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Kim Tolhurst, Esq.
Acting General Counsel
United States Commission on Civil Rights
624 9th Street, N.W.
Sixth Floor
Washington, D.C. 20425
By Federal Express and email

Dear Ms. Tolhurst,

I understand that the United States Commission on Civil Rights is considering the issue of the ability of elementary and secondary schools to protect students against violence and harassment without compromising freedom of speech. I write in the hope that my views and expertise might be of some value as the Commission considers this difficult and important question.

I am the Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. Before, assuming this position in 2008, I was the Alston & Bird Professor of Law and Political Science at Duke University from 2004-2008. Prior to that, I spent 21 years on the faculty of the University of Southern California Law School where I was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. I am the author of seven books, including a leading treatise on constitutional law (Constitutional Law: Principles and Policies 4th ed. 2011) and a leading casebook on the subject (Constitutional Law 3rd ed. 2009), and over 150 law review articles.

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I know that the Commission received testimony on this issue and I am writing because I think that the testimony of the law professors and lawyers overstated the clarity of the law in this area and the limits on the ability of schools to protect their children. There is no doubt that elementary and secondary schools have the ability, and indeed the duty, to protect their students from threats and harassment on the basis of characteristics such as race, national origin, gender, religion, and sexual orientation. Speech that constitutes harassment and threats is not protected by the First Amendment. Without question, schools may prohibit and punish words and conduct that constitute harassment and threats.

The difficult question, of course, arises in determining when speech in schools that is not directed at particular students can constitute impermissible harassment because of its racist, sexist, anti-Semitic, or homophobic content. The line between protected speech and harassment is not clear in other contexts, such as the workplace, and certainly is not settled with regard to schools.

It is clear, though, that under the most recent Supreme Court precedents, a great deal of deference is given to school officials including in regulating and punishing student speech. There have been only four Supreme Court decisions dealing with issues of school regulation of student speech. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that wearing a black armband to protest the Vietnam War was speech protected by the First Amendment. The Court famously declared that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.

But subsequent Supreme Court decisions have deferred to school authorities in regulating student speech. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court upheld the punishment of a student for a speech that was filled with sexual innuendo and given at a school assembly nominating another student for a position in student government. The Court went even further in its deference to school authorities in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which held that school principals could censor materials in high

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school newspapers that they deemed inappropriate. Most recently, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Court held that the First Amendment was not violated when a student was punished for displaying a banner with the inscription, “Bong Hits 4 Jesus.” The Court once more expressed great deference to school authorities in elementary and high schools.

These cases do not involve the issue of school regulation of speech that is harassment or threats, but lower courts have ruled in favor of school officials dealing with such expression. For example, in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), the court held that a student in a public high school could be disciplined for wearing a t-shirt that condemned homosexuality. The court explained: “Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.” *Id.* at 1178.

Although there is great uncertainty in the law in this area, the following can be said with confidence. Schools may prohibit all conduct, including speech, that constitutes harassment or threats on the basis of characteristics such as race, gender, religion, and sexual orientation. The more speech is simply the expression of ideas, even offensive ideas, the greater the likelihood that it is protected by the First Amendment. However, courts recognize the need for schools to protect their students from harassment and courts are thus likely to be very deferential to school officials in deciding when speech is harassment or threats that can be prohibited and punished. Those who advise the Commission of greater limits on schools, such as in some of the testimony the Commission received, are expressing their views about what they want the law to be; they are not describing the law as it exists.

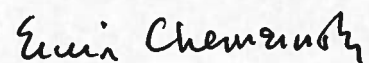
As the Commission considers the appropriate roles for the Department of Education and the Department of Justice it is important to recognize the responsibility of schools to ensure that there is an environment which

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provides for the education of all students without harassment or threats. Rarely will there be a tension between this and the First Amendment. But in such instances courts are very likely to defer to the judgment of school officials as to how to best educate their students.

Of course, please do not hesitate to let me know if I can be of assistance to the Commission in any way.

Sincerely,

A handwritten signature in cursive script that reads "Erwin Chemerinsky".

Erwin Chemerinsky