

TABLE OF CONTENTS

Page

APPEAL NO. 02-15128

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALANA FLORES, et al.,
Plaintiffs/Appellees,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT, et al.,
Defendants/Appellants.

On Appeal from the United States District Court
for the Northern District of California,
Case No. C-98 20358 JW PVT
Hon. James Ware

PLAINTIFF-APPELLEES' BRIEF

KEKER & VAN NEST, LLP
JAMES M. EMERY - #153630
STACEY L. WEXLER - #184466
JILL K. GINSTLING - #217911
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Attorneys for Plaintiffs/Appellees
ALANA FLORES, et al.

ADD'L COUNSEL LISTED ON FOLLOWING PAGE

TABLE OF CONTENTS
(cont'd)

Page

ANN BRICK - #65296 American Civil Liberties Union Foundation of Northern California, Inc. 1663 Mission Street, Suite 460 San Francisco, CA 94103 Telephone: (415) 621-2493 Facsimile: (415) 255-8437	MATTHEW A. COLES - #76090 American Civil Liberties Union Foundation 125 Broad Street, 17th Floor New York, NY 10004 Telephone: (212) 549-2627 Facsimile: (212) 549-2650
KATHRYN D. KENDELL - UT #5498 SHANNON MINTER - #168907 National Center for Lesbian Rights 870 Market Street, Suite 570 San Francisco, CA 94102 Telephone: (415) 392-6257 Facsimile: (415) 392-8442	
DIANE RITCHIE - #100135 Legal Aid Society of Santa Clara County 480 N. First Street San Jose, CA 95103 Telephone: (408) 283-1535 Facsimile: (408) 998-3782	
LESLIE FRANN LEVY - #104634 Boxer & Gerson 171 12th Street, Suite 100 Oakland, CA 94607 Tel: (510) 835-8870 Fax: (510) 835-0415	

TABLE OF CONTENTS
(cont'd)

	<u>Page</u>
I. INTRODUCTION	1
II. JURISDICTIONAL STATEMENT	3
III. ISSUES PRESENTED FOR REVIEW	3
IV. STATEMENT OF THE CASE	4
V. STATEMENT OF FACTS	6
A. DEFENDANTS KNEW OF THE PERVASIVE ANTI-GAY HOSTILE ENVIRONMENT IN MORGAN HILL SCHOOLS	7
B. DEFENDANTS FAILED TO TAKE REASONABLE REMEDIAL MEASURES TO ADDRESS PERVASIVE ANTI-GAY PEER HARASSMENT	10
C. DEFENDANTS KNEW OF THE SPECIFIC HARASSMENT PLAINTIFFS ENDURED	13
1. Alana Flores Repeatedly Reported To School Officials, Including Defendants, That She Was Being Harassed	13
2. Plaintiff FF Repeatedly Sought Help From Teachers And Counselors	17
3. JD Dropped Out of School Because of Anti-Gay Harassment	20
4. School Employees Witnessed Plaintiff VP's Harassment	23
5. Students Verbally And Physically Assaulted CL And HA During Their Senior Year	25
VI. SUMMARY OF ARGUMENT	30
VII. ARGUMENT	31
A. STANDARD AND SCOPE OF APPELLATE REVIEW	32

TABLE OF CONTENTS
(cont'd)

Page

B.	AS THE DISTRICT COURT CORRECTLY DETERMINED, THE EVIDENCE SUPPORTS A FINDING THAT EACH DEFENDANT, INTENTIONALLY AND WITH DELIBERATE INDIFFERENCE, VIOLATED PLAINTIFFS' EQUAL PROTECTION RIGHT AGAINST ANTI-GAY PEER HARASSMENT.....	33
1.	Delia Schizzano.....	37
2.	Maxine Bartschi	38
3.	Richard Gaston.....	40
4.	Robert Davis	41
5.	Don Schaeffer and Frank Nucci.....	42
6.	Additional Indirect Reporting of Anti-Gay Harassment	43
7.	Inadequate Training And Supervision Demonstrates Deliberate Indifference	44
C.	PLAINTIFFS' EQUAL PROTECTION RIGHT AGAINST ANTI-GAY PEER HARASSMENT IN PUBLIC SCHOOLS WAS CLEARLY ESTABLISHED IN 1991	46
VIII.	CONCLUSION.....	52
IX.	CERTIFICATE OF COMPLIANCE	53
X.	STATEMENT OF RELATED CASES.....	54

FEDERAL CASES

<i>Act Up! Portland v. Bagley</i> , 988 F.2d 868 (9th Cir. 1983).....	34
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	8,11,12, 36
<i>Baynard v. Malone</i> , 268 F.3d 228 (4th Cir. 2001)	35, 44
<i>Brewster v. Board of Education of Lynwood Unified School District</i> , 149 F.3d 971 (9th Cir. 1998).....	34, 36
<i>Canton v. Harris</i> , 489 U.S. 378 (1989)	47
<i>Collins v. Jordan</i> , 110 F.3d 1363 (9th Cir. 1997).....	5,7
<i>Davis v. Monroe County Board of Education</i> , 526 U.S. 629 (1999).....	38, 41
<i>Dubbs v. Central Intelligence Agency</i> , 866 F.2d 1114 (9th Cir. 1989).....	52
<i>Ellison v. Brady</i> , 924 F.2d 872 (9th Cir. 1991)	45
<i>Gant v. Wallingford Board of Education</i> , 195 F.3d 134 (2nd Cir. 1999).....	35
<i>High Tech Gays v. Defense Industrial Security Clearance Office</i> , 895 F.2d 563 (9th Cir. 1990).....	52
<i>Johnson v. Duffy</i> , 588 F.2d 740 (9th Cir. 1978)	47
<i>Johnson v. Jones</i> , 515 U.S. 304 (1995)	5,34,36
<i>Knox v. Southwest Airlines</i> , 124 F.3d 1103 (9th Cir. 1997).....	34
<i>LSO, Ltd. v. Stroh</i> , 205 F.3d 1146 (9th Cir. 2000)	49
<i>L. Tarango Trucking v. County of Contra Costa</i> , 181 F. Supp. 2d 1017 (N.D. Cal. 2001).....	37
<i>Larez v. Los Angeles</i> , 946 F.2d 630 (9th Cir. 1991).....	46
<i>Malik v. Brown</i> , 71 F.3d 724 (9th Cir. 1995).....	49
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	8
<i>Monteiro v. Tempe Union High School District</i> , 158 F.3d 1022 (9th Cir. 1998)	37, 40
<i>Murrell v. School District No. 1</i> , 186 F.3d 1238 (10th Cir. 1999).....	35
<i>Nabozny v. Podlesny</i> , 92 F.3d 446 (7th Cir. 1996).....	35,38,41,42,50
<i>Nicole M. v. Martinez Unified School District</i> , 964 F. Supp. 1369 (N.D. Cal. 1997).....	51

<i>Oona, R.-S. v. McCaffrey</i> , 143 F.3d 473 (9th Cir. 1998).....	37,51
<i>Oviatt v. Pearce</i> , 954 F.2d 1470 (9th Cir. 1992)	46
<i>Pruitt v. Cheney</i> , 963 F.2d 1160 (9th Cir.) <i>cert. denied</i> , 506 U.S. 1020 (1992)	51
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	52
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001)	3,7,33,35,49
<i>Sinaloa Lake Owners Association v. City of Simi Valley</i> , 70 F.3d 1095 (9th Cir. 1995)	34
<i>Stemler v. City of Florence</i> , 126 F.3d 856 (6th Cir. 1997), <i>cert.</i> <i>denied</i> , 523 U.S. 1118 (1998).....	52
<i>T.W. Electric Service, Inc. v. Pacific Electric Contractors</i> <i>Associate</i> , 809 F.2d 626 (9th Cir. 1987)	8,31
<i>Thompson v. Mahre</i> , 110 F.3d 716 (9th Cir.) <i>cert. denied</i> , 522 U.S. 967 (1997)	5
<i>Vance v. Spencer County Public School</i> , 231 F.3d 253 (6th Cir. 2000).....	37,40
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	47,49
STATE CASES	
<i>Beaty v. Truck Insurance Exchange</i> , 6 Cal. App. 4th 1455 (1992).....	53
<i>Curran v. Mount Diablo Council of The Boy Scouts of America</i> , 147 Cal. App. 3d 712 (1983)	53
<i>Hubert v. Williams</i> , 133 Cal. App. 3d Supp. 1 (1982).....	53
<i>Rolon v. Kulwitzky</i> , 153 Cal. App. 3d 289 (1984)	53
STATE STATUTES	
Cal. Civ. Code §§ 51, 51.7	53
Cal. Educ. Code § 201(a).....	53
Cal. Educ. Code § 231.5	13

I. INTRODUCTION

This appeal concerns the assertion of qualified immunity by defendant school administrators in Morgan Hill, California, who closed their eyes and ears to rampant sexual orientation harassment suffered by their students, including the six plaintiffs in this case. On December 20, 2001, the district court for the third time denied defendants' motion for summary judgment, ruling that defendants are not entitled to qualified immunity from plaintiffs' sexual orientation Equal Protection claims. On remand from this Court, the district court applied the test set forth in *Saucier v. Katz*, 533 US 194 (2001), and correctly determined that the evidence supports a finding that defendants violated plaintiffs' Equal Protection rights when they reacted with discriminatory intent and deliberate indifference to plaintiffs' repeated reports of anti-gay harassment. The district court also found that plaintiffs' Equal Protection rights were clearly established at the time of the violations.

During their time as students in the Morgan Hill Unified School District, plaintiffs endured graphic, demeaning, and sometimes violent anti-gay peer harassment on a daily basis. The hateful jokes and threats followed them down the halls and into the classrooms, where their teachers allowed the abuse to continue unabated. Although plaintiffs repeatedly reported the anti-gay taunts, epithets, graffiti, pornography, and physical assaults to defendants, defendants took no action to protect plaintiffs from further harassment or to meaningfully punish the offenders, and the harassment continued. Despite their knowledge of the pervasive anti-gay hostile environment in their schools, defendants made no effort to train

teachers or staff to deal with sexual orientation harassment, and they did not inform students that such harassment was prohibited. As the district court concluded, this inaction in the face of the anti-gay hostile environment and the specific abuse plaintiffs suffered evidences discriminatory intent and deliberate indifference on the basis of sexual orientation, in violation of the Equal Protection Clause.

Moreover, Ninth Circuit law provided ample notice to defendant school officials throughout the relevant time period that their response to anti-gay peer harassment was subject to federal Equal Protection scrutiny. By 1989 this Court had ruled that disparate treatment of homosexuals triggers rational basis review under the federal Equal Protection clause. This Court later held that by 1992, at the latest, school officials had a clearly established duty under the federal Equal Protection clause to respond to peer sexual harassment. Accordingly, at all relevant times, reasonable school officials in defendants' position were on notice that the federal Equal Protection clause governs their response to anti-gay peer harassment.

Defendants offer no justification whatsoever for their discriminatory conduct; they simply insist that it never occurred. The trial court disagreed, however, and determined that the evidentiary record would support a jury finding of intentional discrimination or deliberate indifference based on actual or perceived sexual orientation. Because no reasonable school official could believe that intentional discrimination or deliberate indifference, without any asserted justification, against students perceived to be gay is lawful, the evidence of

intentional discrimination forecloses defendants' bid for summary judgment on their qualified immunity defense.

For all these reasons, as set forth more fully below, the Court should affirm the district court's denial of defendants' motion for summary judgment and allow this case to proceed to trial at long last.

II. JURISDICTIONAL STATEMENT

Plaintiffs agree with defendants' jurisdictional statement, as far as it goes. (Appellants' Brief, at 2-3). Defendants fail to acknowledge, however, that their interlocutory appeal as of right from the district court's denial of qualified immunity is limited to "abstract issues of law" and does not reach the district court's factual determinations. *E.g.*, *Johnson v. Jones*, 515 U.S. 304, 313, 316-17 (1995); *Thompson v. Mahre*, 110 F.3d 716, 720 (9th Cir.) *cert. denied*, 522 U.S. 967 (1997); *Collins v. Jordan*, 110 F.3d 1363, 1370-71 (9th Cir. 1997).

III. ISSUES PRESENTED FOR REVIEW

Whether the district court correctly determined that the evidence, when viewed in the light most favorable to plaintiffs, could support a jury finding that defendants, intentionally and with deliberate indifference, violated plaintiffs' Equal Protection right against anti-gay peer harassment in public schools.

Whether plaintiffs' Equal Protection right against anti-gay peer harassment in public schools was clearly established in 1991; and, if not, whether the right became clearly established at any time between 1991 and 1998.

IV. STATEMENT OF THE CASE

Plaintiffs are former students of schools in the Morgan Hill Unified School District whose classmates subjected them to a relentless stream of anti-gay name-calling, taunts, and pornography on a daily basis, while teachers and school administrators stood idly by and failed to take action to protect plaintiffs. Plaintiffs filed this action in 1998 against the school district, the district superintendent, members of the school board, and school officials, including defendants Delia Schizzano, Maxine Bartschi, Richard Gaston, Robert Davis, Donald Schaeffer, and Frank Nucci, alleging violations of Title IX, the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and several state statutes.

After a series of motions to dismiss, defendants filed their first motion for summary judgment. On November 9, 1999, the District Court denied defendants' motion with respect to plaintiffs' Equal Protection sexual orientation discrimination claim, ruling that "Plaintiffs have presented evidence upon which a jury could find that many of the individual defendants personally received reports of particular incidents of sexual orientation harassment and yet failed to take appropriate action... This evidence is sufficient to raise an inference of sexual orientation discrimination at the summary judgment stage." DER¹ 154-166.

Defendants then filed a supplemental summary judgment brief, in which they reasserted the defense of qualified immunity. On February 3, 2000, the district court rejected defendants' qualified immunity defense and denied summary

¹ Plaintiffs refer to Defendant-Appellants' Excerpts of Record as "DER." Plaintiffs refer to Plaintiff-Appellees' Supplemental Excerpts of Record as "PER."

judgment. The court ruled:

“ it is clearly established that ‘the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one’s membership in a definable minority, absent at least a rational basis for the discrimination.’ *Nabozny v. Podlesny*, 92 F.3d. 447, 457 (7th Cir. 1996). Further, ‘there can be little doubt that homosexuals are a[n] identifiable minority.’ *Id.* At trial, it must be determined whether under the clearly established law, a reasonable school district administrator in Defendants’ position could have believed his or her conduct was lawful.

DER 167-168.

Defendants appealed the district court’s denial of qualified immunity, and on September 10, 2001, this Court remanded defendants’ qualified immunity defense to the district court for reconsideration in light of *Saucier v. Katz*, 533 US 194 (2001). DER 194-200. This Court directed the district court to review the evidence to determine whether “the submissions of the parties, when viewed in the light most favorable to the plaintiff, show that the defendant[s] violated a constitutional right.” DER 197.

Pursuant to this Court’s order, the district court rigorously conducted the analysis required by *Saucier*, and on December 20, 2001, the court once again rejected defendants’ qualified immunity defense. DER 535-541. The court ruled that “plaintiffs’ evidence, when viewed in a favorable light, demonstrates that they were treated differently by defendants on account of their sexual orientation,” in violation of the Equal Protection Clause. DER 537. The court went on to cite the evidence against each individual defendant that supports a jury finding of an Equal Protection violation. The court further ruled, as it had in its February 3, 2000

order, that the right at issue was clearly established as early as 1988, such that “a reasonable administrator would have been on notice during the period 1991-98 that intentional discrimination against or deliberate indifference towards students on the basis of their actual or perceived sexual orientation was unlawful if lacking a rational basis.” DER 539-A. Defendants now seek interlocutory review of the district court’s December 20, 2001 order.

V. STATEMENT OF FACTS

On defendants’ motion, the Court must assume the truth of plaintiffs’ evidence as to all disputed facts. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 631 (9th Cir. 1987). Likewise, the Court must grant to plaintiffs all reasonable factual inferences. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Defendants’ motion necessarily fails unless the evidence as a whole, when viewed in this light, prohibits a jury from returning a verdict for plaintiffs. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Plaintiffs’ burden on this motion is simply to present evidence from which a jury might return a verdict in their favor. *Id.* at 257.

Though defendants profess to honor the principle that the Court must construe the record in plaintiffs’ favor, and that plaintiffs are entitled to all reasonable factual inferences, defendants’ presentation of the facts repeatedly ignores this fundamental requirement. Defendants time and again present only their version of disputed facts, and simply ignore evidence plaintiffs submitted to oppose summary judgment.

This evidence shows that anti-gay harassment was a daily fact of life for

students perceived as gay or lesbian at Morgan Hill’s Live Oak High School and at its middle schools. Their peers subjected them to an endless stream of harassment, intimidation, discrimination, and abuse. The plaintiffs in this case endured a relentless barrage of hateful sexual epithets, anti-gay jokes, and demeaning comments. They found derogatory, sexually-oriented graffiti scrawled on lockers. Students forced pornography on them, some of it with threatening, homophobic comments added. Some of the plaintiffs were victims of physical assaults.

The mistreatment of these students by their peers was well known to school board members, administrators, teachers, and school guards in the Morgan Hill Unified School District. Sometimes the harassment occurred right before their eyes, either in the classroom or on the school yard. At other times, plaintiffs or their parents reported the harassment to school officials. The issue was discussed in the school newspaper and raised at school board meetings, even before these plaintiffs started high school. Nevertheless, the District and its employees, including defendants, turned a blind eye toward the torment of the students who were in their care.

On this appeal from a denial of qualified immunity, this Court must accept as true the following facts:

A. DEFENDANTS KNEW OF THE PERVASIVE ANTI-GAY HOSTILE ENVIRONMENT IN MORGAN HILL SCHOOLS

Well before plaintiffs began attending Live Oak High School, students, teachers, administrators and the Morgan Hill School Board (“Board”) all knew that Morgan Hill students perceived to be gay were targets of harassment. As early as March, 1991, the Oak Leaf, the student newspaper at Live Oak High School,

reported peer harassment against lesbian and gay students. PER 1205 (*Letters to the Editor: Student Concerned with Homophobia*, Oak Leaf, Mar. 15, 1991).

Copies of the Oak Leaf were distributed to members of the Board, PER 718-719 (Crow depo, at 79:25-80:4), and were also carried as an insert to the Morgan Hill Times. PER 681-682, 697 (Carr depo, at 16:24-17:2; Choi depo, at 89:21-23).

In the fall of 1992, as a new school year began, an ugly controversy arose when Martin Murphy Middle School included a list of hot lines on the back of its Associated Student Body Card. One of the hot lines was for gay and lesbian teens. PER 690 (Choi depo, at 25:3-15). The cards led to a firestorm of controversy, consuming not one, but two, separate meetings of the Board. PER 720 (Crow depo, at 84:20-24). One Board member issued a statement that she read at the second Board meeting and published in the Morgan Hill Times, identifying “harassment of students based on their sexual identity (or perceived sexual identity) as an important issue facing the District.” See PER 691-693 (Choi depo, at 43-45); PER 1270-1272 (Schmidt depo, at 17:19-18:2; 24:7-16); PER 1216-1218 Emery decl, Exh. II. The meetings were so acrimonious that James Crow, the Superintendent, requested police attendance to protect openly gay teacher Ron Schmidt and the gay and lesbian students attending the meetings. PER 721, 724-725 (Crow depo at 87:6-8; 96:20-97:11). The next day Crow telephoned a Live Oak administrator to express his concern about the physical safety of one student who revealed that he was gay at the meeting. PER 724-725 (Crowe depo at 96:21-97:5). Students wrote about the Board meetings and their reactions in the Oak Leaf. See PER 1206 (*Isolated Student Is Finding Acceptance and Raising Her*

Voice, Oak Leaf, Nov. 20, 1992) (describing experience as a lesbian at Live Oak); *id.*, *Homosexuals Need Recognition And Understanding, Not Bigotry* (urging action “before one of our own Live Oak students is added to the growing statistics of successful suicides”).

The following spring, to combat harassment, two lesbian students decided to organize a gay and lesbian student group at Live Oak. PER 1140-1142 (Schizzano depo, at 82:14-84:11). The Oak Leaf reported the hateful response. Live Oak students became “enraged . . . shoving the people who passed [out flyers announcing the formation of the club,] and calling those involved derogatory names such as ‘fag’ and ‘dyke.’” PER 1207-08 (*Intolerance Results in Homophobic Reactions*, Oak Leaf, April 8, 1993). Graffiti appeared on the sidewalk at school: “DIKES [SIC], KEEP IT IN THE CLOSET, FAGGOTS.” Graffiti on a locker read: “KILL ALL GAYS, KEEP IT IN THE CLOSET.” PER 1207-08 (*Id.*); *see also* PER 707 (Crow depo, at 32:15-22); PER 1030-1031 (Green depo, at 20:22-21:5). That same edition of the Oak Leaf carried a letter to the editor reporting that gay and lesbian students were called “faggot,” “queer,” and “dyke.” PER 1207-08 (Oak Leaf, April 8, 1993). Two months later, the Oak Leaf reported that “fliers [sic] were posted around the campus announcing the formation of a gay-bashing support group. Those interested were invited to call 1-800-RED-NECK.” PER 1209 (*Chain of Hate Crimes Hits School District*, Oak Leaf, June 4, 1993). The new club was controversial not just among students, but among Live Oak employees as well. PER 1030-1031 (Green depo, at 20:21-21:25).

The Oak Leaf continued to report gay and lesbian harassment the next school year. In the fall of 1993, the Oak Leaf announced that The Bridge, a teen counseling center in Morgan Hill, was initiating a new Gay/Lesbian Advocacy and Support Program. PER 1210 (*Bridge Counseling Center Helps Youth*, Oak Leaf, October 29, 1993). The article reported the need to provide support for lesbian and gay students who “face ridicule, harassment and violence from their peers.” *Id.* In February 1994, Daphne Oliver, a senior at Live Oak, wrote a letter to the editor in the Oak Leaf condemning the anti-gay atmosphere pervading Live Oak High School. PER 1211 (Oak Leaf, February 25, 1994).

B. DEFENDANTS FAILED TO TAKE REASONABLE REMEDIAL MEASURES TO ADDRESS PERVASIVE ANTI-GAY PEER HARASSMENT

Despite clear and persistent notice of a pervasively hostile environment for lesbian and gay students, defendants took no action calculated to address the threat under which lesbian and gay students attended school. The District’s limited and incompetent actions show only a disingenuous and unsuccessful attempt to be in paper compliance with the law. Defendants’ few feel-good, ad hoc programs left wholly unaddressed the obvious need for systemic initiatives to protect their students from harassment. PER 1181 (Somerville depo, at 83:4-24); DER 106-107 (Park decl, ¶¶ 6, 8).

During most of the period in which plaintiffs attended Morgan Hill schools, the District’s written sexual harassment policy did not include an express prohibition against sexual orientation harassment.² PER 1106-1107 (McKenna

² When, in 1997, the District finally amended its sexual harassment policy to

depo, at 58:23-59:1); DER 48-55. Moreover, the policy was inadequately promulgated and enforced. The sexual harassment policy was presented to students every year as a single page within a 35-page student handbook containing the full range of school policies. DER 108-109, 130-147 (Schizzano decl, Exh. B). The administrative regulations, which the District did **not** distribute to teachers or students, contained the only written explanation of sexual harassment complaint procedures. PER 1159-1160, 1165 (Schizzano depo, at 230:24-231:2; 244:5-24). The District's policy was **not** posted at the schools, as the California Education Code requires. PER 1138 (Schaefer depo, at 65:2-4); PER 1204 (Webb depo, at 36:20-21); PER 1173 (Schizzano depo, at 280:2-6); *See* Cal. Educ. Code § 231.5. The policy did not contain language accessible to students or descriptions of prohibited behavior. PER 603-607 (Shoop decl, ¶¶ 14, 15, 19, 25).

Students received only minimal training on the sexual harassment policy. Once each year on-site administrators made a presentation to students in social studies class discussing the Code of Conduct and District policies. Discussion with students of all forms of sexual harassment occupied approximately one to five minutes each year. PER 1168, 1174-1175 (Schizzano depo, at 256:19-24; 309:18-310:3); PER 1137 (Schaefer depo, at 54:8-22). Superintendent McKennan simply did not know whether students received **any** training specifically addressing sexual harassment. PER 1108 (McKennan depo, at 65:4-9). Thus, students' information

expressly prohibit sexual orientation harassment, DER 48-55, it included this prohibition only in the District's administrative regulations, which are not distributed to students or teachers. PER 1159-1160, 1165 (Schizzano depo, at 230:24-231:2; 244:5-24). Students and teachers, therefore, had no way of knowing of the new paper "policy" against sexual orientation harassment.

regarding any official District sexual harassment policy was limited to the single page sent home to parents and the one-to-five minute presentation in class. PER 1152 (Schizzano depo, at 127:14-24). Not surprisingly, the annual one-to-five minute presentation to students failed to identify adequately, if at all, sexual orientation discrimination as a prohibited behavior. PER 1135 (Repp depo, at 34:8-11); PER 1109-1110 (McKenna depo, at 71:5-72:6). PER 1168-1169 (Schizzano depo, at 256:25-257:13).

Teacher and staff training fared no better. In her 20 years at Live Oak, teacher Lynn Gautschi received her first training on sexual harassment within the past few years. PER 975-979 (Gautschi depo, at 17-21). Delia Schizzano, who was responsible for staff training on these issues at Live Oak, explained that in her "in service trainings" for staff she would simply say that sexual harassment is not tolerated and move on to a new subject. PER 1161-1165 (Schizzano depo, at 240:9-244:4). Sexual orientation was not mentioned at all in staff trainings while plaintiffs were attending District schools. PER 1166-1169 (Schizzano depo, at 248:24-249:7); PER 1105 (McKenna depo, at 57:13-19); PER 1184-1185 (Urego depo, at 32:11-33:15); PER 1201-1202 (Villegas depo, at 50:11-51:12). Staff "training" in the District fell clearly below the standard of care in the profession. PER 604 (Shoop decl, ¶¶ 17, 18).

Most significantly, student victims of sexual or sexual orientation harassment had no access to any effective complaint procedure. The District's procedure for sexual harassment complaints is described only in the administrative regulations, which teachers, students, and parents never see. PER 1165 (Schizzano

depo, at 244:5-19); PER 605 (Shoop decl, ¶ 20). One assistant principal explained that he only provided the complaint procedure to those who were accused of sexual harassment, and not to the victims. PER 809 (Desimone depo, at 134:6-16). Even by the close of the 1999 school year, more than a year after the commencement of this litigation, the District had not included the complaint procedure in the Student handbook or any other handout to students. PER 130 (Schizzano decl, Exh. B). The District took no meaningful steps to ensure that students and staff knew that school policy prohibited sexual orientation harassment, were aware of any procedure for registering complaints, or were made to feel that a complaint would be taken seriously and appropriately investigated. PER 602-603 (Shoop decl, ¶¶ 11, 12, 14).

Despite their knowledge of the ongoing hostile environment facing sexual minorities in their schools, defendants took no action to ascertain the severity of the continuing problem or to intervene to ameliorate it. PER 1184-1185 (Somerville depo, at 94:12-95:2); PER 1101-1102 (McKenna depo, at 50:25-51:24). Instead, defendants intentionally remained indifferent to the pervasive hostile environment of which they were aware and which they actively perpetuated.

C. DEFENDANTS KNEW OF THE SPECIFIC HARASSMENT PLAINTIFFS ENDURED

1. Alana Flores Repeatedly Reported To School Officials, Including Defendants, That She Was Being Harassed

By the spring semester of her sophomore year at Live Oak, Alana Flores had become the target of intimidating and hostile anti-gay harassment and threats of

violence. PER 829 (Flores depo, at 84:3-4). She found anonymous notes taped onto, written on, etched in, and placed inside her school locker. PER 829, 850 (*Id.* at 84:17-18; 113:16-21). They said: “Dyke Bitch Fuck off”, “Die Dyke Bitch!” and “If you don’t leave, we’ll make you.” PER 829, 832, 844 (*Id.* at 84:20-21; 87:24; 105:17-20). Alana encountered similar messages written in chalk on the floor in front of her locker. PER 863 (*Id.* at 135:10-15). During her three years at Live Oak, Alana told school employees about the locker graffiti approximately 20 times. PER 865 (*Id.* at 166:4-10). She reported these acts directly to Assistant Principal Delia Schizzano about six times during her junior year alone. PER 846 (*Id.* at 109:3-18). Neither Schizzano nor any other school official took any steps to address the problem or to remove the graffiti. PER 853, 866-67 (*Id.* at 114:19-26; 167: 1-13; 170:10-14). Alana’s repeated requests to change lockers were never honored. PER 840, 842, 847-848, 849, 851-852 (*Id.* at 97:1-2; 102:25-26; 110:20-111:9; 112:16-26; 114:7-14; 117:13-23).

Along with the notes, Alana began receiving pornography depicting naked women, sometimes performing sex acts. PER 833 (*Id.* at 88:16-20). During the spring of her sophomore year, Alana’s friend, Brennah Candaleria, found a particularly violent piece of pornography in Alana’s locker. PER 834-835 (*Id.* at 89:18-21; 90:3-7). Frightened and confused, the two girls went directly to defendant Delia Schizzano. PER 835 (*Id.* at 90:10-15); PER 1233 (Emery decl, Exh. NN, at 6:14-28). They showed Schizzano the pornography, described the pattern of harassment and threats against Alana, and entreated Schizzano to do something to stop the abuse. PER 836-837 (Flores depo, at 93:15-25; 94:18-19).

Schizzano expressed neither sympathy nor concern. Instead, she inexplicably asked Alana whether she was gay. PER 838 (*Id.* at 95:25). When Alana replied that she was not, Schizzano asked, “Why are you crying then?” PER 837, 839, 841, 844 (*Id.* at 94:3-11; 96:7; 100:11-13; 105:2). Schizzano then told Alana and Brennah not to bring such “disgusting trash” to her again and told them to return to class. PER 837 (*Id.* at 94:21-23). Neither Schizzano nor any other school official pursued this complaint, PER 842-843 (*see id.* at 102-103), and needless to say, the violent threats and pornography continued to appear in Alana's locker. PER 846 (*Id.* at 109:3-10). Over the next three years, Alana received such material approximately **25 more times**. PER 829-834, 843, 845-846, 871 (*Id.* at 84:7-89:19; 103:22-26; 108:26-109:7; 219:21-22). She reported the pornography and notes to Schizzano approximately five more times. PER 846 (*Id.* at 109:3-10; 109:6-18). Schizzano took no action to stop the harassment.

In Alana’s 10th and 12th grade math classes, male students made crude sexual and anti-gay remarks to each other and to other students on a daily basis. PER 815-817, 828 (Flores depo, at 47:12-13; 48:17-20; 49:2-24; 79:4-7). When Alana asked them to stop, they would reply: “Shut up, you fucking dumb dyke.” PER 823 (*Id.* at 59:17-20); PER 1234 (Emery decl, Exh. NN, at 7:10). Alana repeatedly complained to her teacher Ken King about the vulgar, homophobic comments. PER 818 (Flores depo, at 51:11-12); PER 1264-1266 (King depo, at 47:23-48:4; 51:3-11). King, who showed willingness to curb racial slurs among students, did nothing to stop anti-gay slurs. PER 819-822 (Flores depo, at 53:2-5; 54:20-21; 56:6-16; 58:22-23); PER 1262-1263,1267-1268 (King depo, at 30:21-

31:13; 58:4-59:8). Instead, King pointed to Alana's sexual orientation, asking: "What do you expect?" PER 872-873 (Flores depo, at 227:24-228:20); PER 804 (Desimone depo, at 62:6-12). Alana reported her experiences in King's class and the impact on her grades to Assistant Principal Desimone. PER 825 (Flores depo, at 64:1-14); PER 805 (Desimone depo, at 63:8-14). But the demeaning anti-gay language in King's class continued unabated. PER 826 (Flores depo, at 68:2-5).

Alana encountered a similarly inadequate response when a male student accosted Alana and plaintiff FF, handed them a pornographic picture depicting heterosexual sex acts, and said: "That's what you should be doing, Faggot!" Alana and FF immediately reported the incident to Assistant Principals Desimone and Schizzano. PER 1234 (Emery decl, Exh. NN, at 7:15-7:20); PER 935-936, 946-948 (FF depo, at 244:3-245:12; 406:1-13; 418:17-419:1-7); PER 796-799 (Desimone depo, at 32:17-33:4; 35:3-11; 38:19-21.) Although Principal Bob Davis and Vice Principal Schizzano knew that several students had participated in the confrontation, they disciplined only the one student who actually handed the pornographic picture to Alana and FF. PER 798, 800-802 (Desimone depo, at 35:11-13; 40:4-6; 41:6-42:2); PER 790-792 (Davis depo at 52-58). Even he received only a light suspension, PER 876-877 (Flores depo, at 293:24-294:1), and he bragged to his friends about the school's leniency. PER 1234 (Emery decl, Exh. NN, at 7:27-8:2); PER 937 (FF depo, at 247:11-19). When Alana and FF complained to Principal Davis about his handling of the situation, PER 1234 (Emery decl, Exh. NN, at 7:27-8:2); PER 937 (FF depo, at 247:11-19), Davis did not address their concerns; instead, he inexplicably asked Alana if she was a

lesbian. PER 870 (Flores depo, at 193:6-16). Alana and FF told Davis of the hostile atmosphere at the school, PER 791-794 (Davis depo, at 56-67), and Alana made a number of suggestions about ways to educate the student body about sexual harassment and sexual orientation discrimination. Davis refused to accept or implement any of Alana's suggestions. PER 812 (Flores depo, at 12:12-21); PER 1234 (Emery decl, Exh. NN, at 7:27-8:3). The administration's sole response to Alana's and FF's complaints was to watch the area where the harassment occurred "two to three times." PER 791-794 (Davis depo, at 56-67); PER 800-801, 803 (Desimone depo, at 40:4-6; 41:6-9; 55:16-18.)³

2. Plaintiff FF Repeatedly Sought Help From Teachers And Counselors

FF encountered regular anti-gay verbal harassment and physical abuse from his earliest days at elementary school. PER 988-989 (Glynn depo, at 15:5-15; 16:5-8). His mother reported the harassment to school officials, describing beatings, name-calling and broken glasses, to no avail. PER 988-992 (*Id.* at 15:15-

³ Alana also reported to campus monitors that she experienced frequent and routine name-calling and food-throwing by her peers, most often while she walked from one class to the next during "passing periods" and during lunch breaks. PER 854-855, 858, 861-862, 869; (Flores depo, at 119:12-13; 120:17; 123:6-24; 126:2-5; 131:10-20; 134:5-9; 186:4-12). No District employee took steps to investigate or determine the identities of the perpetrators. PER 856-857 (*Id.* at 124:13-125:9). At school dance recitals, Alana heard "Fag" and "Dyke" shouted at her from the audience while she and FF were performing. PER 858-859; PER 878-879 (*Id.* at 126:15-23; 129:6-10; 296:23-297:5). As far as Alana knows, none of the teachers or administrators in the audience at any of these recitals made any effort to curb the name-calling. PER 1235 (Emery decl, Exh. NN, at 8:13-17). Alana told Carmen Villegas, her dance teacher about the name-calling, PER 859-860 (Flores depo, at 129:17-130:21), but Villegas told Alana "not to worry about it." PER 880 (*Id.* at 298:10-14).

17:3; 17:6-10; 20:7-21:2).

At Martin Murphy Middle School, the harassment increased in both severity and frequency. PER 884-887, 890, 896 (FF depo, at 33:24-34:7; 34:25-35:6; 39:13-15; 39:22-23; 44:13-20; 55:5-17). In one incident, six boys set upon FF at the school's bus stop. PER 893-894, 896 (*Id.* at 50:22-23; 51:5-8; 55:5-17); PER 993-995 (Glynn depo, at 25:18-22; 28:14-15; 29:19-21). They beat him so savagely that he had to be treated at the hospital for "severely bruised ribs." PER 894-895, 897-901 (FF depo, at 51:10-52:16; 56:6-10; 56:19-23; 56:19-57:1; 72:9-14; 72:18-20; 73:9-74:17); PER 993, 996-997, 999-1000, 1007 (Glynn depo, at 25:19-22; 30:4-10; 30:16-23; 30:25-31:2; 33:19-1; 34:2-4; 43:13-16); DER 91-101 (Schaefer decl, Exh. C). Defendants Schaefer and Nucci punished only one of the six students involved in the incident, taking no action against the remaining five assailants. DER 93 (Schaefer decl, at ¶8 & Exh. C). Schaefer and Nucci never informed FF or his mother of their response to the incident, PER 901 (FF depo, at 46:4-16); PER 998, 1000-1002, 1004-1007, 1009 (Glynn depo, at 32:19-24; 34:10-23; 34:21-35:1; 37:19-39:1; 39:23-40:4; 42:24-43:1; 48:18-25), and they transferred FF, the assault victim, to another school.

Even after his transfer to Britton Middle School, FF continued to experience regular physical abuse and verbal assaults. PER 902-904, 907-910 (FF depo, at 107:13-108:5; 109:6-17; 113:13-116:20); PER 1010-1011 (Glynn depo, at 49:18-50:2). Teachers witnessed the harassment but failed to intervene. One day a teacher stood by as a student told FF he could get a job "planting tulips." When FF expressed interest, the student grabbed his own penis and said "You can plant your

two lips right here.” PER 905-906 (FF depo, at 111:25-112:8). Similarly, when FF was “constantly harassed” by fellow students in his ninth grade history class, the teacher, Mr. Skully, “laughed” but did nothing to stop the harassment. PER 916-917 (*Id.* at 143:12-144:10). FF sought help from the school, but the principal refused to get involved and told FF that he had misunderstood his teacher. PER 911-914 (*Id.* at 121:14-122:1; 124:1-25; 125:22-25.) FF and his mother reported his incessant harassment to counselors at Britton, but the harassment continued. PER 915, 923 (*Id.* at 130:16-25; 181:4-6); PER 1012-1013 (Glynn depo at 51:21-52:2).

When FF moved on to high school at Live Oak, the harassment escalated, including, in addition to daily name-calling and regular food-throwing:

- Outside of class – FF found pornography and newspaper clippings from gay magazines in his locker;
- Boys locker room – students made anti-gay comments such as “Silly faggot, dicks are for chicks,” refused to change near FF, and threatened him;
- Choir class – students called FF “faggot names” because he had solos;
- Twelfth grade math class – students called FF “faggot, you queer, fag...;”
- Swimming team – students harassed FF for being “a fag,” gave him pornography because students thought he was “effeminate;”
- Plays and dance recitals – students called names;
- Wrestling – FF quit team because students said he wanted to wrestle with boys because he “liked being touched and grabbed by them;” and
- After graduation--approached on school grounds and told “You fucking faggot. I’m going to kill you and kick your ass.”

PER 918-922, 926-928, 931, 933-934, 952, 949 (FF depo, at 150:4-14; 156:6-159:23; 200:8-201:1; 202:6-12; 234:15-3; 238:15-239:20; 491:18-24; 450:5-15); PER 1014; PER 1016-1017; PER 1020-1028 (Glynn depo, at 59:7-11; 71:19-72:2; 77:15-19; 80:9-22; 94:20-24.; 80:20-22; 82:21-84:1; 81:4-82:1; 95:15-96:7); PER 1035, 1036 (Haines depo, at 27:1; 29:10).

Administrators and teachers were well aware of FF's plight. For example:

- FF's 10th grade counselor, Rick Desimone, learned of FF's harassment from FF, from FF's mother, and from FF's middle school counselor. PER 944, 924-925 (FF depo, at 361:13-24; 189:4-190:2);
- FF told his art teacher, Ms. Pederson, about the harassment he faced in his P.E. classes. PER 929-930 (FF depo, at 207:16-208:4);
- FF's dance teacher, Ms. Villegas, knew of his harassment, knew that FF would not change in the boys' locker room, knew that boys who danced at Live Oak were teased "because they were doing something that was not a typical kind of activity for the boys," but responded "what can you do?" PER 945 (FF depo, at 405:14-21) PER 1018, 1019, 1023 (Glynn depo, at 75:16-24; 76:9-15; 82:2-10); PER 1200, 1197-1199 (Villegas depo, at 38:1-8; 35:14-19; 36:7-37:10);
- FF's mother told assistant principal Schizzano that he was being called names like "gay." PER 1017, 1015 (Glynn depo, at 72:3-9; 64:6-11);
- The P.E. teacher, Ms. Gautschi, heard students calling FF "fag or faggot." Gautschi discussed the issue with other students, with FF and with Villegas. PER 980-986 (Gautschi depo, at 30-36);
- FF's mother reported the incident occurring after graduation on school grounds to the Morgan Hill police and to assistant principal Schizzano. PER 950-951 (FF depo, at 453:20-454:13); PER 1028 (Glynn depo, at 96:15-16).

3. JD Dropped Out of School Because of Anti-Gay Harassment

At the start of her sophomore year at Live Oak, JD attended her first meeting of the Gay Lesbian Bisexual Association. PER 583, 585 (JD depo, at 22:11-19);

32:17-23). The anti-gay harassment began the very next day. Students shouted “dyke” and “queer” at her and pelted her with fruit. PER 584, 587 (*Id.* at 25:25-26:12; 37:20-24). JD immediately reported the incident to the campus monitor on duty, PER 587-588 (*id.* at 38:22-41:3), but the food-throwing continued that very same day. PER 587 (*Id.* at 38:22-39:1). She did not attend any further meetings of the Gay Lesbian Bisexual Association. PER 786 (*Id.* at 245:22-246:4).

For the rest of JD’s time at Live Oak, students verbally harassed her every day; they threw food at her at least once a week. PER 752 (JD depo, at 151:9-17). JD believes that the campus monitors, police officers, and teachers saw the food throwing, but they intervened, if at all, only rarely. PER 736-737 (*Id.* at 57:10-61:20.) JD repeatedly complained about the harassment to campus monitor Julie Urego, but Urego did nothing. When JD asked Urego to escort her to class because she was particularly afraid of the other students, Urego refused, telling JD to go to class early instead. PER 765-769 (*Id.* at 169:5-170:1; 170:18-173:1).⁴ When Irma Morelos, another campus monitor, saw students present JD with a penis-shaped balloon during a lunch period, she merely told the offending students to knock it off. The harassment, of course, did not stop. PER 782-783 (*Id.* at 205:14-206:16). When Morelos found JD crying in the bathroom one day, JD explained that students had been harassing and yelling at her. PER 784-785 (*Id.* at 207:4-208:15). There was no discernable attempt to stop the harassment.

⁴ When Urego encountered JD and another girl in the girls’ bathroom before school one morning, she started a rumor among students that JD and the other girl were having oral sex in the bathroom. PER 746-747, 748-751 (JD depo, at 126:24-127:9, 128:12-131:5).

The harassment often occurred in class in front of teachers, who took no action. JD's biology teacher, Mr. Webb, witnessed a male student repeatedly taunt JD about lesbian sex and call her a "dyke" and a "queer," but he never intervened. PER 589-590 (*Id.* at 48:18-52:26). When JD specifically complained to Webb about the student, Webb's only response was to put JD and the student in separate groups for science projects. PER 591 (*Id.* at 53:1-17). JD had a similar experience in her history class. PER 753-756, 777 (JD depo, at 152:7-155:9, 187:16-22). JD reported the harassment in Mr. King's math class directly to Assistant Principal Schizzano. PER 1143-1151 (Schizzano depo at 90-98).

During P.E. class, students directed lewd sexual comments to JD, suggesting that JD was having sex with another girl in the class. PER 739 (JD depo, at 71:22-72:13). They ostracized JD, refusing to be her partner, explaining that they were afraid that JD "was looking at them." PER 593 (*Id.* at 77:21-78:11). JD told the teacher, Ms. Gautschi, that the other students were poking fun, calling her dyke and queer, and making uncomfortable suggestions. Gautschi did nothing to stop JD's harassment. Indeed, she suggested that JD change her clothes in the bathroom or someplace else removed from the locker room so that the **other girls** would not feel uncomfortable. PER 593-595, 742 (*Id.* at 78:16-79:1, 80:4-21, 83:2-85:19; 88:1-13; 91:18-92:12).

JD's experience with assistant principal Schizzano was even worse. Schizzano called JD into her office for an interview in connection with a sexual harassment complaint **made by another female student against a male student**. Inexplicably, Schizzano then proceeded to interrogate JD about JD's sexual

orientation and about whether she had had sex with boys or with other girls. PER 597, 745, 758-760 (JD depo, at 110:6-111:20, 112:19-114:13, 157:23-158:11-159:23).

JD reported the harassment she suffered to two of the school's assistant principals, Rick Desimone and Maxine Bartschi, when they criticized her poor attendance. In both instances, she explained that her attendance problems were directly related to the unbearable treatment she was experiencing from her peers. PER 761, 763-764, 780-781, 776 (JD depo, at 164:2-22; 166:5-167:21; 202:19-203:15; 184: 2-8). Instead of inquiring further, Ms. Bartschi brusquely replied that those problems were in the past and that JD would simply have to correct her attendance problems. PER 772-76 (*Id.* at 180:12-184:8). On another occasion, Assistant Principal Desimone accused JD of lying in order to be excused from school. JD explained to him that she was upset because students were saying mean things and shouting at her in class. PER 761, 763-4, 780-81 (*Id.* at 164:2-22; 166:5-167:21; 202:19-203:15). Desimone did nothing.

In sum, JD received neither help nor relief from the many persons in authority at Live Oak High School who knew of her untenable situation. Ultimately, JD dropped out of school after the 11th grade.

4. School Employees Witnessed Plaintiff VP's Harassment

VP's fellow students began targeting her with anti-gay slurs in October of 1995, at the beginning of her 10th grade year at Live Oak High School. PER 1115 (VP depo, at 44:11-14). The harassment commenced after VP attended her first meeting of the Gay Lesbian Straight Forum. PER 1132 (*Id.* at 209:16-25). From

that day forward, she was called a “dyke,” “queer,” or “faggot” virtually daily in the public areas of the school. PER 1116-1117, 1122 (*Id.* at 50:11-19; 53:14-17; 69:5-16).

Students openly harassed VP in the classroom. In Mr. Webb’s 10th grade math class, students repeatedly made loud, sexually suggestive comments to VP about girls kissing each other, or demanding “how was [VP’s] girlfriend last night.” PER 1118-1119 (VP depo, at 62:9-63:21). The inappropriate comments in class were loud enough to be heard across the room, yet Mr. Webb never acknowledged them or responded to them, although at other times he did discipline one of the boys for generally talking and disrupting class. PER 1120-1121 (*Id.* at 67:7-68:12). Similarly, in Ms. Cowan’s 11th grade English class, boys broadcast loud comments that faggots are disgusting and lesbians should die. The improper comments were loud enough that all the students turned and looked, but Ms. Cowan ignored them. PER 1126-1127 (*Id.* at 96:5-97:16.)⁵ VP was often late for her second period class so that she could avoid a particularly threatening student, Matthew Estrella, who would harass her regularly. PER 1256 (Emery decl, Exh. QQ, at 4:1-4).

Several of VP’s friends complained to a campus monitor about the harassment directed at VP and her companions during lunch. PER 1123 (*Id.* at 77:7-17). After a separate incident, three of VP’s friends went to the administrative office to complain about the incessant harassment they endured

⁵ One student reported to Assistant Principal Gaston that Cowan showed bias against lesbians in responding to students in her class making negative comments about girls kissing. PR 956-959 (Gaston depo, at 62:1-64:15; 70:11-15).

during lunch period. PER 1124 (*Id.* at 78:13-20). The lunch-time harassment continued even after the repeated efforts of VP's friends to report the misconduct. PER 1125 (*Id.* at 82:6-10).

After witnessing the futile attempts of her friends to report harassment that they and VP had experienced, and fearing that further reporting efforts to unresponsive administrators might actually subject her to more harassment, VP did not even permit her mother to intervene on her behalf. As she explained,

[Other students had] gone up to administrators before, and said there was a problem and nothing was done. It was just like, you know, no big thing to them, so why would it matter if my mom went up? Oh – all they would say is, “Oh, you know, just kids being kids.” But it wasn't.

PER 1129-1130 (VP depo, at 124:8-125:1). After trying for two years, VP managed to enroll in the independent study program for her senior year, so she could avoid the harassment entirely. PER 1128 (*Id.* at 104:9-20).

5. Students Verbally And Physically Assaulted CL And HA During Their Senior Year

Live Oak students began taunting CL and HA with anti-gay comments and sexual gestures in the fall of their senior year (1997), shortly after they started dating. PER 1072 (CL depo, at 118:3-4); PER 645-646, 649 (HA depo, at 131:25-132:15; 169:4-11). Nearly every time CL and HA walked through the halls or sat in the quad, students called them “lesbian,” “queer,” “faggots,” and “dykes.” Students made vulgar sexual jokes about lesbians. PER 1072 (CL depo, at 118:4-6.) For example, one student frequently repeated “Where are you going fishing this weekend?” and another replied “On the dyke.” PER 1070 (CL depo, at

112:15-21). One oft-repeated joke asked “What do you call a lesbian dinosaur?” Answer: A “lick-a-lot-a-pus.” PER 1083-1086 (CL depo, at 144:7-145:6); PER 1245 (Emery decl, Exh. OO, at 7:8-12). At least one student regularly rubbed his fists together to suggest a sexual act between two women. PER 1082 (CL depo, at 143:15-19). Other students threw money at CL and HA while demanding that they kiss. PER 1072 (CL depo, at 118:15-16); PER 630-631 (HA depo, at 104:19-21; 105:18-20). All the while, teachers and campus monitors were within earshot, yet they stood idly by. PER 1089-1090, 1095 (CL depo, at 156:11-157:1; 280:9-18); PER 631-632, 659-666 (HA depo, at 105:25-106:9; 212:23-214:7; 216:3-5; 217:8-17; 218:5-7; 219:21-220:9).

Throughout the 1997-98 school year, a male student in HA’s graphics class repeatedly brushed up against HA and whispered “sexual things” to her, sometimes putting his hand on her thigh. PER 613, 622-623, 651 (HA depo, at 46:3-4; 61:21-62:2; 184:7-15). During one incident in the darkroom, he asked whether HA liked to “put [her] finger in the hole,” pressed against her with his hand on his thigh and whispered “do you want me to do that to you?” PER 1249-1256 (Emery decl., Exh. PP). HA reported this harassment to her graphics teacher, Ms. Brown Korbel. PER 614-617 (HA depo, at 50:24-51:4; 52:7-9; 52:22-25; 53:13-19). Brown Korbel told HA that she would talk to the harasser, PER 618 (HA depo, at 54:20-22), but when HA and Brown Korbel spoke again approximately one week later, Brown Korbel told HA that she had not in fact talked to him. PER 619 (HA depo, at 57:15-23).⁶

⁶ Contrary to defendants’ assertion, HA did not tell Brown Korbel that the

In December or January of their senior year, students physically assaulted CL and HA. While CL and HA were walking through the teachers' parking lot after school, a group of boys shouted anti-gay slurs from their car. PER 1056 (CL depo, at 88:9-14); PER 633-634 (HA depo, at 110:21-111:2). One of them then threw a hard plastic cup containing red liquid at CL and HA, hitting CL in the head. PER 1054-1059 (CL depo, at 84:1-4; 84:23-25; 85:1-5; 88:3-8; 93:22-24; 95:25-96:27); PER 635-637 (HA depo, at 112:9-13; 115:19-116:3). The boys screamed "You fuck'n dykes," cheered "Yeah, you beaned her right in the head!" and then one of them yelled "Why don't you come over here and suck my dick?" PER 1057 (CL depo, at 93:11-20); PER 635, 647 (HA depo, 112:16-19, 142:14-15).

CL and HA promptly reported the cup-throwing incident to Assistant Principal Maxine Bartschi and identified two of their assailants. PER 1060-1062 (CL depo, at 98:9-11; 99:6-14; 99:24-100:3; 100:17-18); PER 638-639 (HA depo, at 120:2-6; 120:14-16; 121:7-20). Instead of taking action herself, Bartschi referred the matter to a campus police officer. PER 1062 (CL depo, at 100:19-25; 101:5-8); PER 640 (HA depo, at 122:8-13). She also promised to get back to CL and HA regarding the incident. PER 644 (HA depo, at 128:5-14).

Notwithstanding CL's and HA's detailed reporting and the acknowledged seriousness of the incident, however, neither Bartschi nor the officer contacted CL

harassment had stopped. Rather, when Brown Korbel asked if the student was still harassing her, HA responded that she had been avoiding the other student. PER 620 (HA depo, at 59:8-16). Instead of following up as she had originally promised, Brown Korbel told HA that "the problem seems to have fixed itself," so there was no need for her to talk to the harasser. PER 621 (HA depo, at 60:8-10).

or HA about this incident again. PER 1068-1069, 1071, 1092-1093 (CL depo, at 110:23-111:2; 114:3-5; 181:5-182:2; 182:21-25); PER 642 (HA depo, at 124:16-20); PER 670 (Bartschi depo, at 54:8-12). Bartschi's failure to take action of her own directly contravened Live Oak policy, which required administrators to conduct independent investigations of assaults and impose their own, school-related sanctions, regardless of whether the matter had been referred to the police. PER 1172 (Schizzano depo at 278:1-22).

Assistant Principal Richard Bondolie exhibited similar indifference when CL and HA told him that other students were harassing them. PER 1076-1077 (CL depo, at 132:23-133:1). When CL and HA began writing down names and telling him what had happened, Bondolie cut them off, telling them he had to go to another meeting, even after they emphasized that they could provide him with additional names of harassers. PER 1074, 1078-79 (CL depo, at 129:16-23; 134:7-18; 135:15-22); PER 627-628 (HA depo, at 83:21-84:21). HA remembers telling Bondolie at some later date that she still had more names to give him and could talk to him anytime. Bondolie replied that he was very busy. PER 629 (HA depo, at 87:14-18).

Assistant Principal Richard Gaston was also aware that CL and HA were being harassed not only by their peers, but also by campus monitor Irma Morelos as well. On one occasion Morelos brought CL and HA to Gaston's office because they were in the halls during class time, albeit with a pass from HA's teacher. PER 1055-1056 (CL depo, at 150:22-23; 151:81-11); PER 960 (Gaston depo, at 89:11-25). CL and HA told Gaston that Morelos and students were harassing them

because they were gay. PER 1086, 1091A (CL depo, at 151:10-14; 180:6-9); PER 961-963, 966-967 (Gaston depo, at 95:16-96:11; 97:19-23; 101:21-102:4). Gaston acknowledged that CL and HA “had a hard time on campus” because they were gay. PER 963 (Gaston depo, at 97:7-16). However, Gaston told CL and HA that he could do nothing about the harassment because they did not identify the harassers. PER 964-965 (Gaston depo, at 99:24-100:3).

When Gaston spoke to Morelos about the incident with CL and HA, Morelos denied hearing any anti-gay comments. PER 968 (Gaston depo, at 107:19-21). Gaston, though, doubted Morelos’ truthfulness, because during their conversation, Morelos referred to CL and HA derogatorily as “Igor” and “Festus.” PER 968-970 (Gaston depo, at 107:21-109:8). Gaston did not discipline CL or HA in connection with this incident because he was “uneasy” about “the possibility of [Morelos’] bias.” PER 972 (Gaston depo, at 112:6-11).

A few days later, CL told Gaston that the harassment had not stopped. PER 1088 (CL depo, at 153:6-7). Thus, teachers and administrators knew that students and at least one campus monitor were harassing plaintiffs CL and HA.⁷ But, as with the other plaintiffs, school officials did nothing to protect them, and the

⁷ Defendants’ assertion that CL and HA never complained to any district employee about harassment, *see* Appellants’ Brief at 51, is not only ludicrous, but it is refuted by defendants’ own brief. Defendants themselves concede earlier in their brief that CL and HA reported the physical assault to defendant Bartschi. *Id.* at 15-17. Defendants also acknowledge that CL and HA reported harassment to defendant Gaston, to teachers, and to Assistant Principal Bondolie. *Id.* While there can be no genuine dispute about whether CL and HA reported their harassment, if the Court finds one, it must resolve that dispute in plaintiffs’ favor. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 631 (9th Cir. 1987).

harassment continued.

VI. SUMMARY OF ARGUMENT

Defendants' failure to respond to the unrelenting anti-gay harassment plaintiffs endured, in light of defendants' knowledge of the pervasive anti-gay hostile environment in Morgan Hill schools, violated plaintiffs' Equal Protection right against sexual orientation peer harassment. As the district court concluded on remand from this Court, the evidence supports a finding that defendants acted with discriminatory intent and deliberate indifference when they turned a blind eye to plaintiffs' repeated reports of anti-gay threats, taunts, pornography, and assaults. Defendants' discriminatory intent and deliberate indifference are further evidenced by their failure to train or educate students, staff, and teachers regarding sexual orientation discrimination and harassment, despite the persistence of rampant anti-gay sentiment in their schools. As the district court further ruled, plaintiffs' evidence supports a finding that defendants' discriminatory conduct, for which they offer no justification, was motivated by plaintiffs' actual or perceived sexual orientation, in violation of the Equal Protection Clause.

As this Court well knows, the absence of published authority directly on point prior to 1996, when the Seventh Circuit published its *Nabozny* decision, cannot shield defendants from liability for constitutional violations of which reasonable school officials were on notice. For more than one hundred years, government actors have known that the federal Equal Protection Clause prohibits them from discriminating between similarly situated persons based on membership in a delineable class. Controlling Ninth Circuit authority from 1989 expressly

identifies homosexuals as a delineable class for federal Equal Protection analysis. Defendants' own policies from the period, as well as myriad state laws in California, further recognized the civil rights of gays and lesbians, as a class.

At the same time, this Court has also ruled that, at least by 1992, school officials were on notice that federal Equal Protection obligations governed their response to peer sexual harassment. No reasonable school official could think that while peer sexual harassment is governed by federal Equal Protection principles, peer harassment based on sexual orientation is not. Taken together, these two lines of authority require the conclusion that a reasonable school official in defendants' position would have known, prior to 1991, that he or she had an affirmative duty to refrain from intentional discrimination and deliberate indifference in responding to anti-gay peer harassment.

VII. ARGUMENT

In *Saucier v. Katz*, 533 US 194 (2001), the Supreme Court refined the analysis courts must undertake when assessing a qualified immunity defense. *Saucier* requires courts to first ask a threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts show the [defendant's] conduct violated a constitutional right?" *Saucier*, 533 US at 201. If the parties' submissions do make out a violation, courts must then ask whether the asserted right was clearly established at the time of the violation. *Id.*

A. STANDARD AND SCOPE OF APPELLATE REVIEW

Plaintiffs agree with defendants that the Court reviews *de novo* the district court's order denying summary judgment based on qualified immunity. Because this interlocutory appeal is limited to "abstract issues of law," *see Johnson v. Jones*, 515 U.S. 304, 317 (1995), this Court is not faced with the task of undertaking a detailed review of the voluminous evidence submitted on summary judgment. Rather, this appeal is properly limited to the purely legal questions of whether **plaintiffs'** version of the facts sustains a claim that a law has been violated, *see, e.g., Brewster v. Board of Education of Lynwood Unified School District*, 149 F.3d 971, 976-77 (9th Cir. 1998), and, if so, whether the law was clearly established at the time of the alleged violations.⁸ The Court does not have jurisdiction on interlocutory appeal over the issue of whether there is a genuine dispute about the underlying facts. *Johnson v. Jones*, 515 U.S. at 319-320; *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) (citing *Armendariz v. Penman*, 75 F.3d 1311, 1317 (9th Cir. 1996) (en banc)). Where, as in this case, a genuine issue of material fact exists about what the defendants knew or what they did or failed to do, then the case must proceed to trial to allow the jury to determine those underlying facts. *Act Up! Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1983); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995).

⁸ In this case, defendants do not argue that the asserted right does not exist – they argue only that its precise contours were not clearly established between 1991 and 1998. *See* Appellants' Brief at 39-43.

B. AS THE DISTRICT COURT CORRECTLY DETERMINED, THE EVIDENCE SUPPORTS A FINDING THAT EACH DEFENDANT, INTENTIONALLY AND WITH DELIBERATE INDIFFERENCE, VIOLATED PLAINTIFFS' EQUAL PROTECTION RIGHT AGAINST ANTI-GAY PEER HARASSMENT

The first step in assessing defendants' qualified immunity defense under *Saucier* is to ask whether the facts, when viewed in the light most favorable to plaintiffs, support a finding that defendants violated a constitutional right. *Saucier*, 533 US at 201. Plaintiffs assert in this case that defendants violated plaintiffs' federal Equal Protection right against anti-gay peer harassment in public schools. To establish this violation, plaintiffs must show that "defendants acted either intentionally or with deliberate indifference" in responding (or failing to respond) to the harassment of plaintiffs. *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996) (holding that school officials who were deliberately indifferent to anti-gay peer harassment against plaintiff were not entitled to qualified immunity); *accord Murrell v. School District No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999) ("a governmental official or supervisory employee may be held liable under section 1983 upon a showing of deliberate indifference to known sexual harassment"); *Gant v. Wallingford Board of Education*, 195 F.3d 134 (2nd Cir. 1999) (holding that plaintiff seeking to establish an equal protection violation by defendant school officials for failing to respond to peer racial harassment must show deliberate indifference by those officials); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (imposing § 1983 liability on school principal based on principal's deliberate indifference to teacher's sexual harassment of student). On summary judgment, plaintiffs are not required to establish intentional discrimination or deliberate

indifference as a matter of law; rather, plaintiffs' burden is merely to present evidence from which a reasonable jury could find in their favor. *Anderson*, 477 U.S. at 257.

At the instruction of this Court, the district court conducted a detailed review of the evidence and concluded for the **third** time that plaintiffs have made this evidentiary showing:

As this court previously ruled, plaintiffs' evidence, viewed in a favorable light, demonstrates that they were treated differently by defendants on account of their sexual orientation. Specifically, plaintiffs present evidence upon which a jury could find that defendants Davis, Bartschi, Gaston, Schaeffer, Nucci, and Schizzano failed to take action to protect plaintiffs from ongoing harassment by their peers **despite being informed of various incidents of harassment** during the period 1991-98, and despite their awareness of pervasive hostility towards homosexual students at the schools. *See Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment*, dated November 9, 1999. Plaintiffs also present evidence upon which a jury could find that defendants' discriminatory treatment of plaintiffs **was motivated by** plaintiffs' actual or perceived sexual orientation.

DER 537 (emphasis added). As the court recognized, defendants repeatedly and deliberately failed to respond to specific acts of anti-gay harassment that plaintiffs reported directly to them.⁹ This persistent refusal by school officials to act upon notice of peer harassment establishes the requisite intent for an Equal Protection

⁹ Defendants continue to argue, despite significant evidence to the contrary, that they did not have notice of the majority of the harassment that plaintiffs suffered. *See Appellants' Brief* at 13. However, the district court has concluded that a jury could find that defendants were informed of the harassment, and as discussed above in Section VII.A, this Court lacks jurisdiction to review that finding. *See Johnson*, 515 U.S. at 319-20; *Brewster*, 149 F.3d at 976-77.

violation, as “[d]iscriminatory intent is present when a defendant is deliberately indifferent to known existing discrimination by someone over whom the defendant has authority and control.” *L. Tarango Trucking v. County of Contra Costa*, 181 F.Supp. 2d 1017, 1032 (N.D. Cal. 2001) (citing *Gant*, 195 F.3d at 140).¹⁰

As they have throughout this litigation, defendants continue to misconstrue plaintiffs’ claims as alleging merely negligence or “lack of follow up.” See Appellant’s Brief at 22-23, 33, 36. Defendants’ argument boils down to the notion that they can escape liability for deliberate indifference to known peer harassment so long as they have done something, no matter how feeble or ineffectual, in response to the harassment. In fact, defendants seem to believe that they can satisfy their Equal Protection obligations merely by expressing concern in response to repeated reports of violent anti-gay harassment. See Appellants’ Brief at 16, 34. This argument, which would render the Equal Protection Clause meaningless to student victims of peer harassment, mischaracterizes the deliberate indifference standard. When school administrators are on notice of peer harassment, they “must respond and must do so reasonably in light of the known circumstances.” *Vance v. Spencer County Public School*, 231 F.3d 253, 261 (6th Cir. 2000); see also *Davis v. Monroe County Bd. of Education*, 526 U.S. 629, 648 (1999). Moreover, defendants’ failure to take stronger measures, when earlier responses to peer

¹⁰ See also *Monteiro v. Tempe Union High School District*, 158 F.3d 1022, 1034 (9th Cir. 1998) (holding that school officials’ failure to act upon notice of peer racial harassment evidences deliberate indifference); *Oona, R.-S. v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998) (denying qualified immunity under the Equal Protection Clause for school officials who failed to take reasonable steps to address peer sexual harassment).

harassment proved to be ineffective, constitutes deliberate indifference. *Vance, supra*, at 261.

The facts of this case are remarkably similar to those in *Nabozny*, in which the Seventh Circuit denied qualified immunity to school administrators who turned a blind eye towards persistent anti-gay harassment of the plaintiff. Here, as in *Nabozny*, plaintiffs repeatedly complained to school administrators, who often promised to respond, yet invariably did nothing. *Compare Nabozny*, 92 F.3d at 452. Here, as in *Nabozny*, plaintiffs identified their harassers, yet defendants took no action. Here, as in *Nabozny*, school employees compounded the effects of peer harassment by revealing their own anti-gay bias toward plaintiffs. Here, as in *Nabozny*, defendants cite no evidence to justify their intentional discrimination. Indeed, there can be no rational basis for permitting one student to verbally and/or physically assault another student based on the victim's sexual orientation, and defendants do not offer one. *See Nabozny*, 92 F.3d at 458.

Moreover, as the district court noted, the record is replete with evidence that each and every defendant knew of the pervasive anti-gay hostile environment in the Morgan Hill Schools – a critical factor in assessing defendants' responses to the specific incidents of harassment plaintiffs suffered. DER 537. District officials, including each defendant, learned about the poisonous anti-gay environment from multiple sources, including: articles in the Oak Leaf and in the Morgan Hill Times; acrimonious school Board meetings where gay and lesbian issues were discussed; reports from teachers; and students' virulent reactions to a short-lived support group at Live Oak for gay and lesbian students. *See supra*,

Section V. Yet in spite of their knowledge that gay and lesbian students (and students perceived to be gay or lesbian) faced such a menacing anti-gay environment, defendants persistently refused to address the general and specific threats to plaintiffs' safety and well-being. In light of these known circumstances, a jury could determine that defendants' failure to take meaningful action in response to known incidents of harassment against the plaintiffs reflects intentional discrimination or deliberate indifference on account of sexual orientation, and not mere negligence.

1. Delia Schizzano

The evidence shows that defendant Schizzano, an assistant principal, not only ignored plaintiffs' cries for help, but she also exacerbated plaintiffs' problems by inappropriately questioning them as to their sexuality. As set forth more fully above, Schizzano interrogated both Alana and JD as to their sexual orientation in response to harassment complaints. Despite the fact that on at least **six** occasions Alana reported to Schizzano that she had received pornographic, violent, and threatening materials in her locker, Schizzano took no action to protect Alana or to prevent further incidents; instead, she told Alana not to bring such "disgusting trash" to her again. Schizzano failed to take even the minimal step of changing Alana's locker or removing the graffiti. Schizzano likewise ignored reports from FF's mother that FF was being verbally harassed and from JD that JD was being harassed.. *See supra*, Sections V.C.1., V.C.2., V.C.3.¹¹

¹¹ Defendants' attempts to portray Schizzano as supportive of gay and lesbian students because of her role in "founding" the Gay, Lesbian, Bisexual club on campus must be disregarded, as they are distortions of the factual record. The

Defendants do not, and cannot, point to a single affirmative step that Schizzano took to protect plaintiffs from further harassment. At most, Schizzano made empty promises to Alana, rather than taking a single remedial measure. This ongoing refusal to help known victims of severe sexual orientation harassment cannot be characterized as mere negligence or “lack of follow-up,” as defendants assert. Rather, as the district court found, Schizzano’s manifest hostility toward plaintiffs and her complete failure to respond to their repeated reports of abuse can only be seen as intentional discrimination or deliberate indifference on account of plaintiffs’ sexual orientation. *See* DER 538; *see also Monteiro*, 158 F.3d at 1034; *Vance*, 231 F.3d at 261-62.

2. Maxine Bartschi

When a group of male students physically assaulted CL and called her a “dyke” as she walked through a Live Oak parking lot with HA, defendant Bartschi abdicated her responsibility to a campus police officer who never followed up with CL, HA, or the perpetrators, despite CL and HA’s detailed reporting, including the names of those perpetrators they could identify. *Supra*, Section V.C.5. Although Bartschi knew the names of two of the harassers, had the power to discipline them, and promised CL and HA that she would follow up on the incident, Bartschi herself took no action to ensure the safety of CL and HA or to discipline the known

impetus for creating the club came not from Schizzano, but from two students. PER 1141, 1156-1157 (Schizzano Depo at 83:15-18; 154:25-155:24). Schizzano was not the faculty advisor for the club; that role belonged to a teacher named Carol Moore. PER 1170 (*Id.* at 268:18-23). Schizzano’s role in the club was limited to attending the first ten minutes of club meetings, after which she would leave. PER 1171 (*Id.* at 270:10-16).

assailants, nor did she contact CL or HA about the incident again. *Id.* Contrary to defendants' assertions, Bartschi's alleged expression of sympathy cannot constitute a legally sufficient response to the assault; in the absence of active measures to punish the assailants or prevent future assaults, this disingenuous show of concern amounts to no response at all.

Bartschi's failure to take administrative action in response to the vicious assault is not excused by her referral of the incident to a campus police officer. It was Live Oak policy for administrators to conduct their own investigations of assaults and impose their own sanctions, such as suspensions, regardless of whether a matter had been referred to the police. *See supra*, Section V.C.5. As that policy reflects, a public school's obligation to prevent peer harassment is distinct from the responsibility of law enforcement officers to investigate and punish criminal assaults through the criminal justice system. *See Davis*, 526 U.S. at 653-654 (school officials may have shown deliberate indifference in failing to protect plaintiff from peer sexual harassment by a fellow student, despite the fact that the alleged harasser had been convicted of sexual battery); *see also* PER 1172 (Schizzano depo, at 278:18-22). In *Nabozny*, the court recognized that referring an anti-gay assault to campus police without any further administrative follow-up is evidence of deliberate indifference. *Nabozny*, 92 F.3d at 452. The district court in this case agreed with the *Nabozny* court, finding that "[n]otwithstanding Bartschi's referral to a police officer, a jury could well find that Bartschi's conduct constituted deliberate indifference." DER 538 (citing *Nabozny*, 92 F.3d at 452).

Like CL and HA, JD spoke to no avail with Assistant Principal Bartschi

about the problems that other students were giving her. Instead of inquiring further when JD told Bartschi that her attendance problems were due to harassment by other students, Bartschi replied that those problems were in the past and that JD would simply have to do better.¹² *See supra*, Section V.C.3. In light of Live Oak’s known anti-gay environment in general, and toward JD in particular, this response evidences deliberate indifference.

3. Richard Gaston

CL and HA complained to Assistant Principal Gaston about repeated anti-gay harassment, including harassment by a **school official** – campus monitor Irma Morelos. Gaston acknowledged that CL and HA “had a hard time on campus” because they were gay. He also acknowledged his awareness of the campus monitor’s anti-gay attitude. Nevertheless, he told CL and HA that he could do nothing about the harassment because they did not identify their harassers. *See supra*, Section V.C.5. However, plaintiffs’ inability to name their anonymous tormentors did not relieve Gaston of his obligation to respond to known incidents of peer sexual orientation harassment. Gaston himself admits that there were “a lot of things” he could have done to prevent further harassment of CL and HA; for example, communicating to the student body that anti-gay harassment would not be tolerated. PER 966-967 (Gaston Depo, at 101:13-102:14). Instead he chose to do nothing. This conduct by Gaston was particularly egregious given that Gaston was aware, as were the other administrators, that CL, HA, and others were

¹² JD’s omission of the word “harassment” in describing the hateful treatment she endured from her classmates did not deprive Bartschi of notice that JD was the victim of conduct that constitutes harassment.

subjected to constant anti-gay harassment by school employees and by their peers. As the district court concluded, “[s]uch inaction is sufficient to create an inference of deliberate indifference towards the sexual orientation discrimination suffered by CL, HA.” DER 539.

4. Robert Davis

The district court also determined that “[i]n light of plaintiffs’ allegations of a generally hostile anti-gay environment at the school, a jury could infer that Davis’ conduct with respect to the harassment of Flores and others on the basis of their sexual orientation constituted deliberate indifference.” DER 539. When a male student, at the urging of other students, presented Alana and FF with a pornographic picture depicting heterosexual sex acts and said “That’s what you should be doing, Faggot,” Davis, along with Schizzano, knew that other students had participated in the confrontation. Yet they disciplined only the one student who actually delivered the pornographic picture, giving him only a light suspension—after which he bragged to his friends about the school’s leniency. *See supra*, Section V.C.1. Moreover, when Alana and FF complained to Davis about the disciplinary process, he ignored their concerns; instead, he asked Alana if she was a lesbian. *See id.*

Davis’ deliberate indifference toward the anti-gay harassment directed at plaintiffs is further exemplified by his response when Alana and FF described directly to him the hostile atmosphere at the school. Alana asked Davis to convey to students that sexual harassment and sexual orientation discrimination are unacceptable, but Davis inexplicably refused. Rather than taking proactive

measures to decrease the chances of further harassment, Davis' sole response to Alana's and FF's complaints was to watch the area where the harassment occurred "two to three times." *See supra*, Section V.C.1. As defendants fail to comprehend, this half-hearted effort runs afoul of the Equal Protection Clause not only because it was ineffective. Rather, Davis' response to the known anti-gay harassment of plaintiffs evidences intentional discrimination and deliberate indifference because, in light of the known anti-gay hostile environment, Davis did not make a reasonable attempt to stop the harassment or punish the offenders. *See Baynard*, 268 F.3d at 236 (principal's "desultory" investigation of sexual harassment allegations demonstrates deliberate indifference); *see also* DER 539.

5. Don Schaeffer and Frank Nucci

While FF was waiting for a school bus to take him to Martin Murphy Middle School, he was beaten so brutally by a group of students that he had to be taken to the hospital with severely bruised ribs. *See supra*, Section V.C.2. Schaeffer and Nucci, as Principal and Vice Principal of Martin Murphy, punished only one of the six students involved in the incident – never informing FF or his mother of the action they took. *Id.* Defendants' purported solution to the assault and harassment was to transfer FF, the victim, to another school.¹³ *Id.* The Ninth Circuit has recognized, in the employment context, that transferring a harassment victim is an improper response to harassment. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 882

¹³ Defendants' contention that FF's mother was responsible for the transfer decision does not accurately represent the evidence. Defendants fail to acknowledge that FF's mother supported the transfer only after it became clear that Schaeffer and Nucci would do nothing to protect FF from further physical attacks if he stayed at Martin Murphy.

(9th Cir. 1991) (“We strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser.”). As the district court concluded, Schaeffer and Nucci evidenced deliberate indifference to the assault on FF by focusing their action on the victim, rather than the assailants, and by allowing five of the six attackers to escape without even a reprimand. *See* DER 539 (“Plaintiffs allegations are sufficient to create an inference of deliberate indifference.”).

6. Additional Indirect Reporting of Anti-Gay Harassment

In addition to these numerous incidents of harassment reported directly to defendants, the evidence supports an inference that defendants knew of other occurrences against the plaintiffs but failed to respond. So much of the harassment suffered by the individual plaintiffs occurred in public areas of the schools, or at public events such as dance recitals, that a jury could plainly infer that the defendant school administrators personally witnessed plaintiffs’ harassment. *See supra*, Section V.C. Additionally, numerous teachers and campus monitors either witnessed or learned of plaintiffs’ harassment directly from the plaintiffs. *See id.* School policy required teachers and monitors to report these allegations of sexual harassment to administrators. PER 672-674 (Bartschi depo, at 140:25-141:11; 157:10-19). Therefore, a jury could reasonably find that these employees followed that policy and reported the harassment to the defendants.¹⁴ Moreover, Assistant Principals Richard Bondolie and Rick Desimone, though not defendants, received

¹⁴ If the teachers and monitors did not report known harassment of the plaintiffs to defendants, as they were required to do, a jury could find that this inadequate response and lack of compliance with school policy resulted from defendants’ failure to train adequately Live Oak staff regarding anti-gay harassment. *See supra*, Section V.B.

specific notice of numerous incidents of harassment from plaintiffs. A jury could infer that Bondolie and Desimone shared these reports, as they should have, with defendants Schizzano, Bartschi, Gaston, and Davis. Even if defendants were not personally informed of these additional incidents, their undisputed knowledge of the pervasive, threatening anti-gay environment in Morgan Hill schools put them on notice that such incidents were likely to happen. *See Oviatt v. Pearce*, 954 F.2d 1470, 1473, 1477-8 (9th Cir. 1992) (sheriff liable for due process violation under § 1983 where sheriff was aware that “from time to time” prisoners were not timely arraigned, though sheriff had no knowledge that plaintiff was held 114 days without arraignment).

7. Inadequate Training And Supervision Demonstrates Deliberate Indifference

Defendants further demonstrated their deliberate indifference to plaintiffs’ Equal Protection rights by inadequately training and supervising their subordinates, including teachers and campus monitors, by “acquiesc[ing] in the constitutional deprivations of which the complaint is made,” and by showing a “reckless or callous indifference to the rights of others.” *See Larez v. Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991); *accord Canton v. Harris*, 489 U.S. 378, 390 (1989); *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978). In its most recent order denying qualified immunity, the district court held that this failure to train and supervise teachers and staff regarding sexual orientation harassment would support a jury finding that “defendants’ discriminatory treatment of plaintiffs was motivated by plaintiffs’ actual or perceived sexual orientation.” DER 537.

As described in Section V.B., *supra*, sexual orientation harassment was not

included in the district's written sexual harassment policy until mid-1997, and when it was included, the newly-amended paper "policy" was not distributed to students or teachers. Moreover, training of teachers on the subject of sexual orientation harassment – if such training took place at all – was plainly inadequate. For instance, defendant Schizzano, who was responsible for staff training on these issues at Live Oak, testified that she would simply say that sexual harassment is not tolerated, and then move on to other topics. Sexual orientation discrimination was never even mentioned at staff trainings while plaintiffs attended Morgan Hill schools. Section V.B., *supra*. Most importantly, Morgan Hill students **were not informed** that their schools prohibited sexual orientation peer harassment. *Id.* This lack of training and education by the defendants helped to create an atmosphere in which students incessantly harassed plaintiffs while teachers and other employees either stood idly by or actively contributed to the problem. Despite their knowledge of the rampant anti-gay sentiment in their schools, defendants made no effort to prepare their teachers to respond to the inevitable harassment that plaintiffs suffered, or to insist that they do so, virtually ensuring that the harassment would continue unabated. As the district court concluded, "this inaction...[is] sufficient to lead to an inference of deliberate indifference with respect to plaintiffs' Equal Protection rights under the Fourteenth Amendment." DER 538.¹⁵

¹⁵ Defendants' admission that "the Board's policies were interpreted throughout the 1990's as prohibiting all forms of discrimination, including...sexual orientation discrimination," *see* Appellants' Brief at 10, does not help them here. If, in fact, defendants were aware that Board policies prohibited sexual orientation discrimination, then their refusal to implement those policies on behalf of plaintiffs

In sum, the evidence plaintiffs have submitted supports a finding that defendants, based on all the circumstances known to them, including the pervasive anti-gay hostile environment in the Morgan Hill Unified School District, responded to plaintiffs with intentional discrimination and deliberate indifference based on plaintiffs' perceived sexual orientation. In the face of this evidence, defendants offer no justification for their conduct. As the district court concluded upon reviewing the evidence, plaintiffs have met their burden of showing that the facts alleged, when viewed in the light most favorable to them, show a violation of plaintiffs' Equal Protection right against anti-gay peer harassment. DER 537-538.

C. PLAINTIFFS' EQUAL PROTECTION RIGHT AGAINST ANTI-GAY PEER HARASSMENT IN PUBLIC SCHOOLS WAS CLEARLY ESTABLISHED IN 1991

The next part of the qualified immunity analysis under *Saucier* requires the Court to determine whether the asserted right was clearly established at the relevant time. *Saucier*, 533 US at 201. This question is purely an issue of law. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000).

It is not necessary that the alleged act have been previously declared unconstitutional, as long as the unlawfulness was apparent in light of preexisting law. In the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts.

Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995) (citations and internal quotations omitted). "The relevant, dispositive inquiry in determining whether a right is

provides even further evidence of their discriminatory intent and deliberate indifference.

clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 US at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

The Seventh Circuit’s decision in *Nabozny* is sufficient by itself to resolve the inquiry in favor of plaintiffs, who assert an equal protection right against anti-gay peer harassment in public schools. The Seventh Circuit held unambiguously that “reasonable persons in the defendants’ positions in **1988** would have concluded that discrimination against *Nabozny* based on his sexual orientation was unconstitutional.” *Id.* at 458 (emphasis added). The court summarily dispensed with the defendants’ argument in *Nabozny* that the absence of case law directly on point supported their qualified immunity defense.

In this case, just like in *Nabozny*, the defendants have not asserted any rational basis for treating anti-gay harassment differently from other forms of peer harassment. They have instead persistently asserted (ignoring all contrary evidence) the absence of any intentional discrimination or disparate treatment. *E.g.*, Appellants’ Brief, at 32. Under similar circumstances, rejecting an equivalent qualified immunity defense, the *Nabozny* court went no further than the Supreme Court’s landmark **1886** ruling in *Yick Wo v. Hopkins*, which articulates the fundamental constitutional prohibition against “discrimination between similarly situated persons based on membership in a delineable class.” *Nabozny*, 92 F.3d at 458 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). Because reasonable Wisconsin school officials in 1988 would have known: (1) that homosexuals are an identifiable minority; and (2) that the federal Equal Protection

Clause prohibits discrimination between similarly situated persons based on membership in a delineable class, the Seventh Circuit held that the *Nabozny* defendants were not entitled to qualified immunity from Jamie Nabozny's Equal Protection claim asserting anti-gay bias. The Wisconsin statute prohibiting sexual orientation harassment in Wisconsin schools was relevant to the qualified immunity analysis only to demonstrate that the defendants "knew that homosexuals are a definable minority." *Id.* at 457 & n.11.

California school officials throughout the relevant period in this case, from 1991 through 1998, had substantially more guidance than their Wisconsin counterparts in 1988 to alert them that intentional discrimination or deliberate indifference in response to anti-gay peer harassment in the public schools violates students' federal Equal Protection rights. Controlling Ninth Circuit law holds that school officials have been on notice, at least since **1992**, that their response to gender-based peer harassment must pass federal Equal Protection scrutiny. *Oona R.-S. v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998); *accord Nicole M. v. Martinez Unified School Dist.*, 964 F. Supp. 1369, 1383 (N.D. Cal. 1997) ("it was clearly established in January and February 1993 that a decision by [the defendant school official] not to take steps to prevent [peer] sexual harassment suffered by Nicole M. because of plaintiff's sex would violate plaintiff's equal protection rights").

Likewise, there can be no doubt that reasonable school officials in California knew that homosexuals (and those perceived to be gay) are an identifiable class of persons under the federal Equal Protection Clause, and that anti-gay discrimination

is subject to active rational basis review. *Pruitt v. Cheney*, 963 F.2d 1160, 1165-66 (9th Cir.) (to analyze equal protection claims based on homosexual status, “we applied the type of ‘active’ rational basis review employed by the Supreme Court in [*Cleburne*]”) *cert. denied*, 506 U.S. 1020 (1992); *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 574-78 (9th Cir. 1990); *Dubbs v. Central Intelligence Agency*, 866 F.2d 1114, 1119 (9th Cir. 1989) (“a blanket policy of security clearance denials to all persons who engage in homosexual conduct would give rise to a colorable equal protection claim”). More recently, but still prior to the bulk of the conduct alleged in this action, the United States Supreme Court held in May, 1996 that the classification of homosexuals in a Colorado voter initiative lacked a rational basis and therefore violated homosexual Coloradans’ federal Equal Protection rights. *Romer v. Evans*, 517 U.S. 620, 635 (1996).¹⁶

In short, controlling Ninth Circuit and Supreme Court authority put school officials on notice that (1) federal Equal Protection principles governed their response to peer harassment (*Oona R.S.* and *Nicole M.*); and (2) disparate treatment of actual or perceived homosexuals is subject to active rational basis scrutiny (*Romer*, *Pruitt*, *High Tech Gays* and *Dubbs*). Combining these two lines of cases, controlling authority specifically taught that defendants must refrain from deliberate indifference or intentional discrimination in responding to anti-gay peer

¹⁶ As the Sixth Circuit explained in rejecting a qualified immunity defense to a sexual orientation Equal Protection claim, based on conduct occurring in 1994, “it didn’t take *Romer* to tell us that such arbitrary state action is contrary to the principle of equal protection of the laws.” *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997) (citing *Yick Wo*), *cert. denied*, 523 U.S. 1118 (1998).

harassment. That is the essential reasoning supporting the Seventh Circuit’s conclusion in *Nabozny*; it is the conclusion this Court must reach as well.

With established Ninth Circuit and Supreme Court authority teaching unambiguously that irrational distinctions based on sexual orientation violate federal Equal Protection rights, the absence during the relevant time period of a state statute specifically prohibiting anti-gay peer harassment in schools cannot support defendants’ bid for qualified immunity. *See* Appellants’ Brief, at 40, 42. If the unambiguous case law were not enough, the plethora of California statutes prohibiting anti-gay bias further demonstrated that gay students are an identifiable class for Equal Protection purposes. *See, e.g.*, Cal. Civ. Code §§ 51, 51.7;¹⁷ Cal. Educ. Code § 201(a) (all California students are entitled “to participate fully in the educational process, free from discrimination or harassment.”).

The District’s own policies in this case, just like the Wisconsin statute in *Nabozny*, further demonstrate that each defendant knew or should have known that gay students (or those perceived to be gay) constitute an identifiable class and are entitled to equal enforcement of the District’s anti-harassment policy. DER 84 (Crow decl, ¶¶ 4-6) (beginning in 1993, superintendent explained numerous times to administrators that District policy applied to and prohibited peer sexual

¹⁷ Section 51.7 of California’s Civil Code expressly enumerates “sexual orientation” among its protected classes. Although Section 51 does not explicitly refer to “sexual orientation,” section 51’s protection against sexual orientation discrimination has been clearly established at all relevant times. *See, e.g., Beaty v. Truck Ins. Exchange*, 6 Cal. App. 4th 1455, 1460 (1992); *Rolon v. Kulwitzky*, 153 Cal. App. 3d 289, 292 (1984); *Curran v. Mount Diablo Council of The Boy Scouts of America*, 147 Cal. App. 3d 712, 733 (1983); *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 5 (1982).

orientation discrimination); DER 88-89 (Jimenez decl, ¶¶ 4-6) (at least since 1991, District administrators explained at administrative meetings that District policy prohibited peer sexual orientation discrimination).

Defendants' forays into federal statutory Title VII and Title IX jurisprudence should not distract the Court from the issue presented on this interlocutory appeal. *See* Appellants' Brief, at 40-42 & nn. 7, 8. Plaintiffs have no Title VII claims. This appeal does not implicate plaintiffs' Title IX claims. The only question presented is whether the federal Equal Protection Clause imposes a clearly established duty for defendants to refrain from deliberate indifference or intentional discrimination in responding to anti-gay peer harassment.

Under all the circumstances, the Court must reject defendants' contention that, as a matter of law, reasonable California school officials in defendants' position would have lacked notice that their conduct was unlawful. As the district court concluded, "a reasonable administrator would have been on notice during the period 1991-1998 that intentional discrimination against or deliberate indifference towards students on the basis of their actual or perceived sexual orientation was unlawful if lacking a rational basis." DER 539-A.¹⁸

¹⁸ The district court defined the right at issue as "the more general right against sexual orientation discrimination." DER 539-A. For the same reasons that the more specific right against anti-gay peer harassment was clearly established in 1991, there can be no question that the broader right formulated by the district court was also clearly established at that time. If this Court determines for any reason that the right at issue was not clearly established in 1991, then the Court is presented with the question of whether the right became clearly established at any time between 1991 and 1998.

VIII. CONCLUSION

This Court should affirm the decision below, which recognized that the evidence submitted, when viewed in plaintiffs' favor, supports a finding that defendants acted with intentional discrimination and deliberate indifference to plaintiffs' Equal Protection right against anti-gay peer harassment in public schools. As the trial judge concluded, it was clearly established at all relevant times, beginning at least as early as 1991, that the Equal Protection Clause of the United States Constitution prohibits school officials from responding to anti-gay peer harassment with intentional discrimination or deliberate indifference based on the victimized students' actual or perceived sexual orientation. Accordingly, defendants are not entitled to qualified immunity, and plaintiffs' claims must be allowed, finally, to proceed to trial.

Dated: June 5, 2002

KEKER & VAN NEST, LLP

By: _____
JILL K. GINSTLING
Attorneys for Plaintiffs-Appellees
ALANA FLORES, et al.

IX. CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,775 words.

Dated: June 5, 2002

KEKER & VAN NEST, LLP

By: _____
JILL K. GINSTLING
Attorneys for Plaintiffs-Appellees
ALANA FLORES, et al.

X. STATEMENT OF RELATED CASES

The undersigned counsel of record for Plaintiff-Appellees hereby states that she is unaware of any other cases related to this case pending in this Court.

Dated: June 5, 2002

KEKER & VAN NEST, LLP

By: _____
JILL K. GINSTLING
Attorneys for Plaintiffs-Appellees
ALANA FLORES, et al.

TABLE OF AUTHORITIES

Page(s)