Lambda Legal
making the case for equality

May 12, 2011

VIA EMAIL to ktolhurst@usccr.gov

Kim Tolhurst, Esq.
Acting General Counsel
United States Commission on Civil Rights
624 9th Street Northwest, 6th Floor
Washington, D.C. 20001

Re: The Role of the First Amendment When Addressing Inter-student Violence, Bullying and Harassment

On behalf of Lambda Legal, I am pleased to offer the following analysis relevant to First Amendment expressive protections in public schools. Lambda Legal is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender ("LGBT") people and those with HIV through impact litigation, education and public policy work. Lambda Legal works for respect and acceptance of lesbian, gay, bisexual, transgender and questioning ("LGBTQ") youth and their allies both in schools and outside of them. Our leadership – from winning the nation's first ruling against a public school for failing to stop anti-LGBT harassment, to fighting for students' expressive freedoms and defending supportive teachers and administrators – ensures that LGBT and questioning youth are visible, heard, and given the chance to reach their full potential and grow into healthy and successful adults. Our work extends to ensuring that LGBT school professionals, children with LGBT family members, and LGBT-supportive heterosexual students are likewise protected in schools from anti-LGBT harassment, censorship, and discrimination. Working in partnership with courageous young advocates and their allies in schools, we help shape national awareness and understanding of LGBT and questioning youth, as well as LGBT-headed families and LGBT and allied school professionals, making clear the harm that anti-LGBT discrimination causes all young people.

Throughout its organizational history, Lambda Legal has taken action to address often catastrophic inter-student violence. We and our clients aim to secure justice for those who have been affected, to change

actions and policies to prevent abuse in schools, and ultimately to contribute to safe and healthy environment for all students to reach their full potential. For example, our client Jamie Nabozny was subjected to relentless antigay verbal and physical abuse by fellow students at his public high school in Ashland, Wisconsin. Students urinated on him, pretended to rape him during class and when they found him alone kicked him so many times in the stomach that he required surgery. Although they knew of the abuse, school officials said at one point that Nabozny should expect it for being gay. In the Nabozny case, as in other school abuse cases brought by Lambda Legal and our sister organizations, we documented a classic pattern of escalation from epithets to physical abuse. As Jamie Nabozny recently wrote,

> Protections for LGBT students are something I care very deeply about, and can speak to personally. Growing up in rural Ashland, Wisconsin in the 1980s and 90s, I knew at a young age that I was gay. By seventh grade, other students started to verbally harass me. Being called "faggot," "queer," and "fudge packer" became a part of my daily routine at school. Despite repeated pleas from my parents and myself, school officials refused to take any action to prevent the abuse from continuing and escalating. *Not surprisingly, the verbal quickly turned into the physical – tripping, pushing, punching and kicking.* The response from school officials was consistent indifference or remarks to the effect that this is what I should expect for being gay and that, "Boys will be boys." [1] (Emphasis added.)

Nabozny attempted suicide several times, dropped out of school and ultimately ran away. Our court victory made clear that constitutional protections for LGBT students must be equal to protections afforded other youth in schools.[2] It is our fervent hope that recent extensive coverage of the suicides of young people targeted for harassment based on their actual or perceived sexual orientation or gender identity has heightened public awareness of the fact that school bullying and discrimination is longstanding, pervasive, and has tragic costs.[3]

We are also conscious of the frequent overlap of violence and discrimination against LGBT students, and suppression of LGBT-supportive speech. Another Lambda Legal client, Charlie Pratt, endured

---

[1] *See* http://www.lambdalegal.org/in-court/legal-docs/ltr_us-rep_polis-sen-franken_20100817_nabozny-ltr-iso-student-non-discrimination-act.html

[2] *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

[3] *See* Gary Remafedi, *Sexual Orientation and Youth Suicide*, 282 J. Am. Med. Ass'n 1291 (1999).

years of harassment at school.[4] Students attacked Pratt relentlessly with antigay and sexist slurs, often in the presence of teachers who failed to intervene. Students also pushed him into walls, threatened him, spat on him and vandalized his locker with antigay slurs. Staff members at the high school mocked him with stereotypically effeminate gestures in front of other students. The high school principal refused to take appropriate action, instead telling Charlie to "tone it down" to avoid harassment. The principal also refused to have teachers trained to address antigay bullying, prohibited students from forming a gay-straight alliance ("GSA"), and told Charlie's parents that he could not ensure their son's safety. Left with no other options, Charlie withdrew from school. Charlie Pratt's younger sister, Ashley Petranchuk, later requested permission to form a GSA at the same school, when she was a sophomore. Administrators denied her request until Lambda Legal filed suit, claiming that a GSA would bother parents and students.

The pending *Pratt* case shows the need for critical analysis that reveals what speech warrants limitation, and guides respect for students' rights to speech protected by the First Amendment. As the Supreme Court famously recognized in *Tinker v. Des Moines Independent Community School District*, students do not check their First Amendment rights at the "schoolhouse gate."[5] Development of students' voices should be part of their school experience and growth as healthy individuals and future leaders. But that speech has bounds, especially when it truly – not speculatively – disrupts a school's functioning or interferes with the rights of other students to secure the full range of educational advantages and benefits that are their due. Our analysis seeks to map the contours of those limits, while preserving students' speech rights under the First Amendment.

Finally, we note that school administrators have an important opportunity – and quite arguably an obligation – to use their own speech to promote an environment that is healthy and respectful for all students and staff, regardless of their personal characteristics, including but not limited to sexual orientation and gender identity. Studies that show the great frequency with which students who are or are perceived to be LGBT are targeted for harassment also point to other personal characteristics that put

[4] *See* www.lambdalegal.org/in-court/cases/pratt-v-indian-river-central-school-district.html.

[5] 393 U.S. 503, 506 (1969)

students at risk for discrimination.[6] School officials have the opportunity to lead with their own speech, including their speech in accurate and inclusive curricula that take full account of LGBT people; for the health and wellbeing of all students, we urge that they take that opportunity. To this end, it may be helpful to reference the well-established medical and therapeutic consensus on the deep-seated nature of sexual orientation and gender identity, and the conclusions of leading professional groups that attempts to influence or alter these characteristics are improper and dangerous.[7]

[6] *See* Commission Report, New Jersey Commission on Bullying in Schools, from the New Jersey Office of the Child Advocate, *There Isn't A Moment To Lose: An Urgent Call for Legal Reform and Effective Practices to Combat Bullying in New Jersey Schools* (Dec. 15, 2009), *available at* www.edlawcenter.org/ELCPublic/elcnews_091216_BullyingCommissionReport.pdf.;
Report, Massachusetts Commission on Gay, Lesbian, Bisexual,and Transgender Youth, *Annual Report* (June 2009), *available at* www.mass.gov/cgly/MCGLBTY_Annual_Report_June_2009.pdf; Task Force Report, Rhode Island Department of Education, *Bandaids Don't Cut It: A Statewide Plan to Address the Needs of Lesbian, Gay, Bisexual, Transgender, Queer and Questioning Youth in Rhode Island* (2006), *available at* www.dcyf.state.ri.us/docs/bandaids.pdf.

[7] *See* "Professional Organization Statements on Sexual Orientation and Gender Identity/Expression," attached as Appendix.

SUMMARY OF ANALYSIS

(1) There is a category of words or forms of expression that can be censored in public schools regardless of the surrounding factual circumstances: epithets and other forms of expression that are so crude or coarse that they should not play any role in civilized discourse, particularly among young people (e.g., "fudgepacker," "tranny," "faggot," "dyke," "she-male," "pussy," "cocksucker").

(2) Schools also can require that a student stop harassment, intimidation, or threats directed at another student or a particular group of students based on sexual orientation, and can do so before the harassment, intimidation, or threats become pervasive, to protect those particular students' safety, well-being, and access to education, and, again, to teach the speaking students about civilized behavior.

However, (3) When expression does not include epithets or other extremely crude derogatory terms, and is not framed in terms of harassment or threats (or shown to be a tool of a directed campaign of harassment or threats) against particular students, a school cannot censor expression – even if it conveys an anti-gay or other disturbing message – unless the school satisfies one of the two prongs of the fact-intensive and stringent *Tinker* standard. If censoring is unjustified under a proper reading of *Tinker*, the school should take other, affirmative actions to ensure that gay students are protected from discrimination and harassment in the school, and should use the anti-gay expression as a springboard for education about the First Amendment and how to carry on a respectful debate.

EXTENDED ANALYSIS

I. Epithets and Other Crude Words or Phrases

There is a category of speech that has not been dealt with directly in the Supreme Court's public school student speech cases, but one where there can be little doubt that schools are free to censor. This speech – epithets and other crude expressions – can be silenced by schools no matter what the factual context, whether it occurs on T-shirts, in other writing, or is said out loud by students,, due to the form or manner of the speech. This category is analogous to the *Fraser* category of lewd and vulgar sexualized expression.[8] While epithets-type speech is distinct from *Fraser* speech, it is similar in that schools are not forced by the First Amendment to abdicate their educational role regarding an appropriate manner of expression and type of discourse for students.

This "epithets" category of student speech has never been ruled on by the Supreme Court likely because it is so self-evident that schools should be allowed to censor and redirect such expression into more civilized formulations – and indeed are expected to do so. This "epithets" idea is analogous to the pithy delineation in Judge Newman's well-known statement: "The First Amendment does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency. . . . [A] school need not capitulate to a student's preference for vulgar expression." *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).

It is important to define this category narrowly and to limit it to speech where the issue truly is repugnance to the manner or form of expression, and not more broadly to a particular message – otherwise it will swallow the First Amendment whole. A school might prohibit, for example, "epithets, vulgar names or expressions, or crude derogatory terms" in any student discourse, and thereby bar "fudgepacker," "tranny," "cocksucker," "bull dyke," etc. However, it is crucial that this category of epithets and other extremely crude forms of expression not be defined merely as negative words or statements, or even simply as "derogatory" words or statements (unless "derogatory" is further limited to mean discourse akin to epithets). Otherwise, a school will go from properly barring a narrow

[8] *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

category of odious forms of speech and educating students that they need to learn to express their ideas in other, more civilized ways, to improperly limiting the expression of negative perspectives on issues.

II. Harassing, Intimidating or Threatening Speech Directed at Specific Students

This second category of speech, like epithets, should also be stopped without any First Amendment obstacle: Schools can require that a student stop harassment, intimidation, or threats directed at another student or a particular group of students based on sexual orientation or gender identity, and can do so before the harassment, intimidation, or threats become pervasive, to protect those particular students' safety, well-being, and access to education, and again, to teach the speaking students about civilized behavior.

Like the first category, censorship of harassing or threatening speech directed by one student against another has not led to a body of First Amendment case law, because few adults question the ability of schools to quash such behavior, and few bullies want to come forward to attempt a First Amendment defense based on harassing statements such as "I'll show you what happens to kids who act so gay" or "Give me your iPod or I'll tell everyone you're a lesbian." Fewer still would step forward to defend targeted threats of violence against another student, even if there was not a foreseeable risk that violence would actually occur. Additionally, much verbal harassment in fact accompanies physical harassment and violence that cannot conceivably be protected by the First Amendment. Thus, in many cases threatening or harassing statements may not be easily separated from students' harmful anti-LGBT physical acts to even arguably make out a First Amendment issue.

As the Third Circuit emphasized in *Sypniewski v. Warren Hills Regional Board of Education*:

> Although mere offense is not a justification for suppression of speech, schools are generally permitted to step in and protect students from abuse. Even where harassment by name calling does not involve a racial component, and even where there is no special history of disruption, prohibition accompanied by the threat of sanction is—and always has been—a standard school response. Students cannot hide behind the First Amendment to protection their "right" to abuse and intimidate other students at school.

307 F.3d 243, 264 (3d Cir. 2002); *see also id.* ("Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully.").

Addressing this second category of speech, and focusing schools on the need to attend to such pointed harassing or intimidating expression, represents a key front in solving the real and persistent problem in schools. The remedy and actions taken by schools should correspond to the real source of serious harm from speech (or harassing conduct): speech (and conduct) in this second category, which can be stopped unhampered by the First Amendment.

Tinker's second prong ("invasion on the rights of others") provides support for schools' taking action against harassing or intimidating speech, though such speech need not rise to the level of intrusion on the rights of others before a school can intervene and impose consequences. 393 U.S. at 513. Even one harassing statement overheard in a school hallway can be nipped in the bud and rebuked by a teacher or administrator, without any analysis of whether it rose to the level of intruding on the rights of the target – indeed, even if the target student failed to hear it. It cannot be the case that a school must wait until a viable basis for a lawsuit exists against it or against one of its students to step up and take action against harassment among students. Again, as captured in *Sypniewski*, it is well-accepted that schools attempt to stop and impose consequences for student-on-student harassment and abuse, and that they should do so.

III. Negative or Discomforting Viewpoints – Protected by the *Tinker* Standard

When expression does not include epithets or other extremely crude derogatory terms, and does not constitute harassment or threats (or a tool in a directed campaign of harassment or threats) against particular students, a school cannot censor that expression – even if the expression conveys an anti-LGBT or other disturbing message – unless the school satisfies the fact-intensive *Tinker* standard.[9] Under *Tinker*, a school can single out particular student expression for prohibition only if *facts exist*[10] that (1) cause the school reasonably to predict substantial disruption or interference with school

[9] *See Nuxoll v. Indian Prairie Sch. Dist. #204*, Nos. 10-2485, 10-3635, 2011 U.S. App. LEXIS 3874 (7th Cir. 2011).

[10] Under *Tinker*, limiting expression generally requires a fact-intensive inquiry to evaluate the effects of the speech in question.

activities *and* the censorship is necessary to avoid that interference or, as referenced above, (2) establish that the speech collides with or impinges on the rights of others. The school clearly has the burden of justification, and the Court emphasizes the necessary "finding" and "showing" and need for evidence in the record that supports a school's substantial grounds for barring the expression; otherwise, a school must allow the "risk" of free student speech.[11] 393 U.S. at 508-10. As the Court explained in *Tinker*, this high bar is necessary to allow the exchange of ideas to flourish in our schools and to truly (not hypocritically) educate public school students about a central, vital constitutional principle. *Id.* at 512-513.

The second prong is less discussed and developed in *Tinker*, but seems to relate to concerns about non-passive or "aggressive" actions that might involve conduct or harassment as well as the expression of a particular message. *See* 393 U.S. at 508. The Court specifically refers to "the rights of other students to be secure and to be let alone[,]" and cannot in the context of the rest of the opinion possibly mean "security" from "the discomfort and unpleasantness" that accompany a viewpoint contrary to one's own; the Court appears to mean some more invasive expressive action. *Id.* at 508-09. To the extent the concern is about the possibility of disruptive invasive actions by the speaker, the second prong collapses to some extent with the first prong, and indeed these were not articulated as distinct "prongs" by *Tinker*. In any event, as discussed above, schools can and regularly do act on harassment, intimidation and threats directed against other students without having to satisfy the *Tinker* second-prong standard of a *factual showing* of the *actual invasion* of others' rights through the speech. If such cases were ever litigated, the courts would support schools in taking quick, automatic action against directed harassment, intimidation or threats.

IV. <u>Strategic Considerations and Recommendations</u>

There appear to be fairly coordinated hostile initiatives to counter LGBT-supportive expression in schools, such as activities like the very successful Day of Silence, and other forms of symbolic

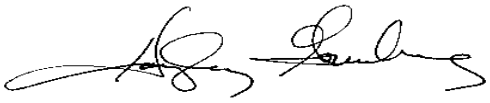
[11] "[O]ur history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." 393 U.S. at 508-09.

expression.[12] Schools, organizations, and individuals concerned about protecting students against harassment and discrimination must attend to the contours of the First Amendment both to properly intervene against harassment and discrimination, and to support lawful expression in public schools. The annual Day of Silence, for example, observed in schools nationwide just last month, is not just about calling attention to harassment and discrimination that silence LGBT people (though that is the central theme). It also encourages LGBT-positive expression in T-shirts, stickers, and the like; in "breaking the silence" at the end of the day; and in other advocacy.

Censoring a responsive anti-LGBT T-shirt or similar expression at schools with some LGBT-supportive activity poses a viewpoint discrimination question. In addition, it poses a consistency problem for students and others putting together LGBT-supportive activities: if they are protesting the harmful silencing and oppression of LGBT people, how can they support silencing their opponents? Although the means of silencing may be different, the concern still centers on silencing expression.

We must not fall into the trap of equating negative views about LGBT people with epithets, harassment, threats or violence against LGBT youth. To this end, Lambda Legal seeks to draw the fine lines and help others see them.

Sincerely,



Hayley Gorenberg
Deputy Legal Director

[12] On a separate but significant First Amendment front, Lambda Legal observes that it is logically and legally inconsistent – and worthy of note – that some of those championing the First Amendment to support anti-LGBT speech also seek to suppress access to LGBT-themed literature or to support blocking LGBT-supportive content on school computers, or even to limit school-designed health or tolerance curricula or respect initiatives. Such actions hostile to LGBT youth contravene the First Amendment, such that individuals and organizations that oppose the rights and wellbeing of LGBT people often seek to contort the Constitution in both directions.