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May 18, 2011

Kimberly Tolhurst, Esq.
Acting General Counsel
U.S. Commission on Civil Rights
624 Ninth Street, N.W., Sixth Floor
Washington, D.C. 20425

Re: Peer-to-Peer Violence and Bullying

Dear Ms. Tolhurst:

I am a longtime member of both the education faculty and the law faculty at UCLA, where I specialize primarily in Education Law and Policy. I am the author of the West casebook *Education and the Law* (2d Ed. 2009; 3d Ed. Forthcoming 2012), and have served as Director of Teacher Education at UCLA, Special Counsel for the California Department of Education, and the Consent Decree Monitor for the U.S. District Court, Northern District of California, in the *SFNAACP v. SFUSD* school desegregation case.

My scholarship includes an extensive focus on the First Amendment (over 200 pages in my casebook alone) and the Fourteenth Amendment (over 100 pages in my casebook and several major law review articles, including pieces published by Cornell and Stanford), and my work seeks to both clarify the challenges faced by marginalized and disenfranchised groups and to identify prospective remedies for these groups under the law and as a matter of policy.

In addition, I have recently published a number of major works focusing on LGBT issues in the K-12 schools, including but not limited to a recent book with the University of Minnesota Press (focusing on the foundational intersection of the First and Fourteenth Amendments), a peer-reviewed legislative and policy brief co-authored by former California State Senator Sheila Kuehl and jointly published by the National Education Policy Center and the Williams Institute, and related articles in the Columbia Teachers College Record and the NYU Journal of Legislation & Public Policy (the latter for a special symposium edition honoring the legislative legacy of Senator Edward M. Kennedy). I have attached a copy of my official UCLA faculty Web site.

I am forwarding this statement to you regarding a prospective federal response to peer-to-peer violence and bullying.[1] Schedule permitting, I may be able to submit additional analysis and information on these matters next week.

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The following key points can be discerned from my research and practice within both the legal and the education communities over the past three decades:

1. Bullying both exemplifies and contributes to peer-to-peer violence.

2. The First Amendment does not preclude legislation seeking to promote respectful interaction and prevent violence between and among all members of K-12 school communities.

3. Prominent recent decisions by Seventh Circuit Judge Richard Posner not only found a "school climate" policy constitutional, but also reaffirmed the principle that a key component of K-12 First Amendment jurisprudence is its focus on preventing the type of escalating violence often set in motion by bullying, harassment, and intimidation.

4. In recent K-12 cases involving competing rights and contested values under the First Amendment, courts are increasingly rejecting absolutist positions and seeking to carve out a reasonable middle ground.

• BULLYING BOTH EXEMPLIFIES AND CONTRIBUTES TO PEER-TO-PEER VIOLENCE.

Bullying is generally defined as behavior ranging from name-calling, threats, and social exclusion to serious criminal acts of libel and repeated physical attacks. Pervasive bullying is perhaps best seen as a type of peer harassment and mistreatment, and it continues to negatively affect persons of every race, ethnicity, gender, and sexual orientation. Indeed, there is evidence that bullying is more prevalent and more of a problem today than it has been in the past.[2]

Bullying remains a significant issue for lesbian, gay, bisexual, and transgender persons (LGBTs). Yet the relevant research clearly shows that bullying is a problem for everyone, gay and straight alike. "Any child who does not fit narrow definitions of masculine or feminine behavior—or is not part of

[1] The findings and conclusions in this document are mine alone and do not reflect the positions of the UCLA School of Law, the UCLA Graduate School of Education & Information Studies, or the University of California system-wide.

[2] *See* STUART BIEGEL & SHEILA JAMES KUEHL, NAT'L EDUC. POLICY CTR. & WILLIAMS INST., SAFE AT SCHOOL: ADDRESSING THE SCHOOL ENVIRONMENT AND LGBT SAFETY THROUGH POLICY AND LEGISLATION 43 (2010), http://www.law.ucla.edu/williamsinstitute/pdf/LGBT-FINAL.pdf.

the dominant race, religion, culture, or appears different from the majority—is an easy target. Approximately 85 percent of children are affected by it: as perpetrators, recipients, or witnesses."[3]

One of the most volatile and relatively unexplored aspects of the bullying problem in K-12 schools is the potential for escalating violence. A single bullying event is often not an end point but the beginning of a series of events that may have truly tragic consequences for many people.[4] Moreover, the aspect of bullying that very few appear willing to confront is that victims of bullying in the present era may, as a result, turn on their tormentors and on many others around them, striking back in the most violent of ways. There is evidence, for example, not only that perpetrators of some of the worst school violence at the K-12 level over the past ten to fifteen years were victims of bullying themselves, but also that they were targeted with anti-gay epithets meant to degrade and alienate them by suggesting a failure to meet gender- and sexuality-based expectations of masculinity.[5]

• THE FIRST AMENDMENT DOES NOT PRECLUDE LEGISLATION SEEKING TO PROMOTE RESPECTFUL INTERACTION AND PREVENT VIOLENCE BETWEEN AND AMONG ALL MEMBERS OF K-12 SCHOOL COMMUNITIES.

School-climate legislation seeking to promote respectful interaction can be designed in a manner that comports with the First Amendment. Education officials have broad power to restrict expressive activity that is reasonably likely to lead to material and substantial disruption or to interference with the rights of others.

The basic principles linking student freedom of expression to campus safety in the K-12 public schools are set forth in *Tinker,* where the U.S. Supreme Court held that First Amendment rights are explicitly made available to public school students, subject to limitations that arise out of the "special characteristics of the school environment."[6]

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[3] Findings of social worker and researcher Gloria Moskowitz-Sweet, reported in STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION & GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS 116 (2010).

[4] The bullying of middle school student Lawrence King in Oxnard, California over time, for example, culminated in his tragic murder and also had a devastating impact on others, including (but not limited to) the virtual destruction of the life of the fourteen-year-old who shot him and the potentially career-ending consequences for the English teacher who was supervising the class when the shooting happened. The bullying of eleven- year-olds Carl Walker-Hoover, in Springfield, Massachusetts, and Jaheem Herrera, in DeKalb, Georgia, led not only to their highly publicized suicides but also to still-undetermined repercussions in the lives of those who came in contact with them.

[5] It should be noted that none of these students identified as LGBT, and no evidence indicated that they were anything other than straight. But they were victimized in this context nonetheless, as many are in K-12 schools across the country.

In Ponce v. Socorro Indep. Sch. Dist.,[7] which built on the jurisprudence of *Tinker* and its progeny in this context, the Fifth Circuit determined that in the aftermath of the tragic events at Columbine in 1999 and in light of the U.S. Supreme Court's 2007 decision in Morse v. Frederick,[8] "the heightened vulnerability of students arising from the lack of parental protection and the close proximity of students with one another make schools places of 'special danger' to the physical safety of the student. And it is this particular threat that functions as the basis for restricting the First Amendment in schools: school officials must have greater authority to intervene before speech leads to violence."[9]

It must be noted that bullying, as defined and discussed above, is a prototypical example of speech that can lead to such violence.[10]

• PROMINENT RECENT DECISIONS BY SEVENTH CIRCUIT JUDGE RICHARD POSNER NOT ONLY FOUND A "SCHOOL CLIMATE" POLICY CONSTITUTIONAL, BUT ALSO REAFFIRMED THE PRINCIPLE THAT A KEY COMPONENT OF K-12 FIRST AMENDMENT JURISPRUDENCE IS ITS FOCUS ON PREVENTING THE TYPE OF ESACLATING VIOLENCE OFTEN SET IN MOTION BY BULLYING, HARASSMENT, AND INTIMIDATION.

In litigation filed by high school students Heidi Zamecnik and Alexander Nuxoll against the Indian Prairie School District in suburban Chicago, Illinois, the federal courts considered both the constitutionality of a "derogatory comments" policy and the banning of a T-shirt that read "be happy, not gay." A Seventh Circuit panel, headed by Judge Richard Posner, issued two opinions on these matters, one in 2008 and the other in 2011. The opinions were consistent with each other, and while the court determined that the banning of the T-shirt under the circumstances violated the First Amendment, it found the "derogatory comments" policy itself to be both appropriate and constitutional. In addition, the court affirmed the right of school officials to draw reasonable boundaries in this area, and it rejected the notion that First Amendment absolutist arguments should be controlling in a K-12 education setting.

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[6] Tinker v. Des Moines Indep. Commun. Sch. Dist., 393 U.S. 503 (1969).

[7] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007).

[8] Morse v. Frederick, 551 U.S. 393 (2007).

[9] *Ponce,* 508 F.3d at 770.

[10] For a detailed overview of K-12 First Amendment jurisprudence since 1969, and an analysis of recent decisions and trends, see generally STUART BIEGEL, EDUCATION AND THE LAW 127-186, 261-278 (2d ed. 2009).

In the 2008 opinion, Nuxoll v. Indian Prairie Sch. Dist. #204 Bd. of Educ., the panel focused extensively on the constitutionality of the policy that sought to improve school climate by prohibiting "derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability."[11]

It is important to underscore just how strongly and emphatically the *Nuxoll* court upheld the constitutionality of the policy. Judge Posner emphasized that the policy only prohibited *derogatory comments* "on unalterable or otherwise deeply rooted personal characteristics about which most people, including--perhaps especially including--adolescent schoolchildren, are highly sensitive." He acknowledged that "[p]eople are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity -- none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being."[12] The Court found the policy to be viable, appropriate, and consistent with principles set forth in prior Supreme Court opinions. It suggested that the school is on strong ground "in arguing that the rule strikes a reasonable balance between the competing interests--free speech and ordered learning--at stake in the case." Construing *Morse v. Frederick* as potentially enabling educators to restrict speech that may have negative "psychological effects," Posner wrote that "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other [similar] symptoms . . . of substantial disruption[,] the school can forbid the speech":

> The rule challenged by the plaintiff appears to satisfy this test. It seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way. . . . The list of protected characteristics in the rule appears to cover the full spectrum of highly sensitive personal-identity characteristics. And the ban on derogatory words is general.[13]

In the recent 2011 opinion addressing remaining procedural matters, Judge Posner emphasized the extent to which the First Amendment does not prohibit the regulation of K-12 student expression that constitutes "severe harassment" and "crosses the line between hurt feelings and substantial disruption of the educational mission":

> Severe harassment…blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth. School authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission, because they have the relevant knowledge of and responsibility for the consequences.[14]

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[11] Nuxoll v. Indian Prairie Sch. Dist. #204 Bd. of Educ., 523 F.3d 668, 669-674 (7th Cir. 2008).

[12] *Id.* at 669-674.

[13] *Id.* at 674.

[14] Zamecnik v. Indian Prairie Sch. Dist. #204 Bd. of Educ., 636 F.3d 874 (7th Cir. 2011).

• IN RECENT K-12 CASES INVOLVING COMPETING RIGHTS AND CONTESTED VALUES UNDER THE FIRST AMENDMENT, COURTS ARE INCREASINGLY REJECTING ABSOLUTIST POSITIONS AND SEEKING TO CARVE OUT A REASONABLE MIDDLE GROUND.

In my recent work, perhaps the most important of all the themes that reappear in my writings is the value of working toward a reasonable middle ground. Influential people of every political persuasion are increasingly identifying principles, guidelines, and compromise positions that can help address the needs of all persons without hurting anyone.[15]

Almost forty years ago, embattled students who sought to establish a Gay Student Organization (GSO) at the University of New Hampshire set forth a statement of purpose that contemplated a heartfelt common ground. "The GSO was created," the court in Gay Students Organization of the University of New Hampshire v. Bonner explained, "as its Statement of Purpose attests, to promote the free exchange of ideas among homosexuals and between homosexuals and heterosexuals, and to educate the public about bisexuality and homosexuality. GSO claims that social events in which discussion and exchange of ideas can take place in an informal atmosphere can play an important part in this communication. . . . And beyond the specific communications at such events is the basic 'message' GSO seeks to convey-that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society."[16]

Similarly, when K-12 students began forming gay–straight alliances in the mid- to late 1990s, an analogous mindset was put forth in mission statements such as the one documented in Colin v. Orange Unified School District. Written by a twelfth grader, the statement emphasized that "[p]ublic schools have an obligation to provide an equal opportunity for all students to receive an education in a safe, nonhostile, nondiscriminatory environment," and that the alliance's goal was "to raise public awareness and promote tolerance."[17]

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[15] See, e.g., Stuart Biegel, *The Privacy Conundrum, Public Education, and the Search for an Elusive Middle Ground*, COLUMBIA TEACHERS COLLEGE RECORD (Dec. 1, 2010).

[16] Gay Students Organization of the University of New Hampshire v. Bonner. 509 F.2d 652, 661 (1st Cir. 1974).

[17] Colin v. Orange Unified School District, 83 F. Supp. 2d 1135, 1138 (C.D. Cal. 2000).

In a like manner, Judge Posner sought to highlight the parameters of a reasonable middle ground in this area, lauding an Illinois school district for adopting a policy that would address the needs of all students.[18]

Finally, Judge Donovan W. Frank, who decided in favor of a student with a "Straight Pride" shirt in Minnesota, captured in a highly cogent manner the nature and extent of the spirit that would appropriately guide everyone's efforts in this area down the road. "All students benefit," Judge Frank wrote, "from the respectful and thoughtful exchange of ideas and sharing of beliefs and practices. Schools, in particular, are vital environments that can provide an education of both the substance of diversity and the responsible manner with which such diversity is approached and expressed."[19]

Sincerely,

Stuart Biegel
Education Faculty
& Law Faculty

Copy of UCLA Faculty Web Site follows…

[18] *Nuxoll,* 523 F.3d at 671.

[19] Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1072–73 (D. Minn. 2001).

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Stuart Biegel is a longtime member of the faculty at the UCLA Graduate School of Education & Information Studies and the UCLA School of Law. He is a recognized expert in the fields of Education Law and Technology Law, and is the author of the casebook Education and the Law (2d ed. 2009), West-Thomson/Reuters (American Casebook Series). The book focuses on the broad range of developments at both the K-12 and higher education levels, and also includes major coverage of technology issues, privacy law issues, and disability rights.

Biegel has served as Director of Teacher Education at UCLA, Special Counsel for the California Department of Education, and the Independent State Monitor for the U.S. District Court in the expansive federal consent decree focusing on the San Francisco public schools (*SFNAACP v. SFUSD*).

The following sections contain biographical highlights and key achievements in his two areas of expertise.

Law & Education

Biegel began his career as a classroom teacher in Los Angeles, teaching both elementary and secondary

classes in public and private schools. He then joined the teacher education faculty at the UCLA Graduate School of Education, where he served as assistant director of the teacher education program, director of the program, and a member of the leadership team that helped create Center X.

At UCLA, Biegel combined his background in education with his more recent legal training to develop an expertise in Education Law. He published numerous articles in this area, and organized several major statewide conferences that brought together academics and practitioners to analyze the implications of recent developments. His education-related publications include an exploration of Fourteenth Amendment rights (Cornell Law Review), an overview of church-state issues (American Journal of Education, University of Chicago), a retrospective on bilingual education (Chicano-Latino Law Review), and an analysis of court-mandated education reform (Stanford Journal of Civil Rights & Civil Liberties).

Biegel has taught law and education courses to doctoral students at the UCLA Graduate School of Education & Information Studies since 1987, and to second and third-year law students at the UCLA School of Law since 1989. He has served as a consultant to the City of Baltimore in their successful school finance lawsuit against the State of Maryland (1995-1996), and has consulted more recently for the American Civil Liberties Union of Northern California (2006-2007) and the National Education Association (2008-2010) on issues relating to equal educational opportunity for marginalized and disenfranchised youth.

Law & Technology

Biegel is a recognized pioneer in the area of technology law & policy. He was one of the first faculty members nationwide to identify the potential of the Internet for both the legal and the education communities. In the mid-1990s, he taught the first official "cyberspace law" courses ever offered on the UCLA campus.

He has written extensively on Internet-related issues, and has spoken at conferences and major universities across the country and overseas. In late 2001, Biegel published a book on cyberspace regulation with MIT Press. The book, entitled *Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace*, has won three awards, including Best Information Science Book of the Year (ASIST 2002). It was released in paperback in 2003.

Biegel has taught technology-related courses in both the law school and the information studies department on topics that range from online regulation and Internet Law generally to a focus on future technologies and an exploration of the ever-widening area of Privacy Law (online and offline). He is also a longtime member of UCLA's Advisory Board on Privacy & Data Protection.

Publications, Policy Studies, and Reports to the Court (Selected Highlights)

· Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after Kadrmas v. Dickinson Public Schools, 74 Cornell Law Review 1078 (1989).

· Public Funds for Private Schools: Political and First Amendment Considerations (with Amy Stuart Wells), American Journal of Education (University of Chicago) (May 1993).

· School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment, 46 Hastings Law Journal 1533 (1995).

· The Wisdom of Plyler v. Doe, 17 Chicano-Latino Law Review 46 (Special Issue on California Proposition 187) (1995).

· New Directions in Cyberspace Law, Los Angeles & San Francisco Daily Journals (January 1996-August 1997).

· Policy Issues and Prospects: Regarding the Potential Breakup of the Los Angeles Unified School District (with Theodore R. Mitchell, S. Carnochan, L. Reynolds, & J. Slayton), Urban Education Studies Center, UCLA Graduate School of Education & Information Studies, July 1997.

· The Consent Decree Monitoring Team Reports on Desegregation & Academic Achievement in the San Francisco Unified School District, Submitted to the U.S. District Court, Northern District of California (1997-2005).

· Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace, MIT Press (2001).

· Education and the Law, Thomson/West (American Casebook Series) (2006).

· Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy after *Seattle-Louisville* and *Brian Ho v. SFUSD,* 4 Stanford Journal of Civil Rights & Civil Liberties 159 (2008).

· Education and the Law, Second Edition, West-Thomson/Reuters (American Casebook Series) (2009).

· The Right to Be Out, University of Minnesota Press (2010).

· The Privacy Conundrum, Public Education, and the Search for an Elusive Middle Ground, Columbia Teachers College Record, December 1, 2010.

· Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community, 14 NYU Journal of Legislation & Public Policy 357, Special Issue on the Legislative Legacy of Senator Edward Kennedy (2011).