Comments of the Student Press Law Center
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-1904
director@splc.org

Federal Enforcement of Civil Rights Law Protecting Students Against Bullying, Violence and Harassment
U.S. Commission on Civil Rights
May 27, 2011

Statement of Commenter's Interest, Introduction and Summary

The Student Press Law Center ("SPLC"), a 501(c)(3) nonprofit founded in 1974, is an educational and advocacy organization that supports student journalists at the college and high-school levels nationwide. The SPLC educates student journalists about the First Amendment, about their legal responsibilities as publishers, and about legal and regulatory developments impacting their field. The founding mission of the SPLC is to promote youth civic engagement through participation in substantive journalism that addresses issues of topical relevance.

From 37 years of dealing with the censorship of students' journalistic work, the SPLC can attest to the importance of clearly delineating schools' authority so as to leave a wide margin for speakers to make good-faith mistakes. In the real world outside of the schoolhouse, it is well-established that doubtful judgment calls must be resolved in favor of the speaker's right to speak. However, federal courts typically reverse this presumption where the regulator is a school and the speaker is a student, providing "breathing space" not for the speaker but for the government. To use an analogy, if the Department of Education sets the speed limit at 55 mph, schools know very well that they will not be ticketed unless they are caught driving 75. Policy must be formulated in anticipation of such excesses.

The Department of Education's recent guidance on bullying, expressed in an October 26, 2010 "Dear Colleague" letter to educational institutions, is well-intentioned but misconceived. The letter fails to adequately acknowledge the First Amendment considerations that arise when the government punishes the content of speech. Needless censorship of students' speech is already far too common an occurrence. The threat of a federal civil-rights enforcement action will further impel schools toward a mentality of "zero tolerance for unpleasantness" and will push many thousands more students – some of them innocent – into a disciplinary system that already is overwhelmed in many schools past the point of functionality. The Department's bullying strategy was formulated with inadequate consideration of the "false positive" disciplinary results that it inevitably will generate, and the impact that discipline will have on the individual students and on the overall free-speech climate within the school community. The Department should rethink its strategy to emphasize education, which most schools do very well, instead of punishment, which many schools do very poorly.

Comments

1. Bullying policy must avoid the "preventive punishment" of speech in anticipation that it might evolve into unlawful speech.

The First Amendment has always been interpreted to offer speakers a wide margin for error in the gray areas of legality. To do otherwise would "chill" lawful expression by prompting speakers to censor themselves in fear of stepping over indistinct boundary lines.[1] In the public policy arena, there are many legitimate social and political issues that touch upon matters of race, sex, religion and national origin – same-sex marriage, Affirmative Action, immigration, the treatment of Muslim-Americans, and so on – about which listeners may be sensitive and may react emotionally. Nevertheless, as the Supreme Court recently reaffirmed in *Snyder v. Phelps*,[2] "Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

The difference between editorial commentary and bullying seems intuitively obvious, but experience has demonstrated that schools at times have trouble making the distinction. For instance, a principal and superintendent in the Novato Unified School District publicly denounced high-school senior Andrew Smith after he authored a sharply worded opinion column in a student newspaper in which he argued that California was overrun with illegal Mexican immigrants.[3] Because those making judgment calls in the public schools understandably are not constitutional lawyers, the government must be especially wary of any policy that points in the direction of punishing speech as a preventive measure *before* the speech crosses the line of constitutional protection.

There are two primary cases in the K-12 realm that have put the issue of "cyberbullying" on the national priority list – the 2006 suicide of Megan Meier in Missouri, and the 2010 suicide of Phoebe Prince in Massachusetts. Importantly, nothing in the DOE guidance would have helped in either of these cases. In the Meier case, the perpetrator was a middle-aged mother, Lori Drew, who was using a false online identity to settle a grudge between her daughter and Meier. In the Prince case, the victim was targeted for severe harassment because of a romantic rivalry and not because of membership in any federally

---

[1] "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern, and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious." *New York Times v. Sullivan*, 376 U.S. 254, 298-99 (1964) (Goldberg, J., concurring).

[2] *Snyder v. Phelps*, No. 09-751, ___ S.Ct. ___ (March 2, 2011), slip op. at 5-6 (internal quotes and citations omitted).

[3] *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508 (Cal. App. 1st Div. 2007).

protected class. While there indisputably are cases in which bullying is motivated by a victim's race, religion, ethnicity or gender, the Meier and Prince cases illustrate that resort to civil-rights law is at best an incomplete remedy.

Severe and pervasive harassment, or threats of violence, already are unprotected speech punishable under existing law. The DOE guidance begs the question when and how the Department envisions schools punishing speech that has not reached the level of threatening or harassing behavior. Without better guidance, the directive that schools are to take affirmative steps to prevent bullying – to include the use of disciplinary sanctions – is an invitation for schools to "preventively" punish speech that has not yet exceeded the boundaries of constitutional protection and may never do so.

2. The threat of civil-rights liability will provoke litigation-averse behavior emphasizing punishment over education.

When school policy is driven by aversion to liability rather than by sound educational practice, excesses and bad judgments proliferate. Raising the stakes by threatening schools with exposure to civil-rights liability inevitably will prompt rash overreactions. The temptation will be inevitable not to respond in the most educationally valid way, but to respond in the way that best "papers the file" in the event of a DOE enforcement action. The principal who believes an informal conversation will most effectively address a student's bullying behavior will instead have every incentive to "suspend first and ask questions afterward," because a suspension, unlike a conversation, will create a paper trail.

History establishes that, given a directive that is justified by reference to student safety, many schools will overreact in ways that are themselves dangerous. If the "zero tolerance" for weapons and "zero tolerance" for substance abuse regimes have taught us anything, it is that policymakers must formulate instructions on the assumption that they will be implemented ultra-literally without regard for common sense. Zero-tolerance regimes have resulted in the punishment of students for behavior as innocent as bringing a Cub Scout eating utensil to show-and-tell[4] or carrying children's scissors in a book-bag.[5]

While bullying undeniably can drive vulnerable young people to despair, so can excessive discipline. In Fairfax County, Virginia, harsh "zero tolerance" punishment was identified as a factor in the suicide of two student athletes during the last three years.[6] Fifteen-year-old Nick Stuban, described as a "model student," killed himself Jan. 20, 2011, after

---

[4] Ian Urbina, *It's a Fork, It's a Spoon, It's a ... Weapon?*, THE NEW YORK TIMES, Oct. 11, 2009.

[5] Connie Langland, *Controversy over 'zero tolerance': Parents say schools are overreacting and expelling students for small infractions*, THE PHILADELPHIA ENQUIRER, Jan. 23, 2005.

[6] Donna St. George, *Suicide turns attention to Fairfax discipline procedures*, THE WASHINGTON POST, Feb. 20, 2011.

being suspended for seven weeks and banned from extracurricular activities because he purchased a (legal) capsule of synthetic marijuana. Seventeen-year-old Josh Anderson killed himself on the morning of March 19, 2009, the day he faced an expulsion hearing resulting from possession of a marijuana cigarette in a school parking lot.

A parents' group that formed in response to the suicides, Fairfax Zero Tolerance Reform, undertook a study of the outcomes of all disciplinary appeal hearings over the last six years in their district's schools. Out of 5,025 cases in which students took the initial disciplinarian's decision to an appeal before the district's hearing office, the student did not prevail a single time. It is inconceivable that the student was wrong and the school correct in every one of 5,025 instances. An affirmation rate so lopsided is the mark of an ineffective system that affords the student no meaningful chance for vindication. The Fairfax, Va., schools are perennially ranked among the best in the country, so this cannot be a problem isolated to a single "bad" school system.

The "discipline of choice" in the public schools has become the withdrawal of participation in extracurricular activities, because schools are aware that federal courts will afford essentially unreviewable discretion to the governance of basketball, cheerleading and the honor society. To give just one example, the Student Press Law Center recently dealt with a case in Texas in which a student was punished for "bullying" on the grounds that she joined a Facebook group in which the discussion devolved into bullying. The student admitted that she joined the group – but she documented that her only participation was to post a message defending her little brother and asking the group's members to stop bullying him. In other words, simply "being in the wrong place at the wrong time" was enough to "convict" her in the eyes of the school. Because the punishment was "only" the deprivation of all extracurricular activities, the student was not afforded any of the process that would normally accompany a suspension or expulsion, and because the penalty was "only" the deprivation of extracurricular activities, her parents determined that there was no realistic possibility of challenging the wrongful decision in court.

Ironically, the minority students who are intended to be the primary beneficiaries of heightened bullying protection are also those most likely to be targeted for discriminatory application of school discipline. Study after study has documented the tendency of schools to invoke suspension or expulsion more readily for black and Latino students than for whites. As one recently published study concluded, "For over 25 years, in national-, state-, district-, and building-level data, students of color have been found to be suspended at rates two to three times that of other students, and similarly overrepresented in office referrals, corporal punishment, and school expulsion."[7] It would be a terrible irony if a policy intended to reduce

[7] *See* Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, SCHOOL PSYCHOLOGY REVIEW (National Association of School Psychologists March 1, 2011). The authors' analysis of data from a cross-section of 272 schools nationwide concluded that "both differential selection at

the harassment of vulnerable minority students became a vehicle for kicking more minority students out of school.

The list of proscribed behaviors in the Department's Oct. 26 letter is so sweeping that, if enforced literally, the majority of students in a typical high school would at one time or another be in violation. The letter defines sexually harassing behavior to include: "making sexual comments, jokes or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating email or Web sites of a sexual nature." The list makes no distinction as to the severity, unwelcomeness or context of the conduct, nor does it give any guidance as to the meaning of such vague terms as "email or Web sites of a sexual nature" (which might include anything from the *Sports Illustrated* swimsuit issue to the website of the Gay-Straight Alliance Network).

It is especially important to dispel the impression that telling one off-color joke is a punishable disciplinary offense, because schools increasingly are asserting the authority to detain and search students based on suspicion not merely of unlawful conduct but of violation of school rules. For example, Virginia Attorney General Ken Cuccinelli issued an opinion in November 2010, shortly after the DOE guidance was circulated, advising schools "that searches and seizures of students' cellular phones and laptops are permitted when there is a reasonable suspicion that the student is violating the law or the rules of the school."[8] The combined effect of the DOE guidance and legal opinions of this nature is that any student *suspected* of having forwarded an email containing a dirty joke – even if the behavior took place entirely off-campus – might be subject to a rather invasive seizure and search of personal effects.

The disciplinary process in many school systems is already badly broken. Imposing hundreds of new disciplinary cases on overburdened schools is the equivalent of pouring ten gallons of water into a leaking five-gallon jug. Just as states should not double sentences when they are turning people loose from overcrowded prisons, the DOE should impose no new disciplinary mandates unless and until it undertakes a comprehensive study of the state of school disciplinary procedures and is satisfied that wrongfully accused "bullies" will have a fair opportunity to clear their names.

3. A comprehensive bullying response recognizes the salutary values of more, not less, student speech.

---

the classroom level and differential processing at the administrative level make significant contributions to the disproportionate representation of African American and Latino students in school discipline."

[8] Brian McNeill, *Cuccinelli opinion: Teachers can seize, search students' cell phones*, CHARLOTTESVILLE DAILY PROGRESS (Nov. 24, 2010).

While the intuitive response to bullying has been to amplify the punitive powers of school administrators, there are ways in which more and not less speech is part of a complete response to improving a school climate that fosters bullying.

Psychological research establishes that bullying is a product of bored and disempowered students lashing out in frustration against weaker targets. Nothing is more certain to guarantee that school is a boring, frustrating and disempowering experience than a heavy-handed regime of censorship that prevents students from expressing themselves. In the same way that gay students are disproportionately singled out for peer harassment and violence, gay students – along with other religious and social "outliers" – are disproportionately victimized by censorship. When a bullied gay student is told by the principal that he may not publish a column calling for the acceptance of homosexuality because "community standards" will not tolerate that opinion, that student is bullied for a second time. This is a too-common occurrence in schools.

Uncensored student expression is itself the best early-warning detector of a dangerous school climate. Consider what editors of *The Spotlight* – the student newspaper serving Phoebe Prince's Massachusetts high school – wrote about the pervasiveness of bullying on their campus:

> "How long can the school department ignore the increasing rate of bullying before reality sets in? How many more harassed kids will it take, how many more enraged parents, how many more cases of depression, and how many attempted suicides? ... Unfortunately, time may be a benefit that bullied students don't have."

Significantly, this editorial column did not follow Phoebe's 2010 suicide – it preceded her death by five years. These perceptive students were able to diagnose a problem overlooked by adults outside the school community. They were able to communicate the problem to the public because Massachusetts is the rare state with a student free-expression statute that prohibits schools from censoring this type of whistle-blowing in the name of image control. In most states, inadequate legal protections would enable the school to censor this expression in a school-supported publication. The ability to use student media – including online media – to candidly discuss the shortcomings of the school is an essential part of creating an honest dialogue about bullying that can lead to progress.

A balanced and complete approach to bullying must include greater safeguards for the protection of student speech addressing itself to matters of public concern, including the subject of bullying itself. Students know best whether bullying policies in their schools are effective, and they must be free to comment publicly on the efficacy of all school policies without fear of reprisal.

Conclusion

The loss of even one child as a product of hateful attack speech is a profound tragedy, and it is appropriate for policymakers at all levels to respond with urgency and sensitivity when young lives are at risk. However, hasty policymaking in an emotional climate frequently results in excesses, and – as demonstrated by the Fairfax experience – excesses can themselves result in disaster.

This Commission's charge includes ensuring that America's legal system adequately protects the civil rights of all of its citizens regardless of their status. The ability to obtain a free public education unimpeded by harassers is a civil right, but so is freedom of speech. A complete and nuanced response to the problem of bullying will not substitute one civil-rights violation for another.

The Department of Education should be encouraged to withdraw its "Dear Colleague" letter and replace it with a more balanced approach that emphasizes the importance of refraining from hasty and excessive punishment of innocent behavior, and that incorporates as a fundamental element of a complete anti-bullying strategy a recognition that heavy-handed censorship is itself a form of bullying.

Respectfully submitted,

Frank D. LoMonte, Esq.
Executive Director
Student Press Law Center
May 27, 2011