances (“GSAs”) equal access to school resources that are generally available to other non-curricular clubs. *See* Equal Access Act, 20 U.S.C. § 4071 *et seq.*; *Mergens*, 496 U.S. at 247; *SAGE v. Osseo Area Schools Dist.*, 471 F.3d 908 (8th Cir. 2006); *Gonzalez v. Bd. of Educ.*, 571 F. Supp. 2d 1257 (S.D. Fla. 2008). The Equal Access Act mandates that, when a public secondary school that received federal financial assistance permits even one non-curricular group to use school resources, it must permit all other non-curricular student groups to do so on equal terms. *See Mergens*, 496 U.S. at 237, 247 (requiring equal access to school newspaper, bulletin boards, public address system, and club fair); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003) (school violated Equal Access Act by denying GSA clubs equal access to school bulletin board and intercom).

The Equal Access Act requires that Oroville Union High School District provide GSAs with equal access to all school resources -- including online resources -- that are made available to other non-curricular clubs. *See SAGE*, 471 F.3d at 912 (LGBT-related group must have “*equal* access to the same avenues of communication as other noncurriculum related groups”) (emphasis in original). The websites for GSA Network, Campus Pride, Day of Silence, and similar websites provide students with advice about how to establish a GSA at their school, suggestions for running an effective club, ideas regarding club activities, sample GSA club by-laws, and tips on how to work with teachers and administrators to address bullying and harassment in schools. But because the “Lifestyle” filter blocks access to those websites, students who seek to form GSAs at Oroville Union High School District cannot access those online resources. By contrast, students seeking to establish or develop activities for other non-curricular clubs are able to access their clubs’ websites through the school’s computers. For example, the website for the Key Club is not blocked by the filter because it is categorized as “Community Organizations,” not “Lifestyle.” This unequal treatment violates the Equal Access Act.

IV. Harassment and Discrimination

More generally, your censorship of LGBT-related websites sends a message of exclusion and intolerance to LGBT students and to their peers. Indeed, censoring websites that advocate tolerance for LGBT persons while at the same time permitting websites that condemn homosexuality may be part of a broader atmosphere of intolerance or harassment against LGBT students. A school district's failure to protect students from such discrimination and harassment violates both the federal Constitution and California law. See *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Donovan v. Poway Unified School District*, 167 Cal.App.4th 567 (2008); Cal. Educ. Code § 220 *et seq.*

Allowing students equal access to LGBT-related websites is not just a legal duty; it also makes sense from a safety perspective, particularly in light of the epidemic of LGBT youth suicides and bullying. Prohibiting access to LGBT websites is especially problematic because many students do not have computers or Internet access at home and can access the Internet only at school. As one court put it, "as any concerned parent would understand, this case [holding that members of the Gay-Straight Alliance must be permitted access to the school's resources in the same way as other clubs], may involve the protection of life itself." *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1148 (C.D. Cal. 2000).

V. Additional Considerations

We wish to emphasize that unblocking individual LGBT-related websites upon request is not an appropriate solution to this problem. It is unfair and burdensome to force students to seek special permission every time they wish to access a website that reflects LGBT-related viewpoints when, in contrast, students may freely access other viewpoints without seeking such permission. Moreover, in the particular context of LGBT-related websites, requiring students to make individualized requests is especially harmful and counterproductive because it would force some LGBT students to risk "outing" themselves by requesting that a website be unblocked. There is no reason why the burden should be placed on a vulnerable population to affirmatively request that school administrators unblock websites for LGBT-resources that they already have a legal right to access.

VI. Conclusion

Please contact us by **May 30, 2011** to indicate whether you intend to disable the filter for "Lifestyle" and provide students equal access to the websites for GSA Network, Campus Pride, Day of Silence, and similar LGBT-related resources in accordance with your school district's legal obligations under federal and state law. After being contacted by the ACLU, several other school districts across the country have disabled similar anti-LGBT filters on their filtering software. We urge Oroville Union High School District to do the same.

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If you continue to censor these websites, you could be subject to legal liability and the expense of litigation, as the boards of education and superintendants of two Tennessee school districts that used a similar type of filtering software recently discovered. Ultimately, after being sued by the ACLU, both Tennessee school districts agreed to enter into a settlement agreement enforceable by the federal district court to stop blocking access of online information about lesbian, gay, bisexual, and transgender issues. See *Franks v. Metro. Bd. of Pub. Educ.*, No. 3:09- 00446 (M.D. Tenn. 2009).

Sincerely,



Elizabeth Gill
Staff Attorney
LGBT & AIDS Project

EXHIBIT A

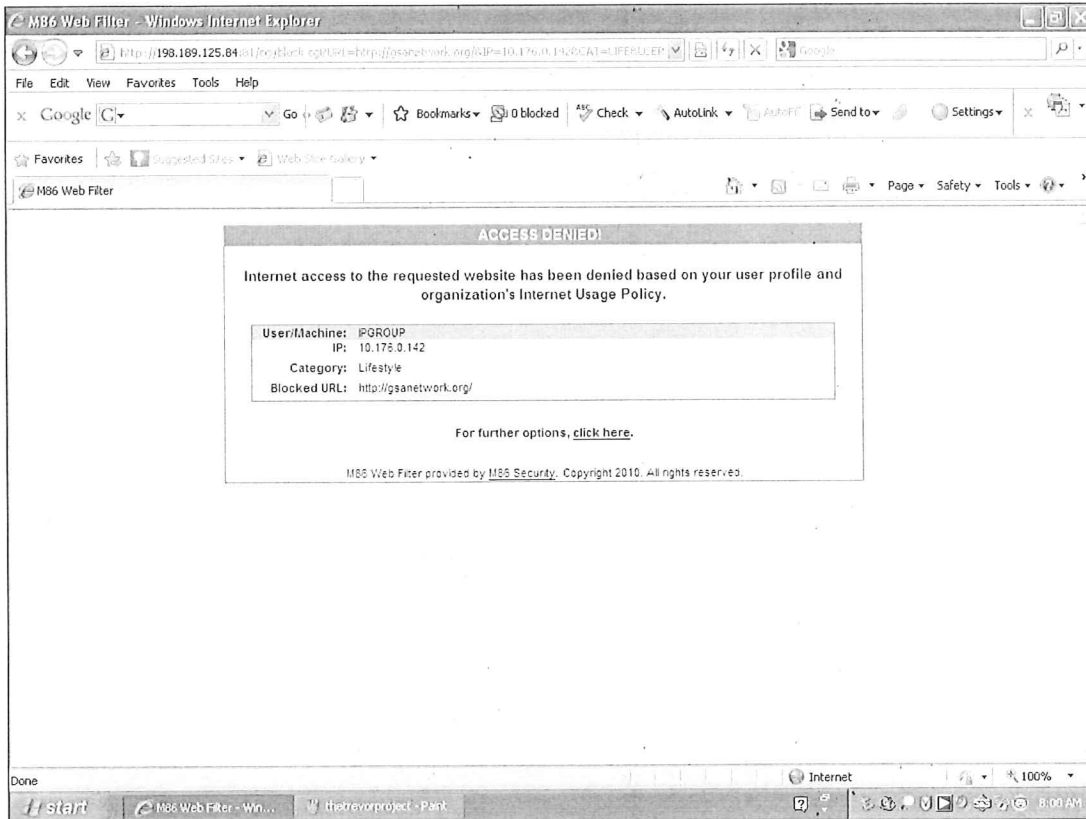


EXHIBIT B

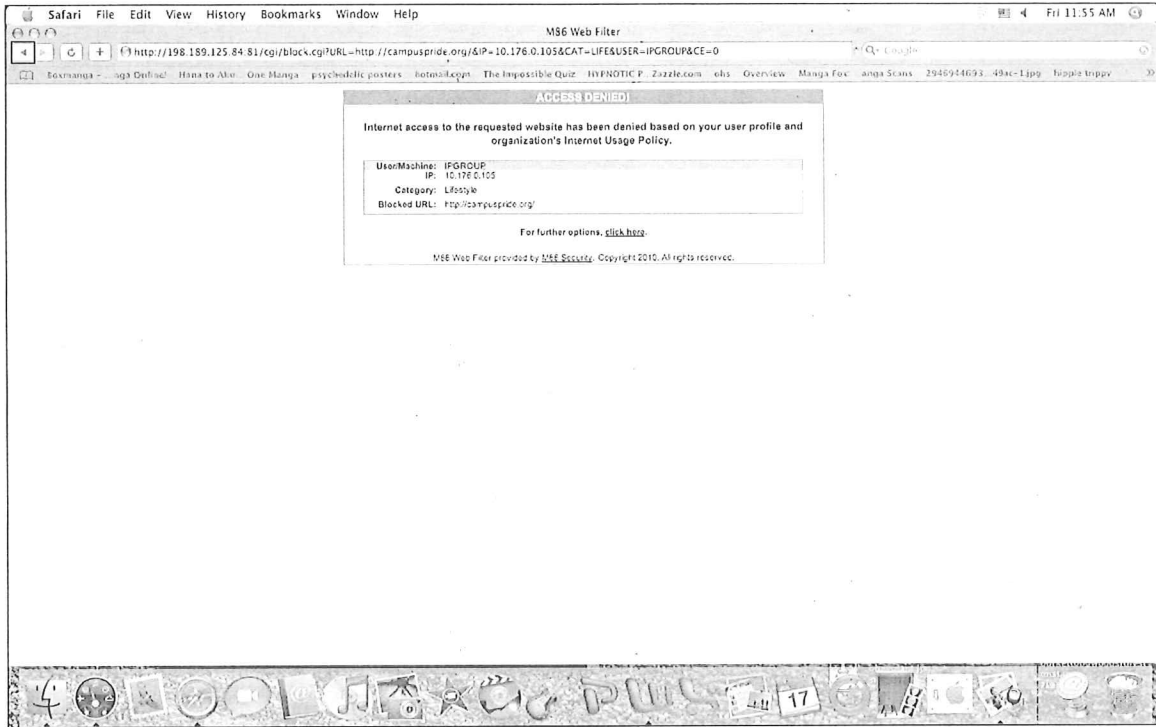


EXHIBIT C

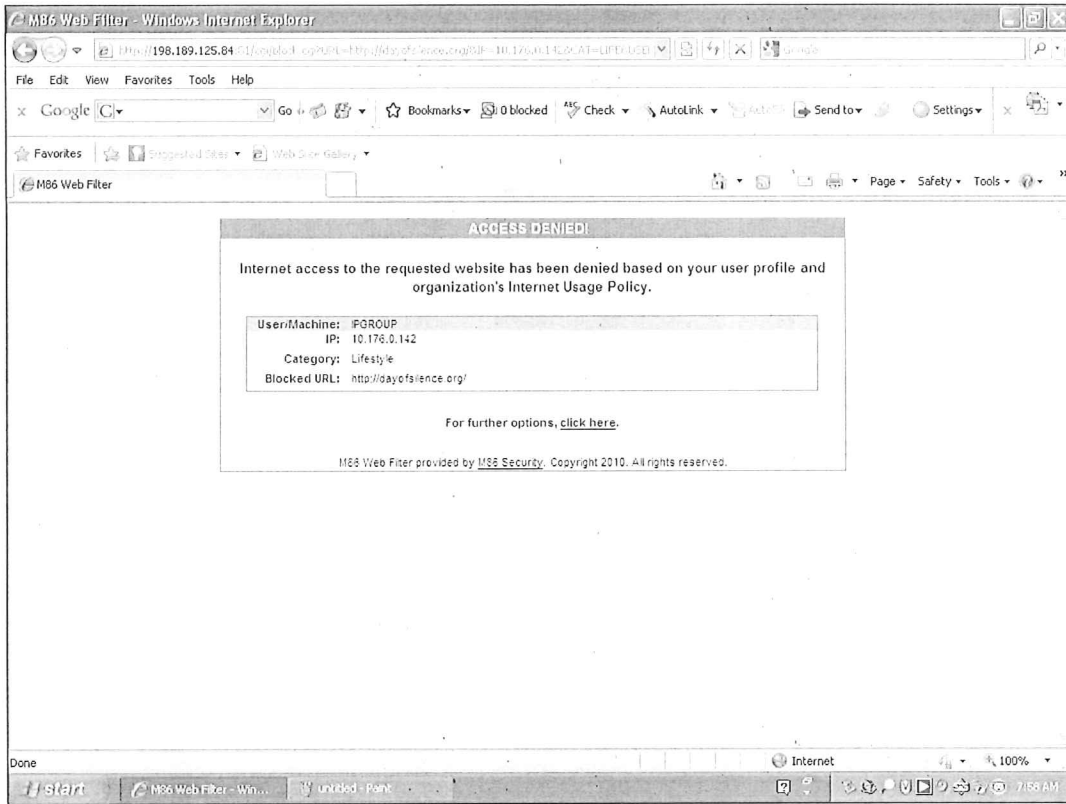


EXHIBIT D

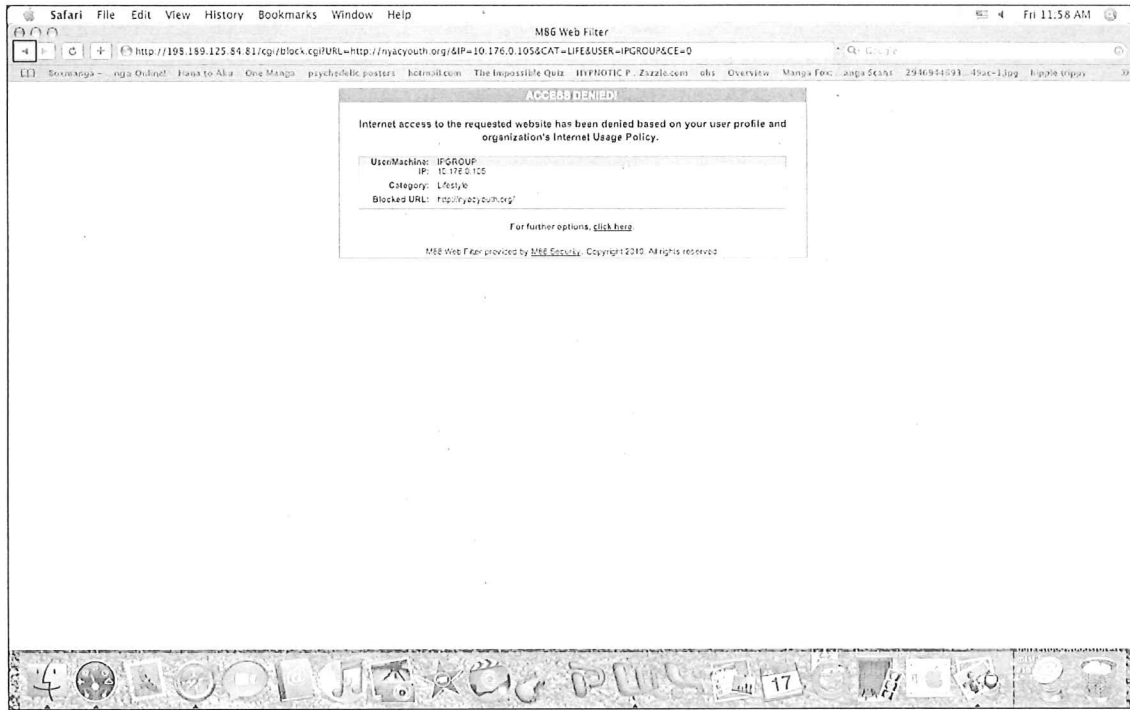


EXHIBIT E

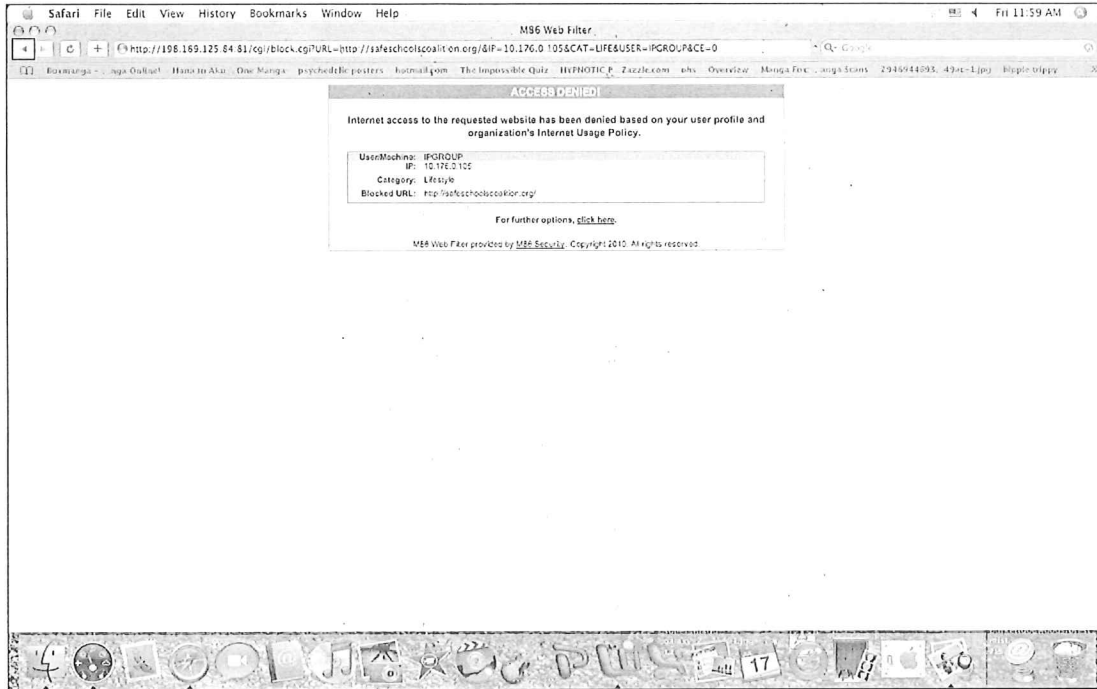


EXHIBIT F

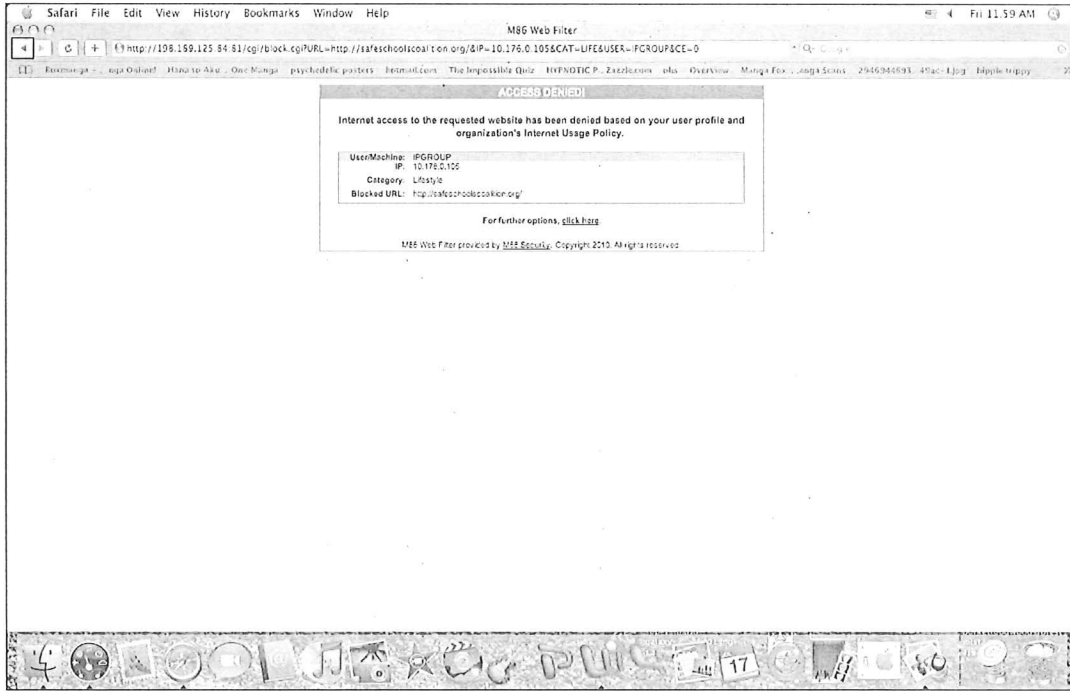


EXHIBIT G

