



December 16, 2010

Via Facsimile and U.S. Mail

Superintendent Richard Swanson
Tehachapi Unified School District
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Dear Superintendent Swanson,

We have been contacted by Wendy Walsh, the mother of Seth Walsh, a thirteen-year old former student of Tehachapi Unified School District who tragically committed suicide in September. Since Seth came out as gay in the sixth grade at Jacobsen Middle School, he was subjected to severe verbal harassment based on his sexual orientation and his failure to conform to gender stereotypes. It is our understanding that despite being notified of the harassment and despite the clear obligations under state and federal law to protect students from such harassment, neither the school nor the district took adequate measures to protect Seth. Even after Seth's death, it is our understanding that the school and the district have done little to redress the pervasive environment of targeted harassment and hostility that led to his death.

We are aware that this is a very difficult time for Seth's family, friends, and community; our goal is to work together with the district and the community to ensure a safe environment for all of Tehachapi's students. We write now to urge the district to do whatever it can to prevent another heartbreakingly premature and potentially avoidable death like Seth's by taking immediate steps to ensure a safe learning environment for all its students who are, or are perceived to be, lesbian, gay, bisexual, transgender or questioning ("LGBTQ").

Factual Background

Seth Walsh was in the fifth grade at Tompkins Elementary School when students first started calling him "gay." Seth had a slight build, wore clothes that had been purchased in the girls' section of stores, wore makeup and nail polish to school, dyed his hair, and had only female friends. In the sixth grade, when he was attending Jacobsen Middle School ("Jacobsen"), Seth came out to his friends and family as gay.

When Seth was in the seventh grade, the verbal harassment he was already experiencing on a constant basis grew significantly worse. Students repeatedly called Seth “fag,” “homo,” “queer,” “sissy,” “pussy,” and “girl.” In the boys’ locker room, students told Seth that he did not dress or act “like a man should” and that he was “too girly.” Seth told his friends that he hated being in the boys’ locker room because other boys would corner him and taunt him and he felt both humiliated and physically threatened. Seth eventually resorted to locking himself in a bathroom stall to change into his Physical Education (“PE”) clothes. Seth also never used the boys’ bathroom at school if any other student was inside. In PE class, one student constantly referred to Seth as “it.” Other students told Seth that he “should burn in hell.” During study hall, boys went up to Seth and told him that it was “gross” and “wrong” to be gay. Outside of school, students threw sandwiches and water bottles at Seth. As a result of the persistent harassment, Seth’s grades went from A’s and B’s in the fifth grade to failing grades in sixth and seventh grades. Additionally, Seth’s friends reported that he became depressed and frustrated, saying that he no longer cared about school, and he withdrew from close friends.

Seth, Wendy Walsh, and other friends and family members reported many of the incidents of harassment to teachers and administrators. Starting when Seth was in the fifth grade, Wendy Walsh spoke to Seth’s teachers about the anti-gay harassment, as well as to school administrators, including Susan Ortega, Principal of Jacobsen. Seth’s grandmother, Judy Walsh, who served on the Tehachapi Unified School District board for six years, discussed the harassment with Principal Ortega before Seth started seventh grade. When Seth was in the seventh grade, Wendy Walsh personally escorted a student to the Principal’s office after the student yelled out “queer” at Seth in Wendy Walsh’s presence. Seth himself went at least twice during his seventh grade year to speak with a school counselor about the harassment.

Teachers and administrators at Jacobsen were also generally aware that Seth was gay and that he was experiencing harassment. A teacher at Jacobsen told a student that she wanted to ask Seth and his boyfriend what was “wrong” with them. Another student reports that an administrator was in the hallway one time when Seth was called “fag,” but the administrator turned away from the scene. Another teacher called Seth “fruity” in front of an entire class. Verbal harassment of Seth by other students took place during study hall and in the boys’ locker room, where teachers were present.

Despite the knowledge of district teachers and administrators and their assurances that they would take care of the problem, the anti-gay harassment directed at Seth grew increasingly worse. In the middle of his seventh grade year, Seth decided he wanted to be homeschooled. Seth spent a few months at home, and then returned to Jacobsen in January 2010. In August 2010, Seth started his eighth grade year at Jacobsen. After two weeks of constant abuse, Seth decided he could not stand it, and again asked his mother to homeschool him. Mrs. Walsh agreed, and on the homeschooling form, which she discussed with Principal Ortega when she turned it in, she listed the reason for homeschooling as “sexual orientation ridicule.”

On September 19, 2010, a group of high school students taunted and harassed Seth at a local park. Seth came home from the park and told Mrs. Walsh that he was scared of the harassment he was experiencing. Seth sent text messages to two friends telling them that he was

going to kill himself in order to get out of the way. Later that day, Seth hanged himself in a tree in his backyard. Mrs. Walsh found Seth's body in the tree. Seth was on life support for nine days before he passed away on September 28, 2010. Seth left a note expressing his love for his family and anger at the school "for bringing you this sorrow."

Although school officials have publicly expressed grief over Seth's death, it is our understanding that the district and the school have not taken adequate steps to redress the dire anti-gay climate that precipitated his death. The school has put up a few generic anti-bullying posters and the district has contacted the Olweus Bullying Prevention Program (a program that does not explicitly address LGBTQ students). However, the school has not even held an all-school assembly for students and staff to address Seth's death or the harassment that led to it. It is our understanding that LGBTQ students in the district continue to suffer harassment based on their sexual orientation and gender identity. Additionally, we have read recent reports that the district has failed adequately to address harassment based on race.¹

Legal Analysis

Under both state and federal law, the district is legally required to protect students who are, or are perceived to be, LGBTQ from discrimination and harassment.

California Education Code Sections 200, 201, 220, and 234 place on school districts the affirmative obligation to combat racism, sexism, and other forms of bias, including sexual orientation and gender identity bias, within their schools. Districts not only must protect students from bias-based harassment and discrimination, but districts are also required to have explicit anti-discrimination and anti-harassment policies and complaint procedures, to publicize these policies and complaint procedures to students, parents, employees, agents of the governing board, and the general public, to post the policies and complaint procedures in all schools and offices, to maintain documentation of every discrimination and harassment complaint, and to ensure the complainants are protected from retaliation. Cal. Ed. Code § 234.1.

Title IX of the 1972 Education Amendments to the Civil Rights Act of 1964 further requires any school that receives federal funding to prohibit gender-based harassment, and a school is responsible for any harassment about which it knows or reasonably should have known. As the United States Department of Education Office of Civil Rights recently explained in a "Dear Colleague" letter, gender-based harassment may include harassment based on sex-stereotyping—or harassment based on a student "exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity."²

¹ 17 KGET News Investigation: *Parents Say Boy Bullied Over Race* (Oct. 21, 2010).

² United States Department of Education Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying*, at 7-8 (Oct. 26, 2010). The example described in the letter is of a gay high school student who, over the course of a school year, was called names (including anti-gay slurs and sexual comments), physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choices of extracurricular activities, apparel, and personal grooming choices.) However, based on the student's self-identification as gay and the homophobic nature of some of the

Finally, the state and federal constitutions, as well as California's Unruh Civil Rights Act, guarantee students equal treatment under the law. Consequently, school administrators may be held liable, in both their official and personal capacities, if they fail to investigate or take adequate measures to remedy anti-gay harassment and discrimination. *See Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1135 (9th Cir. 2003). It is not enough for schools to respond to harassment only in a minimal way; if school administrators know their response is not fixing the problem, they can be held liable if they fail to take further steps to stop the harassment. *See id.* at 1135-36 ("Failure to take any further steps once [school official] knew his remedial measures were inadequate supports a finding of deliberate indifference.").

When school districts fail to take appropriate steps to protect their students from harassment based on sexual orientation or gender identity, there can be significant financial repercussions. Through litigation and in settlement, student plaintiffs in anti-gay harassment and discrimination cases have been awarded hundreds of thousands of dollars in damages, as well as attorneys' fees. In *Flores v. Morgan Hill Unified School District*, for example, after nearly five years of litigation, the school district agreed to pay a total of over \$1.1 million to settle the suit. *See also Poway v. Unified School District*, 167 Cal. App. 4th 567 (2008) (affirming total judgment of over \$700,000 against district). Other school districts in California and around the country also have found that the cost of ignoring anti-gay discrimination and harassment on campus is substantial.

Remedial Measures

As Seth's death so tragically demonstrates, the failure of schools to intervene and prevent discrimination and bias on their campuses has tremendous human costs. And Seth, sadly, is not alone. At least eleven other students—ranging in age from 13 to 19—have committed suicide in just the past four months following harassment at school based on actual or perceived sexual orientation and gender identity. In a nationwide study, the Gay, Lesbian, and Straight Education Network ("GLSEN") found that nearly 9 out of 10 LGBTQ students experienced harassment at school in 2009 and nearly two-thirds felt unsafe because of their sexual orientation.³ Compared to peers who have not experienced harassment, students in California who are harassed based on perceived or actual sexual orientation are three times as likely to seriously consider suicide, and more likely to be victimized by violence.⁴

harassment, the school did not recognize that the misconduct included discrimination covered by Title IX, although the student had been subjected to gender-based harassment covered by Title IX.

³ Kosciw, J.G., Greytak, E.A., Diaz, E.M., and Bartkiewicz, M. J. (2010) *The 2009 National School Climate Survey: The experiences of lesbian, gay, bisexual, and transgender youth in our nation's schools*. New York: GLSEN (the Gay, Lesbian, and Straight Education Network), 22 and 26.

⁴ Russell, S. T., McGuire, J. K., Laub, C., and Manke, E., O'Shaughnessy, M., Heck, K., Calhoun, C. (2006). *Harassment in School Based on Actual or Perceived Sexual Orientation: Prevalence and Consequences* (California Safe Schools Coalition Research Brief No. 2). San Francisco, CA: California Safe Schools Coalition.

In this case, the district's apparent failure to investigate adequately or to take appropriate action to protect Seth from harassment is cause for serious concern, and it is our understanding that the U.S. Department of Education Office of Civil Rights has already opened an investigation. To combat anti-gay harassment going forward, the district must take holistic measures to change the school culture. Without thoughtful and respectful discussion about *why* harassment and discrimination undermine the educational mission of public schools, about the psychological harm they cause, and about the history of discrimination LGBTQ persons and other groups have experienced, the hostile climate that led to Seth's death will persist. Without professional development focused on developing intervention skills and an opportunity to think deeply about these issues, it is extremely unlikely that school staff will be able to respond effectively to harassment. And without student education on the district's anti-harassment and anti-discrimination policies, as well as the reasoning behind the policies, students are unlikely to appreciate the damaging effects of harassment or to understand how best to ask for help when they are being harassed.

We therefore urge the district to incorporate a new harassment-prevention program to redress systemically the hostile environment in which anti-gay harassment has persisted and to provide a safe campus for all of its students. We would be happy to provide you or your attorneys with the names of experts who might be available to help the district develop such a program, but at the very least the district should:

1. Ensure that all district anti-harassment and anti-discrimination policies specifically include actual or perceived sexual orientation as well as gender identity, and are publicized and posted in compliance with state law.
2. Ensure that the district has a specific procedure for complaints about harassment and discrimination, and that the procedure is publicized and posted in compliance with state law.
3. Ensure that all students know where to go for information and support related to sexual orientation and gender identity, as well as the process for complaining about staff or peer harassment or discrimination.
4. Ensure that all school counselors are appropriately trained in discussing sexual orientation, gender identity, and all forms of discrimination and harassment.
5. Implement ongoing faculty/administrator/staff professional development on the impacts of harassment and discrimination and the legal obligation to intervene when necessary to maintain safe schools. These sessions should include creating clear tools and procedures for intervening in harassment when it occurs.
6. Ensure that students and their parents understand how the policies and procedures work by updating parent/student handbooks.
7. Provide a larger contextual framework for policies through:
 - a. Discussions about why it is important not to discriminate against students based on their identity;
 - b. Discussions about the historical context of discrimination and harassment; and

- c. Framing that makes clear that such discussions are important, e.g., by making them part of curricula as well as part of student and staff programs.
8. Develop and introduce curricula that include LGBTQ people and information about sexual orientation and gender identity.
9. Create accountability so that teachers, administrators, and staff understand that part of their overall evaluation will be tied to their ability to implement anti-discrimination and anti-harassment policies, including ensuring that complaints do not go unaddressed.
10. Support the establishment of a Gay-Straight Alliance in any district middle or high school that does not already have one and provide support to existing clubs.

Immediate Next Steps

We are happy to work with you on developing and implementing an appropriate long-term plan to create schools that are safe and productive for all Tehachapi children. In the meantime, we urge you to take some immediate steps to ensure the physical and emotional safety of LGBTQ students in the district:

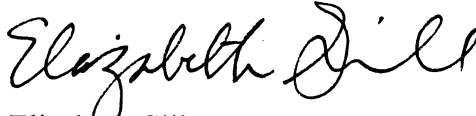
1. Distribute a letter to all teachers and staff informing them of their affirmative responsibility to maintain a safe and non-discriminatory learning environment and the steps they should take to intervene and address harassment whenever it arises.
2. Instruct all homeroom teachers to:
 - a. Review with their students the district anti-harassment policy (including all protected categories—i.e. race, religion, sexual orientation, gender identity, etc.);
 - b. Explain to their students the importance of all students feeling welcome at school;
 - c. Explain the steps students, teachers, and staff are expected and encouraged to take if they overhear harassing comments or observe harassing behavior; and
 - d. Explain that students can tell any school employee if they have a problem, and identify a specific person in each school who has self-identified as an LGBTQ-friendly person to whom students are encouraged to complain of harassment.
3. Hold an assembly for the students at Jacobsen Middle School where trained counselors can facilitate discussion and answer questions about Seth's death, harassment generally, and the district anti-harassment policy (including all protected categories).
4. Instruct teachers to consider working LGBTQ issues into their existing curricula, as appropriate.
5. Require school administrators to document all complaints regarding discrimination or harassment by staff or students based on sexual orientation, gender identity or any other category protected by law, including race, national origin, and ethnicity,

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including maintaining files of all relevant written letters, notes, or records of phone calls from students, parents, or other concerned individuals.

Please have your counsel contact us by December 30, 2010 about the steps the district plans to take to redress the anti-LGBTQ discrimination and harassment.

Very truly yours,



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cc: Wendy Walsh
Mary Graham, School Board President (by email)
Susan Ortega, Principal of Jacobsen Middle School (by facsimile)