

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MEGAN DONOVAN & JOSEPH RAMELLI,

Plaintiffs, Respondents, Cross-Appellants,

vs.

POWAY UNIFIED SCHOOL DISTRICT et al.

Defendants, Appellants, Cross-Respondents.

Court of Appeal No.
D047199

Superior Court No.
GIC823157

Appeal from the Superior Court of San Diego County
The Honorable Steven R. Denton, Judge

APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF SAN
DIEGO & IMPERIAL COUNTIES, AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN CALIFORNIA, & AMERICAN CIVIL
LIBERTIES UNION OF SOUTHERN CALIFORNIA FOR LEAVE TO
FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS,
RESPONDENTS & CROSS-APPELLANTS; STATEMENT OF
INTEREST; AMICUS CURIAE BRIEF

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Application for Leave to File Amicus Brief

The American Civil Liberties Union of San Diego & Imperial Counties, the American Civil Liberties Union of Northern California, and the American Civil Liberties Union of Southern California submit this application for leave to file an amicus curiae brief in support of Plaintiffs, Respondents, and Cross-Appellants Megan Donovan and Joseph Ramelli (referred to herein as Students).

Applicants' Statement of Interest

The American Civil Liberties Union and its California affiliates are nonprofit, nonpartisan organizations with almost 550,000 members nationwide and over 100,000 members in California. The ACLU is dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has been involved extensively as counsel and *amicus curiae* in federal and state litigation to fight unequal treatment based on sexual orientation, especially in the area of preventing harassment of lesbian, gay, bisexual, and transgender (LGBT) students in public schools.

Amici have a strong interest in advocating for civil liberties and equal educational opportunity for all, including LGBT students. The amicus curiae brief will assist the Court by illuminating both the problem created by unlawful harassment and the measures available to prevent or reduce it. A wealth of readily available studies, reports, and other resources, issued by the state and federal governments as well as reputable nongovernmental organizations, have documented both the problem of anti-LGBT harassment in public schools and various proven solutions to the problem. These solutions are well within the resources of any prudent school district, making compliance with the standard of liability imposed by Education Code section 220 a reasonably simple matter.

Amicus Curiae Brief

The Students have thoroughly documented the defendants' failure to prevent or remedy the appalling harassment to which they were subjected at Poway High School. The Students have also demonstrated that Education Code section 220 requires school districts to take reasonable measures to prevent such harassment, that the trial court properly instructed the jury under section 220, and that any alleged error in such instruction was harmless in any event. Further argument on those points is unnecessary.

Instead, this brief is submitted to inform the Court both of the gravity and frequency of anti-LGBT harassment in schools and the ready availability of practical solutions to reduce or prevent it. Both the problem of harassment, and the measures available to prevent it, are well documented in published sources readily available via Internet or otherwise, and have been so since well before this case was filed.¹

As a practical matter, compliance with the standards contained in section 220 is reasonably simple for a prudent and responsible school district. A multitude of resources provide abundant information to school administrators on straightforward, simple, cost-effective, and concrete measures that schools can readily implement "to take immediate and appropriate corrective action" in response to harassment of which they are or should be aware. (CT 732 [trial court's instruction on section 220]).

¹ These sources include a 1998 position paper from the American Psychological Association (APA) on hate crimes, and an APA 1999 primer for Principals and Educators on sexual orientation and youth, a November 1999 cover story from the American School Board Journal on harassment of LGBT students, a 2001 report from the American Association of University Women on bullying, teasing and sexual harassment in schools, and a 2001 report from the Human Rights Watch on violence and discrimination against LGBT students. Citations to these reports, and other documents referenced in this brief, may be found in the Appendix, together with Internet links and dates last accessed.

I.

THE PROBLEM OF ANTI-LGBT HARASSMENT IN OUR SCHOOLS IS WELL STUDIED AND DOCUMENTED.

The events at issue in this case took place from 2000 to 2003. In 1999, as if anticipating this case, a state senate committee described the pressing need for legislation to protect LGBT students (Sen. Comm. on Educ., Analysis of Assem. Bill No. 537 (1999-2000 Reg. Sess.) September 1, 1999, pp. 2-3.) As the committee reported, “Anti-gay violence and harassment affects all youth.... Recent data also indicate[] that violence against gay and lesbian youth and those perceived to be gay or lesbian seems to be escalating.” (Sen. Comm. on Educ., *supra*, at p. 2.)

Multiple sources confirm the persistence of widespread violence and harassment targeting LGBT school students.² The Gay, Lesbian and Straight Education Network (GLSEN) has issued biennial reports on national school climate surveys since 1999, with the most recent report covering 2005. (Kosciw & Diaz (2006) *The 2005 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools*.) Almost two-thirds of students surveyed reported verbal harassment because of their sexual orientation, and almost half because of how they expressed their gender. (Kosciw & Diaz, *supra*, at p. 23.) As the report stated, “Even when faculty or other school staff were present, the use of biased and derogatory language by students remained

² See, e.g., Kosciw & Diaz, *The 2005 National School Climate Survey: the Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools* (2006); California Safe Schools Coalition & 4-H Center for Youth Development, University of California, Davis, *Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Nonconformity and Steps for Making Schools Safer* (2004)

largely unchallenged.” (Kosciw & Diaz, *supra*, at p. 17.). Students also reported physical and sexual harassment, deliberate property damage and “cyberbullying” on the Internet. (Kosciw & Diaz, *supra*, at pp. 26-27.) Therefore, whether in the past, present, or future, school districts have no reason to be unaware of pervasive harassment.

The events at issue in this case took place between 2000 and 2003. During or before that time, the reports discussed above amply documented the problem of harassment of LGBT students in schools throughout the country and in California in particular.³ In addition, readily available case law has revealed the harassment to which LGBT students have been subjected, in California and elsewhere. (See, e.g., *Nabozny v. Podlesny* (7th Cir. 1996) 92 F.3d 446; *O.H. v. Oakland Unified School Dist.* (N.D. Cal. 2000) 2000 WL 33376299; *Ray v. Antioch* (N.D. Cal. 2000) 107 F. Supp. 2d 1165.)⁴ It is thus clear that harassment of LGBT students was nationally pervasive before the Students entered Poway High School.

In addition, more recent studies confirm the existence of a statewide harassment problem. A comprehensive study has reviewed surveys of more than 237,000 students. Data were gathered from two different surveys: (1) the 2001-2002 California Healthy Kids Survey, a state survey of student health risk and resilience factors that includes a question about harassment based on actual or perceived sexual orientation; and (2) the 2003 Preventing School Harassment survey, a more detailed examination of

³ Several documents describing harassment of LGBT students are available on the U.S. Department of Education Educational Resources Information Center (ERIC) at <http://eric.ed.gov/ERICWebPortal/Home.portal>. They include, for example, Jones, Rebecca (Nov. 1999), *I Don't feel Safe Here Anymore*, American School Board J., v186, pp. 26-31.

⁴ These cases are cited for the facts described, not their legal theories, which did not address the legal issue presented in this case.

school climate and harassment based on sexual orientation and gender nonconformity, carried out by the California State Schools Coalition in partnership with the Gay Straight Alliance Network (California Safe Schools Coalition and 4-H Center for Youth Development, University of California, Davis, *Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Nonconformity and Steps for Making Schools Safer* (2004), pp. 1, 3.)

The results showed that more than 7.5 percent of the students surveyed had been harassed based on actual or perceived sexual orientation. These findings indicate that over 200,000 students are targets of such harassment every year in California middle and high schools. (California Safe Schools Coalition, *supra*, at p. 1.) The California Healthy Kids Survey showed that students harassed because of actual or perceived sexual orientation are

- three times more likely to miss school due to fears for safety;
- more than twice as likely to be depressed, or consider suicide;
- more likely to have low grades, use drugs, smoke, use alcohol, or be victims of violence; and
- more likely to report weaker connections to peers, community, teachers and other adults.

(California Safe Schools Coalition, *supra*, at pp.1-2.)

The Preventing School Harassment Survey portrayed California school campuses as hostile environments for LGBT students and gender-nonconforming students (California Safe Schools Coalition, *supra*, at p. 3.) It concluded:

- two in every three LGBT students reported being harassed because of sexual orientation;
- 47 percent of LGBT students were harassed repeatedly;

- 91 percent of the LGBT students heard slurs from peers about their sexual orientation;
- more than 40 percent of the LGBT students heard negative comments or slurs from teachers or staff;
- 27 percent of the students reported harassment because they were not “masculine enough” or “feminine enough”; and
- more than half of all students said their schools were unsafe for boys perceived as less masculine than other boys.

(California Safe Schools Coalition, *supra*, at pp. 1-2, 14.) By any measure, therefore, the problem of harassment remains pervasive and severe.

II.

THE MEANS TO PREVENT AND REDUCE ANTI-LGBT HARASSMENT IN OUR SCHOOLS ARE READILY AVAILABLE TO ANY COMPETENT ADMINISTRATOR.

The means to prevent such harassment are equally well documented. Multiple sources, including the state and federal governments as well as nongovernmental organizations, have provided clear and specific guidance on the concrete steps which can be taken to prevent or reduce harassment. These sources are and have been readily available to any competent school administrator since well before this action, and the measures they recommend are easily implemented.⁵

1999: Dept. of Education Guidelines. A landmark report issued by the federal Department of Education in 1999 – again, before the harassment in this case – offers step-by-step guidance on protecting students from harassment. Though it focused on harassment and violence

⁵ Many other resources on combating harassment are available on ERIC, see fn. 3, *supra*.

based on race, color, national origin, sex and disability, its lessons are equally applicable to harassment based on sexual orientation, and indeed it recognized the “increasing awareness among school officials of the frequency and severity of harassment of students who are, or are perceived to be, gay or lesbian.” (Office for Civil Rights, US Dept. of Educ., *Protecting Students from Harassment and Hate Crime: A Guide for Schools* (Jan., 1999), p. 47.)

1999: Cal. Student Safety and Violence Prevention Act.

California responded to the evidence that LGBT students face harassment, discrimination and violence on a regular basis by enacting Assembly Bill 537 (also known as “the Hate Crimes Bill”), the California Student Safety and Violence Prevention Act, in September 1999. (A.B. 537, California Assem. (1999-2000 Reg. Sess.)) The bill added sexual orientation as a prohibited basis for discrimination in the schools, and made legislative findings concerning school violence, the need for safe, secure and peaceful schools and the relationship of violent discrimination and teen suicide. (Sen. Comm. on Educ., *supra*, at p. 3.)

2000: A.B. 537 Advisory Task Force Report. In 2000, the Superintendent of Public Instruction convened a 36-member task force to determine how best to implement the anti-hate crime legislation. The advisory task force developed detailed recommendations to prevent discrimination, harassment and violence against students based on their sexual orientation and gender identity, which were then distributed to all the school boards in California (California Dept. of Educ., *Assem. Bill 537 Advisory Task Force Report: California Student Safety and Violence Prevention Act of 2000* (2001), pp. 1-9.)

To facilitate awareness of AB 537, now California Education Code sections 200-220, and measures to implement it, the bill’s sponsor wrote a letter to all California school superintendents (State Senator Keuhl, letter to

CA School Superintendents, Dec. 18, 2002.) The letter expressly referred to a specific document (California Safe Schools Coalition, *School Safety and Violence Prevention for Lesbian, Gay, Bisexual and Transgender Students: A Question and Answer Guide for California School Officials and Administrators*) that educates school administrators and staff on their responsibilities and options for enforcing and applying AB 537. Of course, such a letter was not necessary to advise school officials of their legal duties, but it was and remains a helpful reminder.

The recommendations of the foregoing sources may be summarized as follows, following the structure established by the 1999 Department of Education report (Office for Civil Rights, *supra*, at pp. 13-46.) A competent school must take concrete steps to (1) develop a written anti-harassment policy; (2) identify and respond to incidents of harassment; and (3) foster a supportive climate that respects diversity. The measures to accomplish these goals are clear and straightforward and well within the reasonable means of any school district. None of them was unknown or unavailable from 2000 to 2003, nor are any of them novel or unusual today.⁶

⁶ A 1997 Booklet from Youth Pride, Inc. provides a useful resource for students, teachers and administrators who wish to combat homophobia in the schools (Youth Pride, Inc.: *Creating Safe Schools for Lesbian and Gay Students: a Resource Guide for School Staff* (April, 1997).) A more recent work (California Safe Schools Coalition, *supra*, at pp. 23-25) presents an excellent set of recommendations to combat harassment based on sexual orientation. It overlaps considerably with the US Dept. of Education recommendations. Though not published until 2004, and thus not available to Poway school officials during the time period at issue in this case, it remains available to school administrators facing similar issues today and in the future.

A. Developing a written anti-harassment policy

An appropriate written policy is a necessary first step, but of course is not sufficient to protect students from unlawful harassment. At a minimum, the relevant policy or policies should accomplish the following: (a) state the school’s commitment to eliminate harassment and violence and maintain a nondiscriminatory environment; (b) define the types of harassment prohibited, with concrete examples; (c) require staff to report harassment of which they become aware; (d) establish and explain procedures for reporting harassment; (e) prohibit retaliation against persons who report harassment or participate in related proceedings; (f) ensure that all members of the school community are informed about their rights and responsibilities. (Office for Civil Rights, *supra*, at p. 5.)

B. Identifying and responding to incidents

A written policy is only as good as the means and commitment to enforce it. Schools must provide simple procedures for students to follow when they believe they have been harassed, and clear protocols for school employees to follow when they are informed of harassment, with various options depending on the severity, persistence and pervasiveness of the harassment. (Office for Civil Rights, *supra*, at p. 23.) These simple measures can easily provide the kind of “follow-through” on policies that the Students’ expert testified was lacking in Poway High School. (See Students’ Brief at p. 28.)

Schools may easily do the following:

1. **Encourage students and parents to notify the school district when harassment occurs.** A simple form minimizes the need for lengthy complaints. (Office for Civil Rights, *supra*, at p. 23.)
2. **Provide knowledgeable staff responses to reports of harassment.** Staff likely to be informed about harassment

should be trained. Victims must be thoroughly interviewed. Staff must know what information to provide, and which school officials must be informed. School officials should honor requests for confidentiality, and where necessary, provide interim protection for the victim. (Office for Civil Rights, *supra*, at pp. 23-24.)

3. **Require employees to report harassment and to intervene to stop it.** Even absent student reports, when staff learn about harassment incidents they must report them immediately. Staff observing harassment should also intervene immediately to stop it. Teachers who suspect harassment for any reason should report it immediately. (Office for Civil Rights, *supra*, at p. 25.)
4. **Make appropriate law enforcement referrals.** When officials receive a complaint of criminal behavior, they must alert law-enforcement authorities immediately. The school must also investigate the incident. Otherwise, the perpetrators may infer that such behavior is acceptable. (Office for Civil Rights, *supra*, at p. 26.)
5. **Investigate all reports of harassment.** This should include written complaints from students or staff. Even when a student reports harassment but then refuses to sign a written complaint, schools should investigate. (Office for Civil Rights, *supra*, at pp. 26-27.)
6. **Take prompt remedial action appropriate to the offense and the age and identity of the parties.** Prompt punishment of the harasser sends a message about the consequences of harassment. The discipline code must provide an adequate punishment for the harasser, who may also require

counseling. Provisions must also be made for cases of harassment by teachers, administrators or other employees. Transfers of the victim to another class or school should *only* be considered if specifically requested by the student. (Office for Civil Rights, *supra*, at pp. 27-28.)

None of these measures is difficult. All of them are readily available to any competent and reasonable school administrator.

C. Creating a supportive climate

Schools can also take simple steps to create an environment that respects individual differences and promotes appreciation of diversity, and which counteracts stereotypes on which harassment is often based. (Office for Civil Rights, *supra*, at p. 35.)

The following measures are easily implemented:

1. **Provide information about the program.** The adoption of these policies may be announced in school assemblies and publications. A short summary of the anti-harassment policy should be disseminated in district publications, and posted in the schools. (Office for Civil Rights, *supra*, at p. 35)
2. **Train school board members, administrators, and staff.** Staff most likely to hear about harassment should receive special training on how to investigate complaints and how to stop harassment, including on-the-spot intervention. (Office for Civil Rights, *supra*, at pp. 35-36.)
3. **Educate students about harassment and discrimination, and involve them in prevention activities.** Students should be trained to identify harassment, understand its causes and effects, and learn ways to oppose it and feel comfortable reporting it. (Office for Civil Rights, *supra*, at pp. 36-37.)

4. **Implement monitoring programs and prevention strategies.** School districts have multiple means at their disposal to assess the programs needed and the effectiveness of such programs once they are adopted. (Office for Civil Rights, *supra*, at p. 37.) The Department of Education offers a number of tools that may be modified to suit the needs of an individual school system.⁷
5. **Involve parents and community members in anti-harassment efforts.** Children of same-sex couples and/or their parents may help educate the school community.
6. **Maintain an adequate record keeping system, and regularly evaluate the data collected.** Documentation of harassment events allow the district to assess the effectiveness of the school's policies. Records should be centralized, secure and subject to regular, formalized review. (Office for Civil Rights, *supra*, at pp. 38-39.)

All of the foregoing measures are well within the means of any reasonable school district, and abundant resources exist to provide guidance on how to implement them.

⁷ The DOE tools include: Checklist for Evaluation of Grievance Procedures; Investigating Complaints; Checklist and Survey-Is Harassment a Problem in Your School?; Hate Crime School Survey; Addressing Racial Harassment-A Self Evaluation and Planning Guide for School Districts; Preventing and Responding to Hate-Motivated Behavior; sample Hate-Motivated Behavior Incident Report; Preventing Hate Speech, Behavior and Crime: a School Site Count-Down Primer; Guidelines for Determining Hate Motivation; Graffiti Removal Protocol of the University Of Massachusetts; Conflict Intervention Teams: a Response to School Crises; Erasing Hate, A Guide to Your Civil Rights in School: Your Right to Be Free from Discrimination, Harassment and Hate-Motivated Violence. (Office for Civil Rights, *supra*, at p. 55.)

III.

COMPREHENSIVE STUDIES HAVE DOCUMENTED THAT ANTI-HARASSMENT MEASURES PREVENT OR REDUCE HARASSMENT.

Though common sense alone indicates that such measures would be effective, the Safe Schools Coalition has documented that they reduce harassment and promote safety. (California Safe Schools Coalition and 4-H Center for Youth Development, *supra*, at pp.18-22.) The report indicates how the following recommendations have been shown to be effective in preventing or reducing harassment

A. Implementation of written policy

While it bears repeating that policies alone do not cure or prevent harassment, they can be useful starting points in reducing the problem, though of course not without effective commitment to implement them and follow through. (See *id.* at p.18 [Fig. 19-21].)

B. Following through by training teachers and staff, providing information and support, and introducing a curriculum that respects diversity

The Safe Schools Coalition has shown that when teachers stop making negative comments and slurs based on sexual orientation, harassment based on sexual orientation and gender nonconformity diminishes, students' feelings of safety increase, and students experience stronger support. (*Id.* at p. 19 [Fig. 22-24].) When students know where to go at school for information and support related to sexual orientation and gender identity, their feelings of safety increase and their support and connections become stronger. (*Id.* at p. 21 [Fig. 29-30].) When the curriculum respects diversity and students learn about LGBT issues at school, harassment diminishes, feelings of safety increase, and support for LGBT students strengthens. (*Id.* at p. 22 [Fig. 31-33].)

Therefore, concrete, easily implemented measures can have a clear effect on reducing harassment of LGBT students. As a practical matter, in addition to legal considerations, no reasonable school district should fail to implement these measures, which have been recommended by the state and federal governments as well as concerned nongovernmental organizations.

Conclusion

The standard of liability under Education Code section 220 is an issue of law well briefed by the parties. Amici do not suggest that the resolution of that issue should hinge on the availability of measures to prevent harassment of LGBT students. Nor should this Court declare that implementation of such measures would necessarily create immunity from liability as a matter of law in every possible case arising under section 220, because the question whether a duty has been breached in a given case depends on the specific facts of that case. (See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1686 [breach of duty and causation are fact-specific and committed to the trier of fact].) However, the ready availability and effectiveness of such measures show that, as a practical matter, school districts may easily comply with section 220. Amici therefore submit the foregoing information for the Court's review, in support of the Students' position that the trial court correctly instructed the jury on the standard of liability created by Education Code section 220.

Respectfully submitted,

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APPENDIX

A.B. 537, Cal. Assem. (Reg. Sess. 1999-2000) California Student Safety and Violence Prevention Act of 2000, <http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0501-0550/ab_537_bill_19991010_chaptered.html> [as of March 13, 2007.]

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State Senator Keuhl Dec. 18, 2002 letter, reproduced at <<http://www.nclrights.org/publications/skuehl.htm>> [as of March 13, 2007.]

Youth Pride, Inc.: *Creating Safe Schools for Lesbian and Gay Students: a Resource Guide for School Staff* (April, 1997) <<http://members.tripod.com/~twood/guide.html>> [as of March 13, 2007.]

Certificate of Compliance

Undersigned counsel hereby certifies, in reliance on the word count function of the computer program used to prepare this brief, that this brief contains 5032 words, including footnotes.

David Blair-Loy

Declaration of Service

I, David Blair-Loy, declare: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 87131, San Diego, California, 92138. I served the foregoing document, of which a true and correct copy of the document filed in the cause is attached, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I then sealed each envelope and with the postage thereon fully prepaid deposited each envelope in the United States mail at San Diego, California on the date set forth below. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 14, 2007 at San Diego, California.

David Blair-Loy