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17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA

19  
20 ALANA FLORES, et al.,

21 Plaintiffs,

22 v.

23 MORGAN HILL UNIFIED SCHOOL  
24 DISTRICT, et al.,

25 Defendants.

Case No. C 98-20358 JW PT

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
RESPONSE TO DEFENDANTS'  
QUALIFIED IMMUNITY BRIEF**

Date: December 17, 2001

Time: 9:00 a.m.

Dept: 8, Hon. James Ware

1 **I. INTRODUCTION**

2 The Ninth Circuit’s remand presents only one issue for consideration: “whether the  
3 submissions of the parties, when viewed in the light most favorable to the plaintiff, show that the  
4 defendant[s] violated a constitutional right.” September 10, 2001 Order at 4 (citing Saucier v.  
5 Katz, 121 S. Ct. 2151, 2155-6 (2001)). This Court already determined that plaintiffs submitted  
6 sufficient evidence to support a finding that defendants violated plaintiffs’ Equal Protection right  
7 against anti-gay peer harassment in public schools. See November 9, 1999 Order at 11:2-8.  
8 Nothing in defendants’ latest qualified immunity brief, which contains no new factual or legal  
9 arguments, suggests a different result here.

10 During their time as students in the Morgan Hill Unified School District, plaintiffs  
11 endured unrelenting, graphic, and sometimes violent anti-gay peer harassment on a daily basis.  
12 Defendants knew that the environment in their schools was threatening to and physically  
13 dangerous for gay and lesbian students. They knew specifically that plaintiffs were subjected to  
14 taunts, name-calling, pornography, graffiti, and even physical assaults as a result of their actual  
15 or perceived sexual orientation. Plaintiffs repeatedly reported incidents of harassment to  
16 defendants, but their complaints fell on deaf ears. Defendants took no action to protect plaintiffs  
17 from further harassment or to meaningfully punish the offenders, and the harassment continued  
18 unabated. This complete refusal to address known anti-gay harassment evidences the  
19 defendants’ discriminatory intent and deliberate indifference to the plaintiffs, in violation of the  
20 Equal Protection Clause.

21 Moreover, despite their general knowledge of the pervasive anti-gay environment in their  
22 schools, and their specific knowledge of attacks against the plaintiffs, defendants made no effort  
23 to ensure that school employees such as teachers, campus monitors, and guards were trained to  
24 deal with sexual orientation harassment. The training for site administrators, teachers, and  
25 students was plainly inadequate, as it failed to identify sexual orientation harassment as a  
26 prohibited form of discrimination at all. The school district’s sexual harassment policy, which  
27 did not even mention sexual orientation harassment until after this litigation commenced, was not  
28 fully explained to teachers or students. Most importantly, students in Morgan Hill public schools

1 were never expressly told that sexual orientation harassment was prohibited. Defendants' failure  
2 to instruct teachers and students on the issue of sexual orientation harassment virtually ensured  
3 that the harassment of plaintiffs would continue. This inadequate response to an obvious anti-  
4 gay hostile environment and known incidents of harassment against the plaintiffs further  
5 supports a finding of intentional discrimination and deliberate indifference to plaintiffs' Equal  
6 Protection rights.

7 In the face of plaintiffs' evidence of unlawful discrimination, defendants offer no  
8 justification for their discriminatory conduct; they merely deny that such conduct occurred.  
9 Defendants rest their qualified immunity defense on the dubious, discredited argument that the  
10 plaintiffs' right against intentional anti-gay discrimination was not clearly established. However,  
11 this argument, which this Court has already disposed of, is not currently before the Court. The  
12 Ninth Circuit's remand order did not disturb this Court's prior ruling that plaintiffs' Equal  
13 Protection right against anti-gay discrimination was clearly established at all relevant times, and  
14 that disputed factual issues regarding the reasonableness of defendants' conduct preclude  
15 summary judgment of defendants' qualified immunity defense. See February 3, 2000 Order at  
16 1:18-21. The Court need not, and should not, revisit this conclusion.

17 Plaintiffs have submitted ample evidence to support a finding of intentional  
18 discrimination in violation of their clearly established Equal Protection right against peer sexual  
19 orientation harassment. This evidence precludes summary judgment of defendants' qualified  
20 immunity defense. The Court should once again deny defendants' motion and permit plaintiffs  
21 to present their claims to a jury.

## 22 II. STATEMENT OF FACTS

23 On defendants' motion, the Court must assume the truth of plaintiffs' evidence as to all  
24 disputed facts. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 631 (9th  
25 Cir. 1987). Likewise, the Court must grant to plaintiffs all reasonable factual inferences.  
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Defendants'  
27 motion necessarily fails unless the evidence as a whole, when viewed in this light, prohibits a  
28 jury from returning a verdict for plaintiffs. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

1 (1986). Plaintiffs’ burden on this motion is simply to present evidence from which a jury might  
2 return a verdict in their favor. Id. at 257.

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

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

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

23 **A. Defendants Knew of the Pervasive Anti-Gay Hostile Environment In Morgan Hill**  
24 **Schools**

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

1 See, e.g., Letters to the Editor: Student Concerned with Homophobia, Oak Leaf, Mar. 15, 1991.<sup>1</sup>  
2 Copies of the Oak Leaf were distributed to members of the Board, Crow depo, at 79:25-80:4, and  
3 were also carried as an insert to the Morgan Hill Times. Carr depo, at 16:24-17:2; Choi depo, at  
4 89:21-23.<sup>2</sup>

5 In the fall of 1992, as a new school year began, an ugly controversy arose when Martin  
6 Murphy Middle School included a list of hot lines on the back of its Associated Student Body  
7 Card. One of the hot lines was for gay and lesbian teens. Choi depo, at 25:3-15. The cards led  
8 to a firestorm of controversy, consuming not one, but two, separate meetings of the Board. Crow  
9 depo, at 84:20-24. One Board member issued a statement that she read at the second Board  
10 meeting and published in the Morgan Hill Times, identifying "harassment of students based on  
11 their sexual identity (or perceived sexual identity) as an important issue facing the District." See  
12 Choi depo, at 43-45; Schmidt depo, at 17:19-18:2; 24:7-16; Emery decl, Exh. II. The meetings  
13 were so acrimonious that James Crow, the Superintendent, requested police attendance to protect  
14 openly gay teacher Ron Schmidt and the gay and lesbian students attending the meetings. Id. at  
15 87:6-8; 96:20-97:11. The next day Crow telephoned a Live Oak administrator to express his  
16 concern about the physical safety of one student who revealed that he was gay at the meeting.  
17 Id. at 96:21-97:5. Students wrote about the Board meetings and their reactions in the Oak Leaf.  
18 See Isolated Student Is Finding Acceptance and Raising Her Voice, Oak Leaf, Nov. 20, 1992  
19 (describing experience as a lesbian at Live Oak); id., Homosexuals Need Recognition And  
20 Understanding, Not Bigotry (urging action "before one of our own Live Oak students is added to  
21 the growing statistics of successful suicides").

22 The following spring, to combat harassment, two lesbian students decided to organize a  
23 gay and lesbian student group at Live Oak. Schizzano depo, at 82:14-84:11. The Oak Leaf  
24 reported the hateful response. Live Oak students became "enraged . . . shoving the people who  
25 passed [out flyers announcing the formation of the club,] and calling those involved derogatory

26 \_\_\_\_\_  
27 <sup>1</sup> Articles from the Oak Leaf, referenced in this brief, are attached as Exhibit HH to the  
28 accompanying declaration of James M. Emery.

<sup>2</sup> Relevant deposition excerpts and interrogatory responses are attached as Exhibits A-GG and  
RR to the Emery decl.

1 names such as 'fag' and 'dyke.'" Intolerance Results in Homophobic Reactions, Oak Leaf, April  
2 8, 1993. Graffiti appeared on the sidewalk at school: "DIKES [SIC], KEEP IT IN THE  
3 CLOSET, FAGGOTS." Graffiti on a locker read: "KILL ALL GAYS, KEEP IT IN THE  
4 CLOSET." Id.; see also Crow depo, at 32:15-22; Green depo, at 20:22-21:5. That same edition  
5 of the Oak Leaf carried a letter to the editor reporting that gay and lesbian students were called  
6 "faggot," "queer," and "dyke." Oak Leaf, April 8, 1993. Two months later, the Oak Leaf  
7 reported that "fliers [sic] were posted around the campus announcing the formation of a gay-  
8 bashing support group. Those interested were invited to call 1-800-RED-NECK." Chain of Hate  
9 Crimes Hits School District, Oak Leaf, June 4, 1993. The new club was controversial not just  
10 among students, but among Live Oak employees as well. Green depo, at 20:21-21:25.

11 The Oak Leaf continued to report gay and lesbian harassment the next school year. In the  
12 fall of 1993, the Oak Leaf announced that The Bridge, a teen counseling center in Morgan Hill,  
13 was initiating a new Gay/Lesbian Advocacy and Support Program. Bridge Counseling Center  
14 Helps Youth, Oak Leaf, October 29, 1993. The article reported the need to provide support for  
15 lesbian and gay students who "face ridicule, harassment and violence from their peers." Id. In  
16 February 1994, Daphne Oliver, a senior at Live Oak, wrote a letter to the editor in the Oak Leaf  
17 condemning the anti-gay atmosphere pervading Live Oak High School. Oak Leaf, February 25,  
18 1994.

19 **B. Defendants Failed To Take Reasonable Or Effective Remedial Measures To**  
20 **Address Pervasive Anti-Gay Peer Harassment**

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

27 During the entire period in which plaintiffs attended Morgan Hill schools, the District's  
28 written sexual harassment policy never included an express prohibition against sexual orientation

1 harassment. McKennan decl, Exhs. D, F; McKennan depo, at 58:23-59:1. Not until June 1998,  
2 two months after plaintiffs commenced this action, did the District first incorporate “sexual  
3 orientation” harassment into its written sexual harassment policy. McKennan depo, at 55:14-  
4 56:16.

5 Even the sexual harassment policy, which omitted any reference to sexual orientation  
6 harassment, was inadequately promulgated and enforced. The sexual harassment policy was  
7 presented to students every year as a single page within a 35-page student handbook containing  
8 the full range of school policies. Schizzano decl, Exh. B (representative policy booklet). The  
9 administrative regulations, which the District did not distribute to teachers or students, contained  
10 the only written explanation of sexual harassment complaint procedures. Schizzano depo, at  
11 230:24-231:2; 244:5-24. The District’s policy was not posted at the schools, as the California  
12 Education Code requires. Schaefer depo, at 65:2-4; Webb depo, at 36:20-21; Schizzano depo, at  
13 280:2-6; See Cal. Educ. Code § 212.5. The policy did not contain language accessible to  
14 students or descriptions of prohibited behavior. Shoop decl, ¶¶ 14, 15, 19, 25.

15 Students received only minimal training on the sexual harassment policy. Once each year  
16 on-site administrators made a presentation to students in social studies class discussing the Code  
17 of Conduct and District policies. Discussion with students of all forms of sexual harassment  
18 occupied approximately one to five minutes each year. Schizzano depo, at 256:19-24; 309:18-  
19 310:3; Schaefer depo, at 54:8-22. The current superintendent simply does not know whether  
20 students receive any training specifically addressing sexual harassment. McKennan depo, at  
21 65:4-9. Thus, students' information regarding any official District sexual harassment policy was  
22 limited to the single page sent home to parents and the one-to-five minute presentation in class.  
23 Schizzano depo, at 127:14-24. Not surprisingly, the annual one-to-five minute presentation to  
24 students failed to identify adequately, if at all, sexual orientation discrimination as a prohibited  
25 behavior. Repp depo, at 34:8-11; McKennan depo, at 71:5-72:6. Schizzano depo, at 256:25-  
26 257:13.

27 Teacher training fared no better. In her 20 years at Live Oak, teacher Lynn Gautschi  
28 received her first training on sexual harassment within the past few years. Gautschi depo, at 17-

1 21. Delia Schizzano, who was responsible for staff training on these issues at Live Oak,  
2 explained that in her "in service trainings" for staff she would simply say that sexual harassment  
3 is not tolerated and go on. Schizzano depo, at 240: 9-244: 4. Sexual orientation was not  
4 mentioned at all in staff trainings while plaintiffs were attending District schools. Schizzano  
5 depo, at 248:24-249:7; McKennan depo, at 57:13-19; Urego depo, at 32:11-33:15; Villegas depo,  
6 at 50:11-51:12. Staff "training" in the District fell clearly below the standard of care in the  
7 profession. Shoop decl, ¶¶ 17, 18.

8 Most significantly, student victims of sexual or sexual orientation harassment had no  
9 access to any effective complaint procedure. The District's procedure for sexual harassment  
10 complaints is described only in the administrative regulations, which teachers, students and  
11 parents never see. Schizzano depo, at 244:5-19; Shoop decl, ¶ 20. One assistant principal  
12 explained that he only provided the complaint procedure to those who were accused of sexual  
13 harassment, and not to the victims. Desimone depo, at 134:6-16. Even by the close of the 1999  
14 school year, more than a year after the commencement of this litigation, the District had not  
15 included the complaint procedure in the Student handbook or any other handout to students.  
16 Schizzano decl, Exh. B. The District took no meaningful steps to ensure that students and staff  
17 knew that school policy prohibited sexual orientation harassment, were aware of any procedure  
18 for registering complaints, or were made to feel that a complaint would be taken seriously and  
19 appropriately investigated. Shoop decl, ¶¶ 11, 12, 14.

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

25  
26  
27  
28

1 **C. Defendants Knew Of The Specific Harassment Plaintiffs Endured**

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

4 By the spring semester of her sophomore year at Live Oak, Alana Flores had become the  
5 target of intimidating and hostile anti-gay harassment and threats of violence. Flores depo, at  
6 84:3-4. She found anonymous notes taped onto, written on, etched in, and placed inside her  
7 school locker. Id. at 84:17-18; 113:16-21. They said: “Dyke Bitch Fuck off”, “Die Dyke Bitch!”  
8 and “If you don’t leave, we’ll make you.” Id. at 84:20-21; 87:24; 105:17-20. Alana encountered  
9 similar messages written in chalk on the floor in front of her locker. Id. at 135:10-15. During  
10 her three years at Live Oak, Alana told school employees about the locker graffiti approximately  
11 20 times. Id. at 166:4-10. She reported these acts directly to Assistant Principal Delia Schizzano  
12 about six times during her junior year alone. Id. at 109:3-18. Neither Schizzano nor any other  
13 school official took any steps to address the problem or to remove the graffiti. Id. at 114:19-26;  
14 167: 1-13; 170:10-14. Alana’s repeated requests to change lockers were never honored. Id. at  
15 97:1-2; 102:25-26; 110:20-111:9; 112:16-26; 114:7-14; 117:13-23.

16 Along with the notes, Alana began receiving pornography depicting naked women,  
17 sometimes performing sex acts. Id. at 88:16-20. During the spring of her sophomore year,  
18 Alana’s friend, Brennah Candaleria, found a particularly violent piece of pornography in Alana’s  
19 locker. Id. at 89:18-21; 90:3-7. Frightened and confused, the two girls went directly to  
20 Schizzano. Id. at 90:10-15; Emery decl, Exh. NN, at 6:14-28. They entreated her to do  
21 something to stop the harassment and threats. Flores depo, at 93:15-25; 94:18-19. Schizzano  
22 asked Alana whether she was gay. Id. at 95:25. When Alana replied that she was not, Schizzano  
23 asked, “Why are you crying then?” Id. at 94:3-11; 96:7; 100:11-13; 105:2. Rather than  
24 expressing sympathy or concern, Schizzano told Alana and Brennah not to bring such  
25 “disgusting trash” to her again and told them to return to class. Id. at 94:21-23. Neither  
26 Schizzano nor any other school official pursued this complaint, see id. at 102-103, and needless  
27 to say, the violent threats and pornography continued to appear in Alana's locker. Id. at 109:3-  
28 10. Over the next three years, Alana received such material approximately 25 more times. Id. at

1 84:7-89:19; 103:22-26; 108:26-109:7; 219:21-22. She reported the pornography and notes to  
2 Schizzano approximately five more times. Id. at 109:3-10; 109:6-18. Schizzano took no action  
3 to stop the harassment.

4 In Alana's 10th and 12th grade math classes, male students made crude sexual and  
5 anti-gay remarks to each other and to other students on a daily basis. Flores depo, at 47:12-13;  
6 48:17-20; 49:2-24; 79:4-7. When Alana asked them to stop, they would reply: "Shut up, you  
7 fucking dumb dyke." Id. at 59:17-20; Emery decl, Exh. NN, at 7:10. Alana repeatedly  
8 complained to her teacher Ken King about the vulgar, homophobic comments. Flores depo, at  
9 51:11-12; King depo, at 47:23-48:4; 51:3-11. King, who showed willingness to curb racial slurs  
10 among students, did nothing to stop anti-gay slurs. Flores depo, at 53:2-5; 54:20-21; 56:6-16;  
11 58:22-23; King depo, at 30:21-31:13; 58:4-59:8. Instead, King pointed to Alana's sexual  
12 orientation, asking: "What do you expect?" Flores depo, at 227:24-228:20; Desimone depo, at  
13 62:6-12. Alana reported her experiences in King's class and the impact on her grades to  
14 Assistant Principal Desimone. Flores depo, at 64:1-14; Desimone depo, at 63:8-14. The  
15 demeaning anti-gay language in King's class continued unabated. Flores depo, at 68:2-5.

16 Alana encountered a similarly inadequate response when a male student handed a  
17 pornographic picture depicting heterosexual sex acts to her and plaintiff FF. "That's what you  
18 should be doing, Faggot!" he said. Alana and FF immediately reported the incident to Assistant  
19 Principals Desimone and Schizzano. Emery decl, Exh. NN, at 7:15-7:20; FF depo, at 244:3-  
20 245:12; 406:1-13; 418:17-419:1-7; Desimone depo, at 32:17-33:4; 35:3-11; 38:19-21. Although  
21 Principal Bob Davis and Vice Principal Schizzano knew that several students had participated in  
22 the confrontation, they disciplined only the one student who actually handed the pornographic  
23 picture to Alana and FF. Desimone depo, at 35:11-13; 40:4-6; 41:6-42:2; Davis depo at 52-58.  
24 Even he received only a light suspension, Flores depo, at 293:24-294:1, and bragged to his  
25 friends about the school's leniency. Emery decl, Exh. NN, at 7:27-8:2; FF depo, at 247:11-19.  
26 When Alana and FF complained to Principal Davis about his handling of the situation, Emery  
27 decl, Exh. NN, at 7:27-8:2; FF depo, at 247:11-19, Davis did not address their concerns; instead,  
28 he inexplicably asked Alana if she was a lesbian. Flores depo, at 193:6-16. Alana and FF told

1 Davis of the hostile atmosphere at the school, Davis depo, at 56-67, and Alana made a number of  
2 suggestions about ways to educate the student body about sexual harassment and sexual  
3 orientation discrimination. Davis refused to accept or implement any of Alana’s suggestions.  
4 Flores depo, at 12:12-21; Emery decl, Exh. NN, at 7:27-8:3. The administration's sole response  
5 to Alana's and FF's complaints was to watch the area where the harassment occurred “two to  
6 three times.” Davis depo, at 56-67; Desimone depo, at 40:4-6; 41:6-9; 55:16-18.<sup>3</sup>

7 **2. Plaintiff FF Repeatedly Sought Help From Teachers And Counselors**

8 FF encountered regular anti-gay verbal harassment and physical abuse from his earliest  
9 days at elementary school. Glynn depo, at 15:5-15; 16:5-8. His mother reported the harassment  
10 to school officials, describing beatings, name-calling and broken glasses, to no avail. *Id.* at  
11 15:15-17:3; 17:6-10; 20:7-21:2.

12 At Martin Murphy Middle School, the harassment increased in both severity and  
13 frequency. 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  
14 incident, six boys set upon FF at the school’s bus stop. *Id.*, at 50:22-23; 51:5-8; 55:5-17; Glynn  
15 depo, at 25:18-22; 28:14-15; 29:19-21. They beat him so savagely that he had to be treated at the  
16 hospital for "severely bruised ribs." FF depo, at 51:10-52:16; 56:6-10; 56:19-23; 56:19-57:1;  
17 72:9-14; 72:18-20; 73:9-74:17; Glynn depo, at 25:19-22; 30:4-10; 30:16-23; 30:25-31:2; 33:19-  
18 1; 34:2-4; 43:13-16; Schaefer decl, Exh. C. Defendants Schaefer and Nucci punished only one  
19 of the six students involved in the incident, taking no action against the remaining five assailants.  
20 Schaefer decl, at ¶8 & Exh. C. Schaefer and Nucci never informed FF or his mother of their  
21 response to the incident, FF depo, at 46:4-16; Glynn depo, at 32:19-24; 34:10-23; 34:21-35:1;

22 \_\_\_\_\_  
23 <sup>3</sup> Alana also reported to campus monitors that she experienced frequent and routine name-  
24 calling and food-throwing by her peers, most often while she walked from one class to the next  
25 during “passing periods” and during lunch breaks. Flores depo, at 119:12-13; 120:17; 123:6-24;  
26 126:2-5; 131:10-20; 134:5-9; 186:4-12. No District employee took steps to investigate or  
27 determine who the perpetrators were. *Id.* at 124:13-125:9. At school dance recitals, Alana heard  
28 “Fag” and “Dyke” shouted at her from the audience while she and FF were performing. *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.  
Emery decl, Exh. NN, at 8:13-17. Alana told Carmen Villegas, her dance teacher about the  
name-calling, Flores depo, at 129:17-130:21, but Villegas told Alana “not to worry about it.” *Id.*  
at 298:10-14.

1 37:19-39:1; 39:23-40:4; 42:24-43:1; 48:18-25, and they transferred FF, the assault victim, to  
2 another school.

3 Even after his transfer to Britton Middle School, FF continued to experience regular  
4 physical abuse and verbal assaults. FF depo, at 107:13-108:5; 109:6-17; 113:13-116:20; Glynn  
5 depo, at 49:18-50:2. Teachers witnessed the harassment but failed to intervene. One day a  
6 teacher stood by as a student told FF he could get a job "planting tulips." When FF expressed  
7 interest, the student grabbed his own penis and said "You can plant your two lips right here."  
8 FF depo, at 111:25-112:8. Similarly, when FF was "constantly harassed" by fellow students in  
9 his ninth grade history class, the teacher, Mr. Skully, "laughed" but did nothing to stop the  
10 harassment. Id. at 143:12-144:10. FF sought help from the school, but the principal refused to  
11 get involved and told FF that he had misunderstood his teacher. Id. at 121:14-122:1; 124:1-25;  
12 125:22-25. FF and his mother reported his incessant harassment to counselors at Britton, but the  
13 harassment continued. Id. at 130:16-25; 181:4-6; Glynn depo at 51:21-52:2.

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

- 16 • Outside of class – FF found pornography and newspaper clippings from gay  
17 magazines in his locker;
- 18 • Boys locker room – students made anti-gay comments such as "Silly faggot, dicks  
19 are for chicks," refused to change near FF, and threatened him;
- 20 • Choir class – students called FF "faggot names" because he had solos;
- 21 • Twelfth grade math class – students called FF "faggot, you queer, fag...;"
- 22 • swimming team – students harassed FF for being "a fag," gave him pornography  
23 because students thought he was "effeminate";
- 24 • plays and dance recitals – students called names;
- 25 • wrestling – FF quit team because students said he wanted to wrestle with boys  
26 because he "liked being touched and grabbed by them."
- 27 • After graduation--approached on school grounds and told "You fucking faggot.  
28 I'm going to kill you and kick your ass."

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; 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; 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. FF depo, at 361:13-24; 189:4-190:2; Glynn depo, at 358:16-22;
- FF told his art teacher, Ms. Pederson, about the harassment he faced in his P.E. classes. 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?" FF depo, at 405:14-21; Glynn depo, at 75:16-24; 76:9-15; 82:2-10; 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." 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. 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. FF depo, at 453:20-454:13; 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. JD depo, at 22:11-19; 32:17-23. The next day the anti-gay harassment began. Students shouted "dyke" and "queer" at her and pelted her with fruit. Id. at 25:25-26:12; 37:20-24. JD immediately reported the incident to the campus monitor on duty, id., at 38:22-41:3, but the food-throwing continued that very same day. Id. at 38:22-39:1. She did not attend any further meetings of the Gay Lesbian Bisexual Association. 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. 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. 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

1 particularly afraid of the other students, Urego refused, telling JD to go to class early instead. Id.  
2 at 169:5-170:1; 170:18-173:1.<sup>4</sup> When Irma Morelos, another campus monitor, saw students  
3 present JD with a penis-shaped balloon during a lunch period, she merely told the offending  
4 students to knock it off. The behavior, of course, did not stop. Id. at 205:14-206:16. When  
5 Morelos found JD crying in the bathroom one day, JD explained that students had been harassing  
6 and yelling at her. Id. at 207:4-208:15. There was no discernable follow-up.

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

14 During P.E. class, students directed lewd sexual comments to JD, suggesting that JD was  
15 having sex with another girl in the class. JD depo, at 71:22-72:13. They ostracized JD, refusing  
16 to be her partner, explaining that they were afraid that JD "was looking at them." Id. at 77:21-  
17 78:11. JD told the teacher, Ms. Gautschi, that the other students were poking fun, calling her  
18 dyke and queer, and making uncomfortable suggestions. Gautschi did nothing to stop JD's  
19 harassment. Indeed, she suggested that JD change her clothes in the bathroom or someplace else  
20 removed from the locker room so that the **other girls** would not feel uncomfortable. Id. at  
21 78:16-79:1, 80:4-21, 83:2-85:19; 88:1-13; 91:18-92:12.

22 JD's experience with assistant principal Schizzano was even worse. Schizzano called JD  
23 into her office for an interview in connection with a sexual harassment complaint **made by**  
24 **another female student against a male student**. Inexplicably, Schizzano then proceeded to  
25 interrogate JD about JD's sexual orientation and about whether she had had sex with boys or with  
26

27 <sup>4</sup> When Urego encountered JD and another girl in the girls' bathroom before school one  
28 morning, she started a rumor among students that JD and the other girl were having oral sex in  
the bathroom. JD depo, at 126:24-127:9, 128:12-131:5.

1 other girls. JD depo, at 110:6-111:20, 112:19-114:13, 157:23-158:11-159:23.

2 JD reported the harassment she suffered to two of the school's assistant principals, Rick  
3 Desimone and Maxine Bartschi, when they criticized her poor attendance. In both instances, she  
4 explained that her attendance problems were directly related to the unbearable treatment she was  
5 experiencing from her peers. JD depo, at 164:2-22; 166:5-167:21; 202:19-203:15; 184: 2-8.

6 Instead of inquiring further, Ms. Bartschi brusquely replied that those problems were in the past  
7 and that JD would simply have to correct her attendance problems. Id. at 180:12-184:8. On  
8 another occasion, Assistant Principal Desimone accused JD of lying in order to be excused from  
9 school. JD explained to him that she was upset because students were saying mean things and  
10 shouting at her in class. Id. at 164:2-22; 166:5-167:21; 202:19-203:15. Desimone did nothing.

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

#### 14 4. School Employees Witnessed Plaintiff VP's Harassment

15 VP's fellow students began targeting her with anti-gay slurs in October of 1995, at the  
16 beginning of her 10th grade year at Live Oak High School. VP depo, at 44:11-14. The  
17 harassment commenced after VP attended her first meeting of the Gay Lesbian Straight Forum.  
18 Id. at 209:16-25. From that day forward, she was called a "dyke," "queer," or "faggot" virtually  
19 daily in the public areas of the school. Id. at 50:11-19; 53:14-17; 69:5-16.

20 Students openly harassed VP in the classroom. In Mr. Webb's 10th grade math class,  
21 students repeatedly made loud, sexually suggestive comments to VP about girls kissing each  
22 other, or demanding "how was [VP's] girlfriend last night." VP depo, at 62:9-63:21. The  
23 inappropriate comments in class were loud enough to be heard across the room, yet Mr. Webb  
24 never acknowledged them or responded to them, although at other times he did discipline one of  
25 the boys for generally talking and disrupting class. Id. at 67:7-68:12. Similarly, in Ms. Cowan's  
26 11th grade English class, boys broadcast loud comments that faggots are disgusting and lesbians  
27 should die. The improper comments were loud enough that all the students turned and looked,  
28

1 but Ms. Cowan ignored them. Id. at 96:5-97:16.<sup>5</sup> VP was often late for her second period class  
2 so that she could avoid a particularly threatening student, Matthew Estrella, who would harass  
3 her regularly. Emery decl, Exh. QQ, at 4:1-4.

4 Several of VP's friends complained to a campus monitor about the harassment directed at  
5 VP and her companions during lunch. Id. at 77:7-17. After a separate incident, three of VP's  
6 friends went to the administrative office to complain about the incessant harassment they  
7 endured during lunch period. Id. at 78:13-20. The lunch-time harassment continued even after  
8 the repeated efforts of VP's friends to report the misconduct. Id. at 82:6-10.

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

13 [Other students had] gone up to administrators before, and said  
14 there was a problem and nothing was done. It was just like, you  
15 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.

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

## 18 **5. Students Verbally And Physically Assaulted CL And HA During Their** 19 **Senior Year**

20 Live Oak students began taunting CL and HA with anti-gay comments and sexual  
21 gestures in the fall of their senior year (1997), shortly after they started dating. CL depo, at  
22 118:3-4; HA depo, at 131:25-132:15; 169:4-11. Nearly every time CL and HA walked through  
23 the halls or sat in the quad, students called them “lesbian,” “queer,” “faggots,” and “dykes.”  
24 Students made crude sexual jokes about lesbians. CL depo, at 118:4-6. For example, one student  
25 frequently repeated “Where are you going fishing this weekend?” and another replied “On the  
26 dyke.” CL depo, at 112:15-21. One oft-repeated joke asked “What do you call a lesbian

27 <sup>5</sup> One student reported to Assistant Principal Gaston that Cowan showed bias against  
28 lesbians in responding to students in her class making negative comments about girls kissing.  
Gaston depo, at 62:1-64:15; 70:11-15.

1 dinosaur?” Answer: A “lick-a-lot-a-pus.” CL depo, at 144:7-145:6; Emery decl, Exh. OO, at  
2 7:8-12. At least one student regularly rubbed his fists together to suggest a sexual act between  
3 two women. CL depo, at 143:15-19. Other students threw money at CL and HA while  
4 demanding that they kiss. CL depo, at 118:15-16; HA depo, at 104:19-21; 105:18-20. All the  
5 while, teachers and campus monitors were within earshot, yet they stood idly by. CL depo, at  
6 156:11-157:1; 280:9-18; HA depo, at 105:25-106:9; 212:23-214:7; 216:3-5; 217:8-17; 218:5-7;  
7 219:21-220:9.

8 Throughout the 1997-98 school year, a male student in HA’s graphics class repeatedly  
9 brushed up against HA and whispered “sexual things” to her, sometimes putting his hand on her  
10 thigh. HA depo, at 46:3-4; 61:21-62:2; 184:7-15. During one incident in the darkroom, he asked  
11 whether HA liked to “put [her] finger in the hole,” pressed against her with his hand on his thigh  
12 and whispered “do you want me to do that to you?” Emery decl., Exh. PP. HA reported this  
13 harassment to her graphics teacher, Ms. Brown Korbel. HA depo, at 50:24-51:4; 52:7-9; 52:22-  
14 25; 53:13-19. Brown Korbel told HA that she would talk to the harasser, (HA depo, at 54:20-  
15 22), but when HA and Brown Korbel spoke again approximately one week later, Brown Korbel  
16 told HA that she had not in fact talked to him. HA depo, at 57:15-23.<sup>6</sup>

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

25 \_\_\_\_\_  
26 <sup>6</sup> Contrary to defendants’ assertion, HA did not tell Brown Korbel that the harassment had  
27 stopped. Rather, when Brown Korbel asked if the student was still harassing her, HA responded  
28 that she had been avoiding the other student. 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. HA depo, at 60:8-10.

1 CL and HA promptly reported the cup-throwing incident to Assistant Principal Maxine  
2 Bartschi and identified two of their assailants. CL depo, at 98:9-11; 99:6-14; 99:24-100:3;  
3 100:17-18; HA depo, at 120:2-6; 120:14-16; 121:7-20. Instead of taking action herself, Bartschi  
4 referred the matter to a campus police officer. CL depo, at 100:19-25; 101:5-8; HA depo, at  
5 122:8-13. She also promised to get back to CL and HA regarding the incident. HA depo, at  
6 128:5-14. Notwithstanding CL's and HA's detailed reporting and the acknowledged seriousness  
7 of the incident, however, neither Bartschi nor the officer contacted CL or HA about this incident  
8 again. CL depo, at 110:23-111:2; 114:3-5; 181:5-182:2; 182:21-25; HA depo, at 124:16-20;  
9 Bartschi depo, at 54:8-12.

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

17 Assistant Principal Richard Gaston was also aware that CL and HA were being harassed  
18 not only by their peers, but most likely by campus monitor Irma Morelos as well. On one  
19 occasion Morelos brought CL and HA to Gaston's office because they were in the halls during  
20 class time, albeit with a pass from HA's teacher. CL depo, at 150:22-23; 151:81-11; Gaston  
21 depo, at 89:11-25. CL and HA told Gaston that Morelos and students were harassing them  
22 because they were gay. CL depo, at 151:10-14; 180:6-9; Gaston depo, at 95:16-96:11; 97:19-23;  
23 101:21-102:4. Gaston acknowledged that CL and HA "had a hard time on campus" because they  
24 were gay. Gaston depo, at 97:7-16. However, Gaston told CL and HA that he could do nothing  
25 about the harassment because they did not identify the harassers. Gaston depo, at 99:24-100:3.

26 When Gaston spoke to Morelos about the incident with CL and HA, Morelos denied  
27 hearing any anti-gay comments. Gaston depo, at 107:19-21. Gaston, though, doubted Morelos'  
28 truthfulness, because during their conversation, Morelos referred to CL and HA derogatorily as

1 “Igor” and “Festus.” Gaston depo, at 107:21-109:8. Gaston did not discipline CL or HA in  
2 connection with this incident because he was “uneasy” about “the possibility of [Morelos’] bias.”  
3 Gaston depo, at 112:6-11.

4 A few days later, CL told Gaston that the harassment had not stopped. CL depo, at  
5 153:6-7. Thus, teachers and administrators knew that students and at least one campus monitor  
6 were harassing plaintiffs CL and HA. But, as with the other plaintiffs, school officials did  
7 nothing to protect them, and the harassment continued.

### 8 III. ARGUMENT

#### 9 A. Each Defendant Intentionally and With Deliberate Indifference Violated Plaintiffs’ 10 Equal Protection Right Against Sexual Orientation Peer Harassment In Public 11 Schools

12 In Saucier v. Katz, 121 S. Ct. 2151 (2001), the Supreme Court refined the analysis courts  
13 must undertake when assessing a qualified immunity defense. Saucier requires courts to first ask  
14 a threshold question: “Taken in the light most favorable to the party asserting the injury, do the  
15 facts alleged show the [defendant’s] conduct violated a constitutional right?” Saucier, 121 S. Ct.  
16 at 2156. If the parties’ submissions do make out a constitutional violation, courts must then ask  
17 whether the asserted right was clearly established. Id.

18 In its September 10, 2001 order, the Ninth Circuit concluded that, because this Court did  
19 not have the benefit of the Supreme Court’s ruling in Saucier, it had not engaged in the analysis  
20 required by Saucier’s first prong. Accordingly, the Ninth Circuit remanded defendants’ qualified  
21 immunity defense for reconsideration in light of Saucier and directed this Court to determine  
22 whether “the submissions of the parties, when viewed in the light most favorable to the  
23 plaintiff[s], show that the defendant[s] violated a constitutional right.” Sept. 10, 2001 order at 4  
24 (citing Saucier, 121 S. Ct. at 2155-6). That is the only issue the Ninth Circuit asked this Court to  
25 consider.

26 Plaintiffs assert in this case that defendants violated plaintiffs’ federal Equal Protection  
27 right against anti-gay peer harassment in public schools. To establish this violation, plaintiffs  
28 must show that “the defendants acted either intentionally or with deliberate indifference.”  
Nabozny v. Podlesny, 92 F.3d 446, 454 (7<sup>th</sup> Cir. 1996); accord Murrell v. School District No. 1,

1 186 F.3d 1238, 1250 (10<sup>th</sup> Cir. 1999) (“a governmental official or supervisory employee may be  
2 held liable under section 1983 upon a showing of deliberate indifference to known sexual  
3 harassment”); Baynard v. Malone, \_\_\_ F.3d \_\_\_, 2001 WL 1134724 (4<sup>th</sup> Cir. 2001) (imposing §  
4 1983 liability on school principal based on principal’s deliberate indifference to teacher’s sexual  
5 harassment of student). On summary judgment, plaintiffs are not required to establish  
6 intentional discrimination or deliberate indifference as a matter of law; rather, their burden is  
7 merely to present evidence from which a reasonable jury could find in their favor. *Anderson*,  
8 477 U.S. at 257.

9 This Court has already determined that plaintiffs have made this evidentiary showing:

10 Plaintiffs have presented evidence upon which a jury could find  
11 that many of the individual defendants personally received reports  
12 of particular incidents of sexual orientation harassment, and yet  
13 failed to take effective remedial action... This evidence is sufficient  
14 to raise an inference of sexual orientation harassment at the  
15 summary judgment stage.

16 Nov. 9, 1999 Order at 11: 2-8. As the Court recognized, defendants repeatedly and deliberately  
17 failed to respond to specific acts of anti-gay harassment that plaintiffs reported directly to them.  
18 This consistent refusal to act upon notice of peer harassment raises an inference of intent to  
19 discriminate.<sup>7</sup> Moreover, defendants’ failure to take stronger measures, when earlier responses  
20 to peer harassment proved to be ineffective, evidences their deliberate indifference. See Vance  
21 v. Spencer County Public School, 231 F.3d 253, 261 (6<sup>th</sup> Cir. 2000).

22 Defendants’ attempt to distinguish Nabozny on its facts necessarily fails. Here, as in  
23 Nabozny, plaintiffs repeatedly complained to school administrators, who often promised to  
24 respond, yet invariably did nothing. Compare Nabozny, 92 F.3d at 452. Here, as in Nabozny,  
25 plaintiffs identified their harassers, yet defendants took no action. Here, as in Nabozny, school  
26 employees compounded the effects of peer harassment by revealing their own anti-gay bias  
27 toward plaintiffs. Here, as in Nabozny, defendants cite no evidence to justify their intentional

28 <sup>7</sup> Monteiro v. Tempe Union High School Dist., 158 F.3d 1023, 1034 (9<sup>th</sup> 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, 475-6 (9<sup>th</sup> Cir. 1998) (denying qualified  
immunity under the Equal Protection clause for school officials who failed to take effective steps  
to address peer sexual harassment).

1 discrimination. Indeed, there can be no rational basis for permitting one student to verbally  
2 and/or physically assault another student based on the victim's sexual orientation, and defendants  
3 do not offer one. See Nabozny, 92 F.3d at 458.

4 Moreover, the record is replete with evidence that each and every defendant knew of the  
5 pervasive anti-gay hostile environment in the Morgan Hill Schools – a critical factor in assessing  
6 defendants' responses to the specific incidents of harassment plaintiffs suffered. District  
7 officials, including each defendant, learned about the poisonous anti-gay environment from  
8 multiple sources, including: articles in the Oak Leaf and in the Morgan Hill Times; acrimonious  
9 school Board meetings where gay and lesbian issues were discussed; reports from teachers; and  
10 students' virulent reactions to a short-lived support group at Live Oak for gay and lesbian  
11 students. See supra, Section II. Yet in spite of their knowledge that gay and lesbian students  
12 (and students perceived to be gay or lesbian) faced such a menacing anti-gay environment,  
13 defendants persistently refused to address the general and specific threats to plaintiffs' safety and  
14 well-being. In this context, a jury could determine that defendants' failure to take meaningful  
15 action in response to known incidents of harassment against the plaintiffs reflects intentional  
16 discrimination or deliberate indifference, and not mere negligence.<sup>8</sup>

17 **1. Delia Schizzano**

18 The evidence shows that defendant Schizzano, an assistant principal, not only ignored  
19 plaintiffs' cries for help, but she also exacerbated plaintiffs' problems by inappropriately  
20 questioning them as to their sexuality. As set forth more fully above, Schizzano interrogated  
21 both Alana and JD as to their sexual orientation in response to harassment complaints. Despite  
22 the fact that on at least five occasions Alana reported to Schizzano that she had received  
23 pornographic, violent, and threatening materials in her locker, Schizzano took no action to  
24 protect Alana or to prevent further incidents; instead, she told Alana not to bring such

25 \_\_\_\_\_  
26 <sup>8</sup> Thus, the out-of-circuit cases that defendants cite, see Defendants' MPA at 23-24, wherein the  
27 facts supported only a finding of negligence, and not deliberate indifference or intentional  
28 discrimination, are inapposite here. Compare, e.g., Hagan v. Houston Indep. Sch. Dist., 51 F.3d  
48 (5<sup>th</sup> Cir. 1995) (holding that school official was entitled to qualified immunity where he  
interviewed the alleged offenders, the victims, and the victims' parent, he documented his  
investigations, reported his findings to his supervisors, and requested further direction).

1 “disgusting trash” to her again. Schizzano failed to take even the minimal step of changing  
2 Alana’s locker or removing the graffiti. Schizzano likewise ignored reports from FF’s mother  
3 that FF was being called names like “gay.” See supra, Sections II.C.1., II.C.2.<sup>9</sup>

4 Defendants do not claim, nor can they, that Schizzano took any action whatsoever to  
5 eliminate the harassment. At most, Schizzano made empty promises to Alana, rather than taking  
6 a single remedial measure. This continued refusal to help known victims of severe sexual  
7 orientation harassment cannot be characterized as mere negligence or “lack of follow-up,” as  
8 defendants assert. Rather, Schizzano’s manifest hostility toward plaintiffs and her complete  
9 failure to respond to their repeated reports of abuse can only be seen as intentional discrimination  
10 or deliberate indifference. See Monteiro, 158 F.3d at 1034; Vance, 231 F.3d at 262.

## 11 **2. Maxine Bartschi**

12 When a group of male students physically assaulted CL and called her a “dyke” as she  
13 walked through a Live Oak parking lot with HA, defendant Bartschi abdicated her responsibility  
14 to a campus police officer who never followed up with CL, HA, or the perpetrators, despite CL  
15 and HA’s detailed reporting, including the names of those perpetrators they could identify.  
16 Supra, Section II.C.5. Although Bartschi knew the names of two of the harassers, had the power  
17 to discipline them, and promised CL and HA that she would follow up on the incident, Bartschi  
18 herself took no action to ensure the safety of CL and HA or to discipline the known assailants,  
19 nor did she contact CL or HA about the incident again. Id. Contrary to defendants’ assertions,  
20 Bartschi’s alleged expression of sympathy cannot constitute a legally sufficient response to the  
21 assault; in the absence of affirmative action to punish the assailants or prevent future assaults,  
22 this disingenuous show of concern amounts to no response at all.

23 Bartschi’s failure to take administrative action in response to the vicious assault is not  
24

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25 <sup>9</sup> Defendants’ attempts to portray Schizzano as supportive of gay and lesbian students because of  
26 her role in founding the Gay, Lesbian, Bisexual club on campus must be rejected as the  
27 distortions that they are. The impetus for creating the club came not from Schizzano, but from  
28 two students. 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. 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. Id. at 270:10-16.

1 excused by her referral of the incident to a campus police officer.<sup>10</sup> It was Live Oak policy for  
2 administrators to conduct their own investigations of assaults and impose their own sanctions,  
3 such as suspensions, regardless of whether a matter had been referred to the police. Schizzano  
4 depo, at 278:1-22. As that policy reflects, a public school’s obligation to prevent peer  
5 harassment is distinct from the responsibility of law enforcement officers to investigate and  
6 punish criminal assaults through the criminal justice system. See Davis v. Monroe County Bd.  
7 of Education, 526 U.S. 629 (1999) (school officials may have shown deliberate indifference in  
8 failing to protect plaintiff from peer sexual harassment by a fellow student, despite the fact that  
9 the alleged harasser had been convicted of sexual battery); see also Schizzano depo, at 278:18-  
10 22. In Nabozny, the court recognized that referring an anti-gay assault to campus police without  
11 any further administrative follow-up is evidence of deliberate indifference. Nabozny, 92 F.3d at  
12 452. The evidence is particularly telling in this case, as the campus officer to whom Bartschi  
13 referred CL and HA told them that if they were going to be gay, they should expect to be  
14 harassed by their fellow students. Compare Nabozny, 92 F.3d at 451-52.

15 Like CL and HA, JD spoke to no avail with Assistant Principal Bartschi about the  
16 problems that other students were giving her. Instead of inquiring further when JD told Bartschi  
17 that her attendance problems were due to harassment by other students, Bartschi replied that  
18 those problems were in the past and that JD would simply have to do better.<sup>11</sup> See supra, Section  
19 II.C.3. In light of Live Oak’s known anti-gay environment in general, and toward JD in  
20 particular, this response evidences deliberate indifference.

### 21 3. Richard Gaston

22 CL and HA complained to Assistant Principal Gaston about repeated anti-gay  
23 harassment, including harassment by a *school official* – campus monitor Irma Morelos. Gaston

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24 <sup>10</sup> Defendants rely on this Court’s statement in its ruling on defendants’ Motion to Dismiss that  
25 the allegation in plaintiffs’ Complaint that Bartschi referred the matter to a campus police officer  
26 does not, *by itself*, constitute deliberate indifference. See November 8, 1998 order at 9:22-10:1  
(emphasis added). Plaintiffs have since submitted evidence that shows that Bartschi’s failure to  
27 take action of her own amounted to deliberate indifference.

28 <sup>11</sup> 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.

1 acknowledged that CL and HA “had a hard time on campus” because they were gay. He also  
2 acknowledged his awareness of the campus monitor’s anti-gay attitude. Nevertheless, he told  
3 CL and HA that he could do nothing about the harassment because they did not identify their  
4 harassers. See supra, Section II.C.V. However, plaintiffs’ inability to name their anonymous  
5 tormentors did not relieve Gaston of his obligation to respond to known incidents of peer sexual  
6 orientation harassment. Gaston himself admits that there were “a lot of things” he could have  
7 done to prevent further harassment of CL and HA; for example, communicating to the student  
8 body that anti-gay harassment would not be tolerated. Gaston Depo, at 101:13-102:14. Instead  
9 he chose to do nothing. This conduct by Gaston was particularly egregious given that Gaston  
10 was aware, as were the other administrators, that CL, HA, and others were subjected to constant  
11 anti-gay harassment by school employees and by their peers. Gaston’s persistent, unjustified  
12 refusal to take any action to remedy known sexual orientation harassment, when he was aware of  
13 measures that he could have taken to protect the plaintiffs, supports a finding of intentional  
14 discrimination.

15 **4. Robert Davis**

16 When a male student, at the urging of other students, presented Alana and FF with a  
17 pornographic picture depicting heterosexual sex acts and said “That’s what you should be doing,  
18 Faggot,” Principal Davis, along with Schizzano, knew that other students had participated in the  
19 confrontation. Yet they disciplined only the one student who actually delivered the pornographic  
20 picture, giving him only a light suspension—after which he bragged to his friends about the  
21 school’s leniency. See supra, Section II.C.1. Moreover, when Alana and FF complained to  
22 Davis about the disciplinary process, he ignored their concerns, instead, he asked Alana if she  
23 was a lesbian. See id.

24 Davis’ intentional indifference toward the anti-gay harassment directed at plaintiffs is  
25 further exemplified by his response when Alana and FF described directly to him the hostile  
26 atmosphere at the school. Alana asked Davis to convey to students the official school policy that  
27 sexual harassment and sexual orientation discrimination are unacceptable, but Davis inexplicably  
28 refused. Rather than taking proactive measures to decrease the chances of further harassment,

1 Davis' sole response to Alana's and FF's complaints was to watch the area where the harassment  
2 occurred "two to three times." See supra, Section II.C.1. To accept defendants' contention that  
3 this half-hearted effort satisfies Davis' obligations under the Equal Protection Clause is to  
4 endorse the far-reaching proposition that school officials have not shown deliberate indifference  
5 or discriminatory animus so long as they have done something, no matter how ineffectual or  
6 unreasonable, in response to allegations of harassment. This argument, which would render the  
7 Equal Protection Clause meaningless to student victims of peer harassment, has already been  
8 rejected in other cases, see Vance, 231 F.3d at 260-1; Baynard, 2001 WL 1134724 at 4  
9 (principal's "desultory" investigation of sexual harassment allegations demonstrates deliberate  
10 indifference), and it must be rejected here.

11 **5. Don Schaeffer and Frank Nucci**

12 While FF was waiting for a school bus to take him to Martin Murphy Middle School, he  
13 was beaten so brutally by a group of students that he had to be taken to the hospital with severely  
14 bruised ribs. See supra, Section II.C.2. Schaeffer and Nucci, as Principal and Vice Principal of  
15 Martin Murphy, punished only one of the six students involved in the incident – never informing  
16 FF or his mother of the action they took. Id. Defendants' purported solution to the assault and  
17 harassment was to transfer FF, the victim, to another school.<sup>12</sup> Id. The Ninth Circuit has  
18 recognized, in the employment context, that transferring a harassment victim is an improper  
19 response to harassment. See, e.g., Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) ("We  
20 strongly believe that the victim of sexual harassment should not be punished for the conduct of  
21 the harasser."). By focusing their action on the victim, rather than the assailants, and by allowing  
22 five of the six attackers to escape without even a reprimand, Schaeffer and Nucci evidenced  
23 deliberate indifference to the assault on FF.

24  
25  
26  
27 <sup>12</sup> Defendants' contention that FF's mother was responsible for the transfer decision does not  
28 reflect 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.

1           **6. Additional Indirect Reporting of Anti-Gay Harassment**

2           In addition to these numerous incidents of harassment reported directly to defendants, the  
3 evidence supports an inference that defendants knew of other occurrences against the plaintiffs  
4 but failed to respond. So much of the harassment suffered by the individual plaintiffs occurred  
5 in public areas of the schools, or at public events such as dance recitals, that a jury could plainly  
6 infer that the defendant school administrators personally witnessed plaintiffs' harassment. See  
7 supra, Section II.C. Additionally, numerous teachers and campus monitors either witnessed or  
8 learned of plaintiffs' harassment directly from the plaintiffs. See id. School policy required  
9 teachers and monitors to report these allegations of sexual harassment to administrators, Bartschi  
10 depo, at 140:25-141:11; 157:10-19; therefore, a jury could reasonably find that these employees  
11 followed that policy and reported the harassment to the defendants.<sup>13</sup> Moreover, Assistant  
12 Principals Richard Bondolie and Rick Desimone, though not defendants, received specific notice  
13 of numerous incidents of harassment from plaintiffs. A jury could infer that Bondolie and  
14 Desimone shared these reports, as they should have, with defendants Schizzano, Bartschi,  
15 Gaston, and Davis. Even if defendants were not personally informed of these additional  
16 incidents, their undisputed knowledge of the pervasive, threatening anti-gay environment in  
17 Morgan Hill schools put them on notice that such incidents were likely to happen. See Oviatt v.  
18 Pearce, 954 F.2d 1470, 1473, 1477-8 (9<sup>th</sup> Cir. 1992) (sheriff liable for due process violation  
19 under § 1983 where sheriff was aware that "from time to time" prisoners were not timely  
20 arraigned, though sheriff had no knowledge that plaintiff was held 114 days without  
21 arraignment).

22           **7. Inadequate Training And Supervision Demonstrates Deliberate Indifference**

23           Defendants further demonstrated their deliberate indifference to plaintiffs' Equal  
24 Protection rights by inadequately training and supervising their subordinates, including teachers  
25 and campus monitors, by "acquiesc[ing] in the constitutional deprivations of which the

26 \_\_\_\_\_  
27 <sup>13</sup> If the teachers and monitors did not report known harassment of the plaintiffs to defendants, as  
28 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 adequately train Live Oak staff regarding  
anti-gay harassment. See supra, Section II.B.

1 complaint is made” and by showing a “reckless or callous indifference to the rights of others.”  
2 See Larez v. Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991); accord Canton v. Harris, 489 U.S.  
3 378, 390 (1989); Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978). As described in Section II.B.,  
4 supra, “sexual orientation” harassment was not even included in the district’s written sexual  
5 harassment policy until two months after plaintiffs commenced the present action. Moreover,  
6 training of teachers on the subject of sexual orientation harassment – if such training took place  
7 at all – was plainly ineffective. For instance, defendant Schizzano, who was responsible for staff  
8 training on these issues at Live Oak, testified that she would simply say that sexual harassment is  
9 not tolerated, and then go on to other topics. Sexual orientation was never even mentioned at  
10 staff trainings while plaintiffs attended Morgan Hill schools. Section II.B., supra. This lack of  
11 training by the defendants helped to create an atmosphere in which students incessantly harassed  
12 plaintiffs while teachers and other employees either stood idly by or actively contributed to the  
13 problem. Despite their knowledge of the rampant anti-gay sentiment in their schools, defendants  
14 made no effort to prepare their teachers to respond to the inevitable harassment that plaintiffs  
15 suffered, or to insist that they do so, virtually ensuring that the harassment would continue  
16 unabated.

17 In the face of, and contrary to, the above-cited evidence presented by plaintiffs,  
18 defendants argue that they aggressively pursued each of plaintiffs’ complaints and punished the  
19 alleged perpetrators whenever possible. Compare Nabozny, 92 F.3d 446 at 455. However, as  
20 the Court held in Nabozny, “Whether to believe the defendants or [the plaintiffs] is, of course, *a*  
21 *question of credibility for the fact-finder.*” Id. (emphasis added). In the context of considering a  
22 summary judgment motion, the Court must consider plaintiffs’ version as the credible one. Id.

23 In sum, the evidence plaintiffs have submitted supports a finding that defendants, based  
24 on all the circumstances known to them, including the pervasive anti-gay hostile environment in  
25 the Morgan Hill Unified School District, responded to plaintiffs with intentional discrimination  
26 and deliberate indifference. In the face of this evidence, defendants offer no justification for  
27 their conduct. Plaintiffs have therefore met their burden of showing that the facts alleged, when  
28 viewed in the light most favorable to them, show a violation of plaintiffs’ Equal Protection right

1 against anti-gay peer harassment.

2 **B. This Court Should Reject Defendants’ Invitation to Reconsider Issues That Are Not**  
3 **Properly Before The Court On Remand From The Ninth Circuit**

4 In its February 3, 2000 ruling, this Court unambiguously ruled that “it is clearly  
5 established that ‘the Constitution prohibits intentional invidious discrimination between  
6 otherwise similarly situated persons based on one’s membership in a definable minority, absent  
7 at least a rational basis for the discrimination.’” February 3, 2000 Order at 1:18-21 (quoting  
8 Nabozny, 92 F.3d at 457). After noting that homosexuals are undoubtedly an identifiable  
9 minority, the Court further ruled that it must be determined at trial, and not on summary  
10 judgment, “whether under the clearly established law, a reasonable school district administrator  
11 in Defendants’ position could have believed his or her conduct was lawful.” Id. at 1:22-24.  
12 Nothing in the Ninth Circuit’s order remanding this case for reconsideration in light of Saucier  
13 disturbs this ruling, and the Court should rebuff defendants’ efforts to do so.

14 The Ninth Circuit limited its remand to the question of whether the facts submitted by  
15 plaintiffs, viewed in the light most favorable to them, show a violation of plaintiffs’ equal  
16 protection rights. September 10, 2001 order at 4-5. This question tracks the first prong of the  
17 Saucier qualified immunity analysis: “Taken in the light most favorable to the party asserting  
18 the injury, do the facts alleged show [defendants’] conduct violated a constitutional right?”  
19 Saucier, 121 S. Ct. at 2156. The second prong of the Saucier test, which asks whether the right  
20 in question was clearly established (so that a reasonable officer would understand that his  
21 conduct violates that right), id., is not now properly before the Court. When it decided not to  
22 remand this issue for reconsideration, the Ninth Circuit implicitly affirmed this Court’s earlier  
23 ruling that plaintiffs’ right against intentional sexual orientation discrimination was clearly  
24 established at all relevant times, and that the reasonableness of defendants’ belief in the  
25 lawfulness of their conduct is a jury question that survives summary judgment. Defendants’  
26 current request for a ruling to the contrary represents, in effect, an improper sub silentio motion  
27 for reconsideration of an argument that this Court has already soundly rejected.

28 Because no reasonable school official could believe that unjustified intentional

1 discrimination against gay students or students perceived to be gay is lawful, this Court properly  
2 denied summary judgment on the grounds of qualified immunity. Analysis of defendants'  
3 qualified immunity defense under Saucier compels the same result. Plaintiffs have submitted  
4 more than enough evidence to support a finding of intentional discrimination in violation of  
5 plaintiffs' Equal Protection right against peer sexual orientation harassment. The Court has  
6 already held that that right was clearly established, and that material factual disputes exist on the  
7 issue of the reasonableness of defendants' conduct. Summary judgment of defendants' qualified  
8 immunity defense therefore remains improper.

9 **IV. CONCLUSION**

10 For all the foregoing reasons, the Court should reject defendants' qualified immunity  
11 defense and deny their motion for summary judgment. Plaintiffs have submitted evidence to  
12 establish that defendants intentionally and with deliberate indifference violated plaintiffs' clearly  
13 established Equal Protection right against intentional sexual orientation discrimination. This  
14 evidence of unjustified intentional discrimination precludes summary judgment on defendants'  
15 qualified immunity defense.

16  
17 Dated: November 13, 2001

KEKER & VAN NEST, LLP

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20 By: \_\_\_\_\_  
21 JAMES M. EMERY  
22 Attorneys for Plaintiffs  
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PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Kecker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On January 14, 2002, I served the following document(s):

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANTS' QUALIFIED IMMUNITY BRIEF**

by **COURIER**, by placing a true and correct copy in a sealed envelope addressed as shown below, and dispatching a messenger from Worldwide Attorney Service, whose address is 1540 Market Street, Suite 278, San Francisco, CA, with instructions to hand-carry the above and make delivery to the following during normal business hours, by leaving a true copy thereof with the person whose name is shown or the person authorized to accept courier deliveries on behalf of the addressee.

Mark E. Davis, Esq. (SBN 79936)  
Needham, Davis, Kirwan & Young, LLP  
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San Jose, CA 95126-1493

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 14, 2002, at San Francisco, California.

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NOEMI G. STEWART