

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION**

**CONSTANCE MCMILLEN,**

**Plaintiff,**

v.

**ITAWAMBA COUNTY SCHOOL DISTRICT; TERESA MCNEECE, in her official capacity as the Superintendent of Itawamba County School District; TRAE WIYGUL, in his official capacity as Principal of Itawamba Agricultural High School, and RICK MITCHELL, in his official capacity as Assistant Principal of Itawamba Agricultural High School,**

**Defendants.**

**CIVIL ACTION  
NO. 1:10-CV-0061-D-D**

**FIRST AMENDED COMPLAINT**

Plaintiff CONSTANCE MCMILLEN, through her undersigned counsel, sues Defendants ITAWAMBA COUNTY SCHOOL DISTRICT; TERESA MCNEECE, in her official capacity as the Superintendent of Itawamba County School District; TRAE WIYGUL, in his official capacity as Principal of Itawamba Agricultural High School; and RICK MITCHELL, in his official capacity as Assistant Principal of Itawamba Agricultural High School. By this First Amended Complaint, she seeks declaratory relief, compensatory damages, costs and attorneys fees, as well as any other relief to which she may be entitled.

**NATURE OF THE ACTION**

1. This is a free speech case on behalf of Plaintiff Constance McMillen (“Plaintiff” or “Constance”), who is a twelfth-grade student at Itawamba Agricultural

High School (“IAHS”), which is within the Itawamba County School District (the “District”). Constance is eighteen years old. Like many of her classmates, Constance had been looking forward all year to attending IAHS’s prom this spring, which was originally scheduled to take place on April 2, 2010. Also like many of her classmates, Constance desired to bring a date of her choosing to the prom.

2. Constance wanted to attend the school prom with her girlfriend, a sophomore at IAHS, but had been prohibited from doing so because IAHS policy mandates that all prom dates must be of the “opposite sex.” *See* Memorandum to All IAHS Juniors and Seniors from Sandy Prestage and Sundra Sabine re: Prom, dated February 5, 2010, attached hereto as Exhibit A (stating that all prom dates must be of the “opposite sex”). Constance was also informed by Superintendent McNeece that Constance and her girlfriend could be ejected from the school prom if any of the other students complained about their presence there together.

3. Moreover, Constance desired to wear a tuxedo, as opposed to a dress, to the school prom. After consultation with the school board for the District, Superintendent McNeece informed Constance that only male students were allowed to wear tuxedos to the school prom that was originally scheduled for April 2, 2010, and that female students must wear dresses.

4. Prior to bringing this lawsuit, Constance attempted to resolve these issues informally with the District, including meeting with Defendant Mitchell, Defendant Wiygul, and Defendant McNeece and requesting in writing through her counsel permission to bring her girlfriend to the school prom peacefully and to wear a tuxedo instead of a dress. *See* Letter from Kristy Bennett and Christine Sun to Defendants

Wiygul, McNeece, and the District School Board, dated March 2, 2010, attached hereto as Exhibit B. Plaintiff's efforts were unsuccessful.

5. On or about the afternoon of March 10, 2010, the District announced its intent to cancel the school prom in order to avoid Defendants' constitutional obligations to Plaintiff. Such actions were taken for the purpose of suppressing the viewpoint of Constance's constitutionally protected speech.

6. On March 16, 2010, Plaintiff filed a Motion for a Preliminary Injunction, seeking to prevent "Defendants from cancelling or threatening to cancel the [IAHS] prom, originally scheduled for April 2, 2010, and enjoining Defendants from forbidding Plaintiff from bringing a same-sex date to the prom and from wearing a tuxedo to the prom, pending litigation of this case." Pl.'s Mot. for Prelim. Inj., dated March 16, 2010.

7. On March 22, 2010, the Court held a hearing on Plaintiff's Motion for a Preliminary Injunction. At that hearing, Defendant McNeece testified that a "parent-sponsored" prom to be held at the Tupelo Furniture Market on April 2, 2010 would be "open to all students." Counsel for Defendants also stated that when Defendants canceled the IAHS prom, they "took into consideration the fact that they felt comfortable that a social event would be held and that all students would be allowed to go," including Constance.

8. On March 30, 2010, after she had attempted to purchase tickets to this "parent-sponsored" prom at the Tupelo Furniture Market, Constance learned that this scheduled prom had been canceled. Later that same day, Defendants invited Constance to "the prom for juniors and seniors of Itawamba Agricultural High School," which was to be held on April 2, 2010, at the Fulton Country Club.

9. Unbeknownst to Constance, the Fulton Country Club “prom” was a sham, attended by her and only a handful of other IAHS students. An entirely separate prom was held on April 2, 2010, at the Evergreen Community Center (the “Evergreen Prom”). Constance was not invited to the Evergreen Prom, although, on information and belief, nearly every other junior and senior at the school had been invited to attend.

10. On information and belief, there was no basis for Defendants’ claim at the preliminary injunction hearing that a “parent-sponsored” prom was open to all students, including Constance. Further, on information and belief, Defendants were involved in the planning and/or cancellation of the Tupelo Furniture Market prom, the planning of the sham “prom” at the Fulton Country Club, and coordinating the Evergreen Prom.

11. Defendants’ prohibitions and actions against Constance constitute impermissible viewpoint discrimination under the First Amendment to the United States Constitution.

### **JURISDICTION AND VENUE**

12. Plaintiff brings this action pursuant to 42 U.S.C. §1983 for violations of the freedom of expression under the First Amendment to the United States Constitution.

13. The Court has subject-matter jurisdiction over this matter pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1343(a)(3) (civil rights).

14. The Court has jurisdiction to declare the rights of the parties and to award any further necessary and proper relief pursuant to 28 U.S.C. §§ 2201 and 2202. Rule 65 of the Federal Rules of Civil Procedure authorizes injunctive relief. The Court has authority to award costs and attorney’s fees under 42 U.S.C. § 1988.

15. Venue is proper in this judicial district and division pursuant to 28 U.S.C. § 1391(b) because the events or omissions giving rise to Plaintiff’s claims occurred in

Fulton, Mississippi, which is within the Northern District of Mississippi, Eastern Division.

### **PARTIES**

16. Plaintiff Constance McMillen is, and was at all relevant times to the First Amended Complaint, a twelfth-grade student at Itawamba Agricultural High School. She is eighteen years old. As a student at IAHS, Constance remains subject to the authority and directives of the Defendants.

17. Defendant Itawamba County School District is a school district operating in Mississippi under color of state law and is located in Itawamba County, Mississippi. It may be served with process through its superintendent, Teresa McNeece, at Itawamba County School District, 605 South Cummings St., Fulton, MS 38843.

18. Defendant Teresa McNeece is, and was at all times relevant to the First Amended Complaint, the Superintendent of Itawamba County School District. Pursuant to Mississippi Code of 1972, § 37-9-69, she has the responsibility of, *inter alia*, enforcing school rules, regulations, and policies. McNeece is sued in her official capacity. She may be served in her official capacity with process at Itawamba County School District, 605 South Cummings St., Fulton, MS 38843.

19. Defendant Trae Wiygul is, and was at all times relevant to the First Amended Complaint, the Principal of Itawamba Agricultural High School. Pursuant to Mississippi Code of 1972, § 37-9-69, he has the responsibility of, *inter alia*, enforcing school rules, regulations, and policies. Wiygul is sued in his official capacity. He may be served in his official capacity with process at Itawamba County School District, 605 South Cummings St., Fulton, MS 38843.

20. Defendant Rick Mitchell is, and was at all times relevant to the First Amended Complaint, the Assistant Principal of Itawamba Agricultural High School. Pursuant to Mississippi Code of 1972, § 37-9.-69, he has the responsibility of, *inter alia*, enforcing school rules, regulations, and policies. Mitchell is sued in his official capacity. He may be served in his official capacity with process at Itawamba County School District, 605 South Cummings St., Fulton, MS 38843.

### **FACTS GIVING RISE TO THIS ACTION**

21. Constance McMillen is eighteen years old and a senior at IAHS.
22. Constance is a lesbian.
23. Constance's sexual orientation is known by many of the students at IAHS as well as the teachers and administrators at IAHS.
24. Like many of her classmates, and high school students all over the country, Constance had been looking forward to attending the IAHS prom all year.
25. The IAHS prom had been originally scheduled to take place on April 2, 2010.
26. Constance desired to bring her girlfriend, who is a sophomore at IAHS, as her date to the school prom.
27. Constance's girlfriend desired to attend the school prom with Constance as her date.
28. But for Defendants' unlawful policy prohibiting same-sex dates, Constance's girlfriend would have been qualified to be her date to the school prom, and vice-versa.
29. Constance was prohibited from bringing her girlfriend to the school prom because her girlfriend is not of the opposite sex. *See Exhibit A.*

30. IAHS has a dress code.

31. The dress code does not contain gender-based requirements for students.

*See IAHS Dress Code, printed on March 9, 2010 from*

*www.itawambaahs.com/dresscode.htm, attached hereto as Exhibit C.*

32. Consistent with the school's dress code, Constance wears pants to school, as do many other female students.

33. Constance had desired to wear a tuxedo to the prom.

34. Constance was informed by school officials, including Assistant Principal Mitchell and Superintendent McNeece, that female students would be required to wear dresses to the school prom and only male students would be allowed to wear tuxedos.

35. Constance was prohibited from wearing a tuxedo to the IAHS prom.

36. Constance had desired to bring her girlfriend to the school prom in order to express peacefully that she is a lesbian and her political and social viewpoint that it is appropriate for gay and lesbian students to bring same-sex dates to the prom.

37. The communicative content of her act of bringing her girlfriend as her date would have been understood by other students, as well as teachers and administrators, at the IAHS prom.

38. Constance had desired to wear a tuxedo in order to express peacefully her social and political viewpoint that it is appropriate for female students to wear tuxedos despite traditional notions of how females should dress.

39. The communicative content of her act of wearing a tuxedo would have been understood by other students, as well as teachers and administrators, at the IAHS prom.

40. Constance had no desire to attend the school prom without a change to Defendants' unlawful policies prohibiting students from bringing a same-sex date to the prom and prohibiting female students from wearing a tuxedo to the prom.

41. On March 22, 2010, the Court held an evidentiary hearing on Plaintiff's Motion for a Preliminary Injunction, which sought to enjoin Defendants from canceling or threatening to cancel the IAHS prom. At the hearing, Defendants contended that they withdrew sponsorship of the IAHS prom for reasons such as concerns about teacher time spent in organizing the prom and district liability over potential student drinking and drug use. *See* Hearing Transcript ("Tr."), at 53, attached hereto as Exhibit D.

42. Defendant McNeece testified at the hearing that parents of IAHS students had organized a "private" prom to be held at the Tupelo Furniture Mart. Tr. (Ex. D) at 41.

43. In response to Plaintiff's testimony that she had not been invited to the prom at the Tupelo Furniture Mart, Defendant McNeece testified that there were "no invitations per se being sent out" to any students, but that "it would be open to all students" and that attendance at the "private" prom was "available to all students," including Constance." Tr. (Ex. D) at 41.

44. Defendants' counsel represented at the hearing that Defendants' decision to cancel the IAHS prom was based, in part, on the fact that a supposedly inclusive "private" parent-sponsored prom had been planned:

[Defendants] also took into consideration the fact that they felt very comfortable that a social event would be held and that all students would be allowed to go. Ms. McMillen had already purchased a ticket to the prom that was being hosted and was actually going to be allowed to attend that. There was no question about her attendance to that prom.



We saw no evidence or no belief to feel that she would not also be allowed to attend the other prom, the other social event.

Tr. (Ex. D) at 107.

45. On March 23, 2010, the Court issued an opinion and order denying Constance's preliminary injunction motion. *McMillen v. Itawamba County School Dist., et al.*, No. 10-CV-00061, slip op. at 1 (N.D. Miss. Mar. 23, 2010) (hereinafter, the "Opinion").

46. The Court found that Plaintiff had met her burden of establishing three out of the four elements required for a preliminary injunction, including that Defendants' cancellation of the IAHS prom infringed her First Amendment rights, thereby causing her "irreparable injury." *See* Opinion at 9.

47. As to the fourth factor — whether issuing the injunction would "not disserve the public interest" — the Court found that Constance had not met her burden of proof. *See* Opinion at 10-11. The Court noted:

Defendants testified that a parent sponsored prom which is open to *all* IAHS students has been planned and is scheduled for April 2, 2010. Though the details of the "private" prom are unknown to the Court, Defendants have made representations, upon which this Court relies, that *all* IAHS students, including the Plaintiff, are welcome and encouraged to attend.

*Id.* at 11 (emphasis in original).

48. Given the ongoing planning of the parent-sponsored prom, the Court found "that requiring Defendants to step-back into a sponsorship role at this late date would only confuse and confound the community on the issue." Opinion at 11.

49. In the days following the Court's opinion, Constance attempted to obtain information about the "parent-sponsored" prom scheduled to take place at the Tupelo

Furniture Market and whether she had to purchase tickets. Constance also attempted to determine whether she would be allowed to bring a same-sex date to the prom and wear a tuxedo.

50. Because Constance's efforts were unsuccessful, her counsel sent a letter to Defendants noting that, "[b]ased on the limited information regarding the "private" prom provided to plaintiff, it is not clear — despite your representations to the Court — that Ms. McMillen will be welcome to this event with her same-sex date and wearing a tuxedo." *See* Letter from Christine Sun to Michele Floyd and Benjamin E. Griffith, dated March 26, 2010, attached hereto as Exhibit E.

51. In that letter, Constance's counsel requested that Defendants "immediately provide us with all the information that you have regarding this event, including what rules will be enforced, and inform us if your representations to the Court were in fact accurate," by no later than March 31, 2010, two days before the Tupelo prom. *Id.*

52. On March 29, 2010, Constance was told for the first time by a classmate that the last day to purchase tickets to the Tupelo parent-sponsored prom purportedly had been the prior Saturday, March 27, 2010, and that the tickets had been available at a local clothing store. Constance also was told that the Tupelo parent-sponsored prom would not allow same-sex dates or "cross-dressing."

53. That same day, after school, Constance went to the local clothing store where tickets had been available. She spoke to the store owner about buying tickets. The store owner, who was not involved in organizing the prom, said that the last day to buy tickets had been the past Saturday, but that she would call the prom organizers to inquire whether Constance could still get tickets given that she had not been aware of the

deadline. The store owner took Constance's telephone number and represented that one of the prom organizers would call her.

54. On information and belief, that same evening, the parent organizers of the Tupelo Furniture Market prom convened a meeting that was attended by Superintendent McNeece and counsel for Defendants, Michele Floyd. At the meeting, the parents discussed the fact that they did not want to allow Constance to attend the Tupelo prom. Defendant McNeece apparently claimed that if the parents did not allow Constance to attend the Tupelo prom, the school district would lose millions of dollars in federal funding, and that if they were determined to exclude Constance, the parents would need to cancel the Tupelo prom. The parents decided instead that they would hold two proms, one for Constance and another for her classmates.

55. The next morning, on March 30, 2010, Constance received multiple text messages from classmates that had been sent the night before accusing her of causing the Tupelo prom to be canceled. One such text message said, in words or substance, "Heard you got the other prom canceled. Good job." Other texts said, in words or substance, "You don't even deserve to go to our school," and "Are you going to ruin graduation too?" Later that day, another classmate sent a text message that said, in words or substance, "I don't know why you come to this school because no one likes your gay ass anyways."

56. Later in the afternoon of March 30, 2010, Defendants wrote to Constance's counsel, claiming that "the prom for the juniors and seniors of Itawamba Agricultural High School will be Friday night from 7:30 p.m. until midnight at the Fulton

Country Club in Fulton, MS.” *See* Letter from Michele Floyd to Christine P. Sun, dated March 30, 2010, attached hereto as Exhibit F.

57. In the following days, Constance heard rumors that at least one other prom was being organized for the same night as the Fulton Country Club prom. She unsuccessfully attempted to determine if she was invited to that other prom.

58. On the evening of Friday, April 2, 2010, Constance attended the Fulton Country Club “prom” with her same-sex date and dressed in a tuxedo.

59. Constance and her date arrived at the Fulton Country Club at approximately 8:30 p.m. When they arrived, they faced a virtually empty room. Only seven other students were in attendance. Defendant Wiygul and several IAHS faculty members were also in attendance as chaperones. When Constance returned home later that evening, she broke down in tears.

60. By the next Monday, April 5, 2010, it was evident that the Fulton Country Club “prom” was not, in fact, “the prom for the juniors and seniors of Itawamba Agricultural High School,” as had been represented by Defendants. The vast majority of IAHS juniors and seniors had instead been invited to and attended a prom held in Evergreen, Mississippi. Student photos of the Evergreen Prom, the location of which was concealed from Constance, have circulated on the Internet. *See* sample photos attached hereto as Exhibit G. In the following days, as the news about the Evergreen Prom surfaced, one classmate asserted in an internet posting that other students had organized the Evergreen Prom specifically to exclude Constance, stating: “We wanted a drama-free gathering to celebrate 3 great years and 1 lousy one together, and we wanted to lay low. We also wanted to do it without the main cause of the lousy.” The student explained that

her classmates were unapologetic about excluding Constance, asserting: “So we did, and now we’re getting flack because poor Connie’s ego got a bit of bruising. She’s playing the lesbian card to prove she ALWAYS gets what she wants. This time, we didn’t just let her.”

61. On information and belief, Defendants had no basis for their representation at the preliminary injunction hearing that Constance would be welcome to attend a “parent-sponsored” prom. Moreover, on information and belief, Defendants were involved in the planning and/or the cancellation of the “parent-sponsored” prom at the Tupelo Furniture Market, the reinstatement and planning of the sham “prom” at the Fulton Country Club, and the planning of the Evergreen Prom.

62. As a result of Defendants’ unlawful actions described above, Constance has suffered mental and emotional hardship, which has required medical attention. Constance also has been publicly humiliated and disparaged not only directly by Defendants, but also by students, parents and teachers in her community as a consequence of Defendants’ unlawful actions. Indeed, the stress and trauma of these events have required Constance to take medical leave from her classes at IAHS and has caused her to seek transfer out of the Itawamba County School District. *See* Letter from Christine P. Sun to Michele Floyd and Benjamin E. Griffith, dated April 15, 2010, attached hereto as Exhibit H.

63. At all times, Defendants have acted under color of state law.

**COUNT I: FREEDOM OF EXPRESSION**

Violation of First Amendment,  
as applied to the states under the Fourteenth Amendment  
(Against All Defendants, 42 U.S.C. §1983)

64. Plaintiff realleges and incorporates by reference all of the preceding paragraphs in this First Amended Complaint.

65. Defendant Itawamba County School District and Defendants McNeece, Wiygul, and Mitchell, in their official capacities, are liable pursuant to 42 U.S.C. § 1983 and the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, for promulgating, implementing, ratifying, enforcing, and/or delegating final decision-making over rules and acts that deprive, and continue to deprive, Constance of her right to freedom of expression.

66. In depriving Constance of this right, Defendants acted under color of state law. This deprivation under color of state law is actionable under and may be redressed by 42 U.S.C. §1983.

#### **PRAYER FOR RELIEF**

WHEREFORE Plaintiff respectfully prays for the following relief:

- (i) A declaration that Defendants have violated Constance's constitutional right to freedom of expression;
- (ii) An order enjoining Defendants and their officers, agents, affiliates, subsidiaries, servants, employees and all other persons or entities in active conceit or privity or participation with them, from taking retaliatory action against Constance for bringing and proceeding with this lawsuit;
- (iii) An entry of judgment for Constance against Defendant Itawamba County School District for compensatory damages in an amount to be determined at trial to compensate Constance for the public humiliation and disparagement borne by Defendants' actions, as well as the mental health,

medical, and educational repercussions that she has incurred;

- (iv) Reasonable attorneys' fees and costs; and
- (v) Any other relief to which Constance may be entitled.

DATED: April 21, 2010

Respectfully submitted,

/s/ Kristy Bennett

Kristy L. Bennett (MS Bar # 99525)  
American Civil Liberties Union of Mississippi  
P.O. Box 2242  
Jackson, MS 39225  
(601) 354-3408  
Fax: (601) 355-6465  
kbennett@aclu-ms.org

Christine P. Sun  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2500  
Fax: (212) 549-2650  
csun@aclu.org

Norman C. Simon  
Joshua Glick  
Jason Moff  
Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, NY 10036  
(212) 715-9100  
(Fax): (212) 715.8000  
nsimon@kramerlevin.com  
jglick@kramerlevin.com  
jmoff@kramerlevin.com

Alysson L. Mills (MS Bar # 102861)  
Fishman Haygood Phelps  
Walmsley Willis & Swanson, L.L.P.  
201 St. Charles Avenue, Suite 4600  
New Orleans, Louisiana 70170

Telephone: 504-586-5252  
Facsimile: 504-586-5250  
amills@fishmanhaygood.com

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I certify that on April 21, 2010, I filed the foregoing First Amended Complaint and accompanying exhibits with the Clerk of Court for the Northern District of Mississippi via the Court's CM/ECF system, which will send notice of filing to all CM/ECF participants.

Benjamin Griffith  
Daniel Griffith  
Griffith & Griffith  
123 South Court Street  
P.O. Drawer 1680  
Cleveland, MS 38732  
bgriff@griffithlaw.net

Michele H. Floyd  
Itawamba County School District  
605 South Cummings St.  
Fulton, MS 38843  
Telephone: 662-862-2159  
Fax: 662-862-4713  
[mhfloyd@itawamba.k12.ms.us](mailto:mhfloyd@itawamba.k12.ms.us)

**COUNSEL FOR DEFENDANTS**

THIS the 21<sup>st</sup> day of April, 2010.

/s/Kristy L. Bennett  
KRISTY L. BENNETT