

MEMORANDUM

To: Kim Tolhurst, esq., Acting General Counsel, U.S. Commission on Civil Rights

From: Hariqbal Basi, Gay & Lesbian Alliance Against Defamation (GLAAD)

Date: 5/3/2011

Re: Arguments for the USCCR to Address Inter-School Violence and the Bullying of LGBT students

Attachments: GLAAD's Cyber-Bullying Information Memo, Williams Institute at UCLA School of Law Policy Brief; GLAAD's Safe Messaging Guidelines (in conjunction with other organizations); Speech by GLAAD President Jarrett Barrios to the American Psychological Association; GLSEN 2009 National School Climate Survey

LGBT students across the country experience harassment, bullying, and physical assaults. In many instances, school administrators have failed to act or blamed the victim student, even when incidents are brought to the school's attention. An extensive national study collecting data over 10 years found that nearly 9 out of 10 LGBT students are subject to harassment in school.¹ The experiences of these students, documented in detail by GLSEN's submission and report, lead to unhealthy and often dangerous environments at school, where every child should be able to engage in the learning process with a feeling of safety. As explained in detail below, bullying speech in schools is not protected by the First Amendment, harassment on the basis of sexual orientation is and should be considered a federal issue, and LGBT students who experience psychological stress and engage in self-harm do so as a consequence of many factors, including negative societal messages, rather than any innate predisposition.

I. Bullying and Harassment are Specifically Prohibited, and Do Not Constitute Protected Speech

The 1969 Supreme Court decision of *Tinker v. Des Moines Independent Community School District* established the precedent of students' free speech rights in school.² While the Court in *Tinker* concluded students in public schools retain their First Amendment speech rights, it also acknowledged the right of all students to be secure and to be let alone.³ For a prohibition on a particular expression or opinion to be justified, the school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁴ The Court noted that the content of student speech may be regulated or prohibited to the extent necessary to avoid "material and substantial interference with schoolwork or discipline."⁵ In *Tinker*, no evidence of any such reasonable risk of classroom disruption was present. In subsequent cases, the Court has tackled this question and upheld the authority of school officials to maintain a healthy learning environment for all students.

¹ Joseph G. Kosciw, Emily A. Greytak, Elizabeth M. Diaz & Mark J. Bartkiewicz, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY 15 (Gay, Lesbian and Straight Education Network 2010), available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/2624.html?state=research&type=research>.

² 393 U.S. 503 (1969).

³ 393 U.S. 503, at 508.

⁴ 393 U.S. 503, at 509

⁵ "The prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. 503, at 511.

In *Bethel School District v. Fraser*,⁶ the Supreme Court recognized the need for schools to teach the “shared values of a civilized social order.”⁷ Public schools are required to balance the freedom of a student’s speech rights against the school’s interest in teaching students the boundaries of socially appropriate behavior.⁸ Schools are not limited to prohibiting constitutionally unprotected speech. Certain constitutionally protected speech can be limited or prohibited at the school’s discretion if that speech is “lewd, indecent, or offensive.”⁹

Subsequent cases, such as *Hazelwood v. Kuhlmeier*, have furthered clarified that a school is able to control and limit speech that is inconsistent with the school’s “basic educational mission, even though the government could not censor similar speech outside the school.”¹⁰

Given the above cases, speech posing the threat of disruption, speech considered offensive or indecent, and speech contrary to the basic educational mission of a school can all be controlled. Bullying of one student by another, in any context, falls into all three of the above categories. In the context of LGBT students, allowing them to be harassed, whether physically or verbally, constitutes disruptive behavior. When a student is called names such as “faggot” with the intent to intimidate, or even seemingly in jest, such words carry feelings of hatred and anger, and when used are disruptive to the learning environment. Intimidation of students in any fashion which might compromise the feeling of a safe learning environment is disruptive.

Moreover, insulting students on the basis of their perceived or actual sexual orientation or gender identity is offensive behavior. Under *Fraser*, such speech should be prohibited by schools due to its offensive and indecent nature. In training children to become productive members of a civilized society, schools should not allow the use of language and behavior that is denounced among civilized society. Anti-gay slurs and threatening conduct constitute such reprehensible behavior. Every school’s mission should include ensuring a safe and healthy learning environment for all students. Any conduct directed at harassing, humiliating, insulting, or bullying a student is antithetical to that mission and needs to be appropriately punished so that our public schools can focus on properly educating our youth.

Not only is such speech by bullies unprotected, schools are mandated by law to enforce their anti-harassment policies in a fair and nondiscriminatory manner.¹¹ This doctrine of fair application, applies to all students, including LGBT students. Schools must take similar action when similar complaints are reported about bullying or harassing student conduct, regardless of the individual traits of the victim or perpetrator.

II. Sexual Orientation is Federally Protected and is an Appropriate and Necessary Issue for the Federal Government to be Involved With

⁶ 478 U.S. 675 (1986).

⁷ 478 U.S. 675, at 683.

⁸ 478 U.S. 675, at 681.

⁹ 478 U.S. 675, at 683.

¹⁰ 484 U.S. 260, at 266.

¹¹ *Flores v. Morgan Hill USD*, 324 F.3d 1130 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996);

Pursuant to the Fourteenth Amendment to the United States Constitution, a State shall not "deny to any person within its jurisdiction the equal protection of the laws."¹² It is well established that this protection applies to discrepancies in treatment based on gender.¹³ Gender based discrimination is triggered when school administrators respond differently to complaints by female students versus complaints by male students regarding similar behavior.¹⁴ For example, when school officials allegedly reprimanded and took action against male students for using slurs such as "slut" and "whore" when referring to female students, but failed to take action when a gay student was subjected to a mock rape at school, this was considered gender based discrimination under the Equal Protection Clause.¹⁵ Equal protection has been interpreted to prohibit "intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority," and "definable minority" includes gay men and lesbians.¹⁶ Discrimination against individuals because of their sexual orientation thus falls within the equal protection clause.

In addition, Title IX of the Education Amendments of 1972 protects any individual from sex discrimination, thereby protecting male and female students from sexual harassment by school employees, other students, or third parties, regardless of the sex of the victim and harasser.¹⁷ Even if the harasser and the victim are the same gender, the sexual harassment is prohibited. An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.¹⁸

Accordingly, sexual harassment directed at gay or lesbian students is covered by Title IX, regardless of the gender of the perpetrator. Harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX.¹⁹

Schools that receive federal funding (including colleges and universities) are required by federal law to address discrimination on a number of different personal characteristics.²⁰ School districts may violate civil rights statutes and the U.S. Department of Education's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or

¹² U.S. CONST. amend. XIV, § 1.

¹³ See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁴ *Nabozny*, 92 F. 3d 446, at 454-455.

¹⁵ "Nabozny does allege, however, that when he was subjected to a mock rape Podlesny responded by saying "boys will be boys," apparently dismissing the incident because both the perpetrators and the victim were males. We find it impossible to believe that a female lodging a similar complaint would have received the same response." *Id.*

¹⁶ "There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society." *Id.* at 457

¹⁷ Sexual Harassment Guidance 1997, Office for Civil Rights, U.S. Department of Education, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ StopBullying.gov, When Bullying May Be a Civil Rights Violation, http://www.stopbullying.gov/topics/civil_violation/index.html (last visited May 2, 2011).

ignored by school employees.²¹ While current laws enforced by the Office for Civil Rights of the US Department of Education do not specifically protect against harassment based on religion or sexual orientation, they do include protection against harassment of members of religious groups based on shared ethnic characteristics as well as gender-based and sexual harassment of gay, lesbian, bisexual, and transgender individuals.²²

III. Gay and Lesbian Students Experience Psychological Stress as a Direct Result of Negative Social Responses

Research by leading psychologists has shown that individuals who identify as gay or lesbian do not have any inherent pre-existing conditions or factors that lead to depression and psychological stress, but rather the psychological stress is a direct result of, inter alia, negative societal messages.²³

The National Mental Health Association has classified LGBT students as an at-risk population. “Gay and lesbian teens are at high risk,” the NMHA reports, “because their distress is a direct result of the hatred and prejudice that surround them, not because of their inherently gay or lesbian identity orientation.”²⁴ Another study has shown the LGBT students, or those perceived to be LGBT, are bullied more than twice as much as any other identifiable group.²⁵

A 2009 National Education Association Report found that LGBT students from poor and rural communities are particularly disadvantaged in obtaining resources, finding allies, and integrating into school culture, and that gay and gender non-conforming youth of color are at elevated risk of harassment and social, familial, or community estrangement.²⁶

The American Academy of Pediatrics’ Committee on Adolescence noted that the psychosocial problems of gay and lesbian adolescents are primarily the result of societal stigma, hostility, hatred and isolation, and given that being gay is a normal variant of human behavior, there are no signs or symptoms of distress or dysfunction that distinguishes heterosexuals from gay people.²⁷

These studies unanimously demonstrate that gay and lesbian teens are not inherently more prone to depression and behavior that may contribute to self-harm or suicide. In direct contrast to that largely unsupportable theory, these studies indicate that gay and lesbian students are like any other student,

²¹ *Id.*

²² *Id.*

²³ Press Release, American Psychological Association, Anti Same-Sex Marriage Amendments Spark Psychological Distress Among GLBT Adults and Their Families, According to New Research (Nov. 18, 2008), available at <http://www.apa.org/news/press/releases/2008/11/glb-stress.aspx>; “Marriage Amendments and Psychological Distress in Lesbian, Gay and Bisexual (LGB) Adults,” Sharon Scales Rostosky, Ph.D., and Ellen D.B. Riggle, Ph.D., University of Kentucky; et. al. *Journal of Counseling Psychology*, Vol. 56, No. 1, available at <http://www.apa.org/pubs/journals/releases/cou-jan09-Rostosky.pdf>.

²⁴ Stuart Biegel & Sheila James Kuehl. SAFE AT SCHOOL: ADDRESSING THE SCHOOL ENVIRONMENT AND LGBT SAFETY THROUGH POLICY AND LEGISLATION 4 (Williams Institute, UCLA School of Law, October 2010).

²⁵ *Id.*

²⁶ *Id.* at 9.

²⁷ *The American Academy of Pediatrics’ Committee on Adolescence*, October 1993; *Testimony of Marshall Forstein, State of New Hampshire, SB 427 Study Commission – – for the NH Commission on the Civil Rights, Responsibilities, Laws and Legal Obligations Related to Same-Sex Unions.*

and when consistently made fun of or harassed, will begin to experience psychological stress just as anyone, gay or straight, placed in the same situation would.