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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

CHARLENE NGUON, et al.,

Plaintiffs,

v.

BEN WOLF, et al.,

Defendants.

CASE NO. SACV-05-868 JVS (MLGx)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: September 25, 2006
Time: 1:30 p.m.
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I. INTRODUCTION

Defendants' assertion that there are no material facts in dispute should be summarily rejected. In fact, the record is replete with evidence establishing that Defendants discriminated against Plaintiff because of her sexual orientation, suppressed her freedom of expression, and violated her right to privacy.

Santiago High School ("SHS") has no written policy regarding public displays of affection ("PDA") and its officials impose discipline for PDA in a subjective and discriminatory fashion. Indeed, the evidence shows that, prior to this lawsuit, the only couples formally disciplined recently at SHS for PDA were Plaintiff Charlene Nguon ("Charlene") and her girlfriend, another lesbian couple, and a straight couple who were hugging next to Charlene and Trang. The evidence also demonstrates that straight couples routinely and openly make out and engage in inappropriate touching without any formal punishment, often in front of school officials. In contrast – and notwithstanding Defendants' hyperbole – the behavior for which Charlene was repeatedly punished was minor and likely did not even violate the unwritten PDA policy. Finally, that Charlene was targeted because of her sexual orientation is established through the contemporaneous documents, in which school officials stated that Charlene was being disciplined for PDA "w/ other girls," "with another female student," and because of her "persistent public display of relationship with another girl."

The evidence also shows that Defendants violated Charlene's right to privacy. Defendant Wolf told Charlene's mother that she was "gay." Even Wolf admitted that he told Charlene's mother much more than that she was "kissing" another girl: he also told her mother that Charlene was "making out" and "inappropriately touching" "a lot" with "another girl."

Finally, Defendants cannot excuse their wrongful conduct by claiming they enjoy immunity or because they took appropriate remedial action. Defendants admit they knew it was wrong to discriminate on the basis of sexual orientation,

which precludes immunity. Similarly, Defendants provide no evidence that they have taken any remedial action whatsoever. Indeed, at every turn, they have denied any wrongdoing.

These disputed material facts, and those below, preclude summary judgment.

II. FACTUAL BACKGROUND[1]

Until school officials targeted her because of her sexual orientation and forced her to leave SHS, Charlene was regarded as a model student. She had a 3.93 GPA, was in the top 5% of her class, and, until her junior year, she had never missed a day of high school.[2] There was no concern on the part of administrators of her being a troublemaker.[3] School officials described her as "very shy but excellent," "very cooperative," having a "good attitude," and a "hard worker."[4] Even as he forced her to leave SHS, Wolf recognized her as a top student, telling another principal: "I do have another student I'd like you to take instead, but she'll [Charlene] raise your test scores."[5]

A. Santiago High School Had No Consistent Or Written Policies Prohibiting Public Displays Of Affection.

During Charlene's enrollment at SHS, there was no written policy prohibiting specific kinds of PDA.[6] Indeed, there was no written policy addressing PDA until after Charlene brought this lawsuit.[7] School officials were free to apply their own idiosyncratic standards to determine which kinds of behavior were permitted, standards which – as described below – allowed for discriminatory

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[1] Unless otherwise noted, all deposition transcripts and documents are numerical exhibits to the Declaration of Jordan Kushner ISO Plaintiffs' Opposition. All deposition transcripts are referred to by the name of the deponent.

[2] April 4, 2005 Report Card (Ex. 33); Attendance report (Ex. 34).

[3] December 11, 2005 letter of recommendation from Gordon C. Owens to the University of Southern California (Ex. 35); Wolf (Ex. 29) 160:25-161:5.

[4] Wert (Ex. 28) 22:9-11; Quarterly Grade Reports (Ex. 33).

[5] Wolf (Ex. 29) 157:1-12; March 28, 2005 email from Ben Wolf to Donna Sievers (Ex. 36).

[6] Defendants' Response to Plaintiffs' Interrogatory No. 7 (Ex. 37); Wolf (Ex. 29) 81:15-82:4.

[7] *Id.*; Smith (Ex. 23) 38:14-21, 40:9-41:5.

enforcement of rules against "inappropriate" PDA. Because the written policy addressing PDA created after Charlene brought suit lacks any objective standard, school officials remain free to use it to discriminate against lesbian and gay students. One official deemed inappropriate "any behavior that is of an excessive nature that *certain* people or *some* individuals might find objectionable or inappropriate for a school setting."[8] The two campus aides who allegedly witnessed inappropriate PDA by Charlene and her girlfriend described the standard as "you know it when you see it."[9] Another official relied on her own obscure creed that "there is a way everyone should behave in every certain area of their life I think."[10] Wolf testified that inappropriate PDA is always "sexual" conduct.[11]

Although the Defendants refer to these standards collectively as "common sense,"[12] school officials admit that there is no consensus as to the kind of behavior that is inappropriate.[13] As one school official admitted, "[s]ometimes it's a little vague. It gets a little fuzzy."[14] Despite this obvious lack of clarity, Wolf never attempted to determine if school officials had a uniform understanding of what is and is not appropriate or to determine if the rules were being fairly enforced.[15]

School officials agreed that short kisses and hugging are considered appropriate PDA.[16] However, at least one campus aide believed hugging may have been impermissible for same-sex couples, but permissible for a male and female.[17] In addition, based on their observations of the behavior that was occurring all around them, students, including Charlene, did not believe or know that French

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[8] Stovall (Ex. 25) 55:24-56:10 (emphasis added).
[9] McCuistion (Ex. 10) 36:2-7; Sharabi (Ex. 20) 37:20-21.
[10] Sharabi (Ex. 20) 35:12-13.
[11] Wolf (Ex. 29) 131:12-23.
[12] Mot. at 3:16.
[13] Ney (Ex. 12) 27:14-28:7; Smith (Ex. 23) 53:9-15.
[14] Sharabi (Ex. 20) 41:4-6.
[15] Wolf (Ex. 29) 40:24-41:4; 272:11-13.
[16] Sharabi (Ex. 20) 38:3-5; McCuistion (Ex. 10) 33:21-23; Wolf (Ex. 29) 37:18-21; Baird (Ex. 1) 54:12-14.
[17] Sharabi (Ex. 20) 42:17-21; 43:15-21.

kissing was prohibited on campus.[18] At least one teacher admitted that she did not know that French kissing was prohibited.[19]

B. Charlene Was Disciplined For Behavior That Was Tolerated When Engaged In By Opposite-Sex Couples.

1. Public displays of affection by heterosexual couples are ubiquitous and tolerated at Santiago High School.

During the 2004-05 school year, there were roughly 2000 students at SHS, and at least 50 heterosexual couples.[20] By contrast, only a small minority of SHS students is openly gay. School officials recall only one other openly same-sex couple that year, and no more than a total of four or five during all prior years.[21]

Making out on campus among heterosexual students is common.[22] More serious conduct also occurs, including groping breasts, oral sex, and intercourse, although much less frequently.[23] Often PDA will take place openly in the student quad, in the parking lot in front of the administration office (the same place where Charlene and Trang allegedly engaged in inappropriate PDA), and in the presence of school officials, who do nothing more than to occasionally tell the students to "knock it off," sometimes to the same students on repeated occasions.[24] Defendants misleadingly insist that they "disciplined other couples for similar

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[18] Nguon (Ex. 14) 51:15-52:9; Ngo (Ex. 13) 83:5-15; D. Vo (Ex. 26) 71:17-19.

[19] Schulman (Ex. 18) 29:24-30:15.

[20] Stovall (Ex. 25) 83:13-14; Shaw (Ex. 21) 48:9-18.

[21] McCuistion (Ex. 10) 57:7-13; Shaw (Ex. 21) 17:7-11; Garcia (Ex. 4) 45:14-24.

[22] Insixiengmay ("Insix.") (Ex. 7) 44:9-15; 126:18-25; Carbajal (Ex. 2) 12:2-17; W. Vo (Ex. 27) 197:22-199:12; Huyhn (Ex. 6) 68:7-69:6; Schulman (Ex. 18) 28:5-29:17; 30:25-31:5; D. Vo (Ex. 26) 123:5-124:8; H. Nguyen (Ex. 15) 58:24-59-24; Carbajal (Ex. 2) 12:2-13:14; McCuistion (Ex. 10) 20:8-16; Nguon (Ex. 14) 74:25-76:9.

[23] Ney (Ex. 12) 45:20-25; D. Vo (Ex. 26) 122:11-13; Schulman (Ex. 18) 16:18-17:16; Huynh (Ex. 6) 68-24-69:2, 129:5-130:10; Ngo (Ex. 13) 19-5-20:4; W. Vo (Ex. 27) 191:25-192:1; Insix. (Ex. 7) 128:9-13; Carbajal (Ex. 2) 10:16-24.

[24] Wert (Ex. 28) 10:13-11:2; Garcia (Ex. 4) 18:10-19:25; Oldenberg (Ex. 17) 24:24-25:16; Insix. (Ex. 7) 43:22-50:12; Schulman (Ex. 18) 28:5-29:17, 30:25-31:5, 31:18-32:2, 38:7-39:7; McCuistion (Ex. 10) 66:19-67:7; H. Nguyen (Ex. 15) 76:6-12; Huynh (Ex. 6) 119:5-11; W. Vo (Ex. 27) 92:25-94:15; Carbajal (Ex. 2) 31:3-17; Nguon (Ex. 14) 74:25-76:15.

behavior" to that for which Charlene was disciplined. The reality, however, is that prior to this lawsuit, out of more than 2000 students per year, Defendants can only point to three couples who have ever been given any sort of formal discipline, *e.g.*, Saturday detention or suspension, for PDA—specifically "defiance" of a PDA rule. Two of those couples were lesbian couples: Charlene and Trang, and two other female students named Alex and Samantha.[25] Only *one* was an opposite-sex couple, and that couple was with Charlene and Trang at the time they allegedly engaged in inappropriate PDA. School officials, including the campus aides who witnessed the alleged inappropriate PDA by Charlene and Trang, make no effort to keep track of the number of times they have verbally reprimanded any particular *heterosexual* couple for inappropriate PDA and yet insist, incredibly, that no heterosexual couple—except the one couple disciplined at the same time as Charlene and her girlfriend—ever makes out again in the open after being given a single warning.[26] Moreover, the evidence shows that Charlene and Trang were issued numerous warnings because their lesbian relationship was the subject of gossip among the SHS staff, leading to more intense and coordinated scrutiny.[27]

As SHS's past disciplinary practices make clear, opposite-sex couples are able repeatedly to make out, inappropriately touch each other, and engage in other forms of PDA without repercussion, so long as they stop briefly whenever verbally reprimanded. Opposite sex couples face punishment for PDA only if they are engaged in PDA near a same-sex couple that is engaged in similar behavior. Same-sex couples, however, are monitored more strictly and, as described below, gravely disciplined for behavior for which straight couples are not punished.

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[25] Defendants' Undisputed Material Facts ("UMF") 51-56; Merito (Ex. 11) 49:23-53:13; D. Vo (Ex. 26) 121:6-9; Declaration of Alex Ho (Ex. 30).

[26] Sharabi (Ex. 20) 58:3-16; Stovall (Ex. 25) 80:4-16; McCuistion (Ex. 10) 52:17-23, 53:6-7.

[27] McCuistion (Ex. 10) 86:11-18; Schulman (Ex. 18) 19:8-20:11; Insix. (Ex. 7) 129:1-13, 140:6-20.

2. Defendants' version of events should be received skeptically in light of several obvious untruths and exaggerations.

Defendants make the remarkable assertion in their Moving Brief that Charlene admitted to the actions they describe therein. In fact, most of the events described by Defendants never occurred.

Perhaps realizing this shortcoming, Defendants resort to exaggerated and inflammatory language when describing the two girls' conduct as a means to justify their discrimination. Defendants accuse Charlene and Trang of being between one another's legs "doggie-style." That language, however, was never used by any witness to describe any of Charlene's conduct. That inflammatory term was introduced into this lawsuit by Defendants' counsel and has been used repeatedly by counsel in misleading, harassing, and inappropriate questions to several students at their depositions.[28] There is no evidence, even among the testimony cited by Defendants, that Charlene engaged in any conduct "doggie style," as that term is defined either in the contemporary lexicon (where it refers to intercourse where one partner is behind another) or by Defendants' lawyers.[29]

Defendants also insist that there were occasions when Charlene "had her hand up Trang's shirt." Not so. On one occasion, in a playful gesture, Trang merely pressed one hand on Charlene's side because her hand was cold.[30] Trang neither groped nor fondled Charlene, and, clearly, this was not a sexual act.

Defendants also allege that several parents of other SHS students complained about Charlene's conduct in the schoolyard. In reality, Defendants received only one such complaint, and this complaint—relayed to Wolf immediately before he first warned Charlene and Trang to stop hugging—was

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[28] Nguon (Ex. 14) 84:8-11, 128:24-129:12; W. Vo (Ex. 27) 225:23-226:1; D. Vo (Ex. 26) 94:8-12; Huynh (Ex. 6) 124:24-125:3.

[29] Nguon (Ex. 14) 391:18-24.

[30] *Id.* at 110:11-113:7.

motivated by the fact that Charlene and Trang were both girls.[31]

3. Charlene was disciplined only for hugging her partner and giving her a short kiss goodbye.

Charlene and Trang were warned, given Saturday school, and suspended twice for hugging, briefly kissing, and placing one's hand on the other's side in a manner that cannot, by any reasonable standard, be deemed sexual. As is discussed above, school officials agree that none of this behavior is inappropriate, at least when it is engaged in by a heterosexual couple.[32]

Defendants insist that prior to December 10, 2004, Charlene's first warning for PDA resulted from her "making out" with Trang. This is not true. Charlene was not "making out," but rather merely hugging Trang, much to the chagrin of a nearby apparently anti-gay parent of another student who complained about it—spurring Wolf to action.[33] Prior to being warned, Charlene was approached by a campus aide, Dorothy McCuistion. Ms. McCuistion, who had never before seen two girls displaying affection for one another at SHS, snidely remarked that it was "getting hot and heavy" and walked away.[34] Ms. McCuistion then approached another campus aide, Marcia Sharabi, and gossiped about the apparently salacious

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[31] Sharabi (Ex. 20) 78:13-22, 78:23-79:7; Ney (Ex. 12) 59:3-6; McCuistion (Ex. 10) 45:8-46:6.

[32] Defendants also emphasize Charlene's off-campus blog, but clearly this did not contribute to Defendants' justification for disciplining Charlene. Donna Rose Sievers, who was in charge of the District Disciplinary Committee ("DDC") and another DDC member concluded the blog "didn't seem significant enough to warrant a discipline hearing," or discipline of any kind, and it didn't occur to her that the blog might cause disruption. March 24, 2005 entry on Form 431 (Ex. 37); Sievers (Ex. 22) 49:22-50:6. Defendants admit that the blog did not violate a school rule. Def. UMF 100. Moreover, when asked by Wolf if he wanted the school to take any action, one of the teachers mentioned in the blog replied, "no." Ney (Ex. 12) 12:16-13:8. The other admitted that it had no effect on her ability to teach, and that the only action she took was to ask her union lawyer if she could sue Charlene for slander. Garcia (Ex. 4) 56:9-19, 60:18-23. Nikki Ly, the student about whom the blog was written, has admitted that the blog did not make her feel suicidal, as Defendants dramatically allege. Declarations of Nikki Ly, ¶ 3 (Ex. 31).

[33] Nguon (Ex. 14) 169:4-170:4.

[34] McCuiston (Ex. 10) 54:19-21; Nguon (Ex. 14) 170:4-25.

and unusual sight of "two girls hugging."[35] Although the girls were merely hugging, and had never before been warned by either aide about inappropriate PDA, Ms. Sharabi—who had not even witnessed the hugging—immediately notified Wolf.[36] Wolf arrived within minutes and told Charlene and Trang to stop and warned them not to engage in such inappropriate PDA again.[37] Later, Wolf instructed Ms. McCuistion to bring the "two girls" into the office if she ever saw them engage in "inappropriate" PDA again.[38] This was the first and only time in her three years at SHS that Ms. McCuistion could recall Wolf instructing her to bring any couple to his office for engaging in PDA.[39] All because of a simple hug.

Charlene was first disciplined—rather than merely verbally warned—for PDA on December 10, 2004.[40] She was sitting on a bench hugging Trang, who was standing up and facing Charlene. They were with three friends, an opposite-sex couple who were also hugging, and William Vo.[41] Both couples were taken to Wolf's office, reprimanded by him, and given Saturday detention.[42] Although Defendants assert that Charlene was disciplined for "defiance," in completing the formal discipline form ordering Charlene to Saturday detention, a school official stated that she was being punished for engaging with PDA "w/ other girls."[43]

On December 15, 2004, Charlene was observed giving Trang a one to two-

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[35] Sharabi (Ex. 20) 42:17-21.
[36] *Id.* at 42:17-25; Nguon (Ex. 14) 169:25-170:25.
[37] Nguon (Ex. 14) 168:7-9.
[38] McCuistion (Ex. 10) 46:1-6.
[39] *Id.* at 73:18-25.
[40] Defendants assert that Charlene and Trang were caught making out in the library, and were issued a verbal warning by the library clerk, Anne Stafford. As a preliminary matter, this incident is irrelevant, since the incident did not take place until April 2005, after Wolf had already disciplined Charlene and decided to transfer her to another high school. Stafford (Ex. 24) 16:12-17. And there is no evidence that Wolf knew about the incident until after this lawsuit was filed. Stafford (Ex. 24) 21:9-16. Furthermore, Charlene was not kissing Trang; they were hugging. Nguon (Ex. 14) 103:21-104:7.
[41] Nguon (Ex. 14) 174:2-25, 183:13-20; Insix. (Ex. 7) 57:19-25, 60:23-61:1, 68:11-23, 75:19-21, 174:14-175:2, 177:5-10; W. Vo (Ex. 27) 109:9-113:4.
[42] Def. UMF 55-56.
[43] Defendants' Ex. I.

second kiss goodbye.[44] For that, Wolf immediately suspended her.[45] Wolf explained to Charlene's parents that Charlene was being suspended for being affectionate with another girl.[46]

Soon it became clear that administrators were gossiping about Charlene and Trang, and that the couple was subjected to disparate scrutiny by school officials. At some point between December 2004 and March 2005, Charlene and Trang were approached by Assistant Principal Ryan Smith. Defendants do not suggest that Charlene was engaged in inappropriate PDA at the time, nor could they. Charlene and Trang were simply taking pictures of themselves arm-in-arm.[47] Nevertheless, Mr. Smith asked them if they were "the infamous kissing girls."[48]

This scrutiny continued. On March 22, 2005, Charlene was standing, facing Trang, who was sitting on a bench. Trang had one of her cold hands on Charlene's side, under her shirt.[49] They were approached by Assistant Principal Stovall, taken to Principal Wolf's office, and suspended for three days.[50] Again, Defendants insist that the suspension was for defiance. And again, in documentary evidence generated shortly after the incident, Wolf states that he suspended Charlene because she was not even trying to be "discreet" about her affection with her girlfriend and because she "can't stop from having public displays of affection *with another female student*."[51] And, at Wolf's direction, Assistant Principal Stovall referred Charlene and her girlfriend, and their families, to the Family and Youth Outreach Program of the Boys and Girls Club, citing as the reason for the referrals,

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[44] Nguon (Ex. 14) 232:9-233:9.
[45] Def. UMF 62-65.
[46] Chhun (Ex. 3) 41:13-15; March 24, 2005 entry on Form 431, Ex. 37.
[47] Nguon (Ex. 14) 262:22-263:12, 256:21-257:6.
[48] *Id.* at 256:21-257:6.
[49] *Id.* at 111:8-113:7.
[50] Def. UMF 93-96; Nguon (Ex. 14) 268:15-269:4. Curiously, Stovall claimed during her deposition that she had never seen Charlene and Trang engage in any sort of public display of affection at all. Stovall (Ex. 25) 85:4-6.
[51] Wolf (Ex. 29) 157:1-12 (emphasis added); March 28, 2005 email from Ben Wolf to Donna Sievers, Ex. 36; March 24, 2005 entry on Form 431 (Ex. 37).

"Persistent public display of relationship *with another girl*. Warned repeatedly."[52]

C. Wolf Disclosed Charlene's Sexual Orientation To Her Mother.

1. Charlene Was Open About Her Sexual Orientation Only Away From Her Parents.

During her junior year, Charlene confided in four or five close friends that she was gay.[53] She later displayed affection with her girlfriend, Trang, at school. Still, she reasonably expected that her family would continue to be ignorant of her social life at school.[54] Her mother struggles with the English language, and there is no evidence that she previously came to campus except at Charlene's request or interacted with Charlene's friends, other parents of SHS students, or SHS staff.[55]

2. Wolf told Charlene's mom that she was gay.

Wolf told Charlene's mother that Charlene had kissed another girl.[56] This came as a shock to her mother, who assumed Charlene had kissed a boy.[57] Soon after, Wolf told her mother that Charlene was gay.[58] Wolf also told Charlene's mother that Charlene was "making out" and "inappropriately touching" "another girl," and that she had repeatedly engaged in these behaviors.[59] Charlene had not previously disclosed her sexual orientation to her mother.[60] Her mother had never seen Charlene be affectionate with another girl.[61]

Defendants admit that Wolf may have disclosed to Charlene's mother that Charlene was kissing, making out and inappropriately touching another girl, but

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[52] Stovall (Ex. 25) 104:8-13, 106:23-107:2; Family and Youth Outreach Program referral form (Ex. 44) (emphasis added).
[53] Nguon (Ex. 14) 199:13-17.
[54] *Id.* at 209:2-8.
[55] *Id.* at 242:15-243:5.
[56] Chhun (Ex. 3) 41:13-15.
[57] *Id.* at 40:18-19, 41:18-19; Def. UMF 74.
[58] Chhun (Ex. 3) 49:24-50:13.
[59] Wolf (Ex. 29) 217:3-11, 219:17-20, 279:10-280:3.
[60] Chhun (Ex. 3) 50:14-16; Nguon (Ex. 14) 209:9-11.
[61] Chhun (Ex. 3) 55:20-56:4.

nevertheless insist that he did not disclose her sexual orientation.[62] They simultaneously argue that Charlene was disclosing her sexual orientation to others on campus simply by engaging in PDA with Trang.[63] Obviously, these positions are incompatible. Moreover, this attempt to draw an artificial distinction between same-sex affection and sexual orientation is further belied by the testimony of Wolf's own staff, who admitted that they identify students' sexual orientation based on their public displays of affection, such as handholding and hugging, with other students.[64] Charlene's mother, and Trang's father, plainly understood Wolf's disclosures about their same-sex affection to mean that the students were lesbians.[65] In fact, upon learning of his daughter's sexual orientation, Trang's father threatened to send her to a special school in Florida "to fix her."[66]

Defendants insist that Charlene's mother had suspicions that her daughter was gay.[67] But those suspicions only came about *after* Wolf told her during their first meeting that Charlene was kissing another girl.[68] Certainly, even if Charlene's mother had suspicions independent of Wolf's disclosures, which she did not, Wolf would not have been free to confirm those suspicions.

D. Wolf's Forced Transfer Of Charlene Violated District Policy.

There are two types of school-to-school student transfers in GGUSD. The first is an involuntary transfer, which occurs only after a school administrator presents evidence at a noticed hearing before the DDC.[69] The second transfer procedure, referred to as a "principal-to-principal transfer" is a voluntary one, in

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[62] Mot. at 6:5-6.
[63] Def. UMF 5; Defendants' Reply in support of Motion to Dismiss (Ex. 45) at 13:26-14:3 ("She was openly lesbian before 20 administrators, teachers, students, parents and anyone else on campus").
[64] Shaw (Ex. 21) 39:20-40:5; Merito (Ex. 11) 62:15-63:1.
[65] Chhun (Ex. 3) 59:23-60:5; T. Nguyen (Ex. 16) 30:14-18.
[66] T. Nguyen (Ex. 16) 219:2-8.
[67] Mot. at 2:26-28.
[68] Chhun (Ex. 3) 76:10-14.
[69] Sievers (Ex. 22) 14:23-15:19.

which a student's parents request a transfer.[70] Principal Wolf forced Charlene or Trang to transfer to another school, but not through either of these procedures.

Wolf first attempted, unsuccessfully, to submit the matter to the DDC, hoping that it would hold a transfer/expulsion hearing.[71] When that failed, he met with Charlene's mother to urge her to transfer her daughter to a different school. Wolf explained to Charlene's mother that "it would be in Charlene's best interest if she got a fresh start somewhere else," and that "things weren't going great for [Charlene] at Santiago."[72] Charlene's mother did not request a transfer. Indeed, she pleaded with Wolf to let her daughter stay at Santiago until graduation.[73] Wolf ignored her pleas and insisted that either Trang or Charlene had to leave. Wolf even went so far as to tell Charlene's mother that if he were to submit the matter to the disciplinary committee, Charlene might be expelled.[74] It is clear that the transfer of Charlene to Bolsa Grande High School was not voluntary. Even if Charlene's mother ultimately consented to the transfer, that consent was coerced.

III. ARGUMENT

A. A Genuine Issue Of Fact Exists As To Whether Defendants Treated Charlene And Other Gay Students Differently Because Of Their Sexual Orientation.[75]

Evidence of an intent to discriminate can be either direct or indirect, and "very little such evidence is necessary to raise a genuine issue of fact." *Lowe v. Monrovia*, 775 F.2d 998, 1011 (9th Cir. 1985).[76] Furthermore, because the PDA

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[70] *Id.* at 22:15-19; Baird (Ex. 1) 75:8-16.

[71] Sievers (Ex. 22) 10:14-19, 50:21-51:3; Wolf (Ex. 29) 155:9-18, 156:13-17; Baird (Ex. 1) 67:5-68:4; March 24, 2005 entry on Form 431 (Ex. 37).

[72] Wolf (Ex. 29) 160:13-24.

[73] Chhun (Ex. 3) 57:22-58:21; Malm (Ex. 9) 88:9-15.

[74] Chhun (Ex. 3) 57:22-23; Wolf (Ex. 29) 163:25-164:24.

[75] This issue is relevant to Plaintiffs' First, Second, Fourth, Fifth, Seventh, Eighth, and Ninth Claims for Relief.

[76] The standards applied under Title VII are equally applicable to discrimination suits under 42 U.S.C § 1983. *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1180 n.11 (9th Cir. 1998) ("This Court applies the same standards to disparate treatment claims pursuant to Title VII, the Age Discrimination in

policy at issue here was unwritten, subjective, and vague, it was "particularly susceptible to discriminatory abuse and should be closely scrutinized." *Jauregui v. Glendale*, 852 F.2d 1128, 1136 (9th Cir. 1988); *EEOC v. Inland Marine Industries*, 729 F.2d 1229, 1236 (9th Cir. 1984) ("courts should examine [subjective] criteria very carefully to make certain that they are not vehicles for silent discrimination").

1. School officials admitted to disciplining Charlene because her PDA was with another girl.

When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998). In this case, there is substantial direct evidence, including undisputable documentary evidence, that Defendants intentionally targeted Charlene for discipline because of her sexual orientation (or, to the extent there is a distinction, the same-sex nature of Charlene's conduct). Ms. McCuistion admitted that she issued a warning to Charlene because her conduct involved "two girls hugging."[77] Charlene's Saturday detention notice explicitly indicates that she was being punished for engaging in PDA "w/ other girls."[78] After suspending Charlene for a second time, Wolf admitted to another principal in writing that he had disciplined Charlene for "having public displays of affection *with another female student*."[79] And, at Wolf's direction, Assistant Principal Stovall referred Charlene to the Family and Youth Outreach Program of the Boys and Girls Club, for "Persistent public display of relationship *with another girl*."[80] It is difficult to envision more explicit and probative evidence of discrimination.

Employment Act (ADEA), and §§ 1981 and 1983."); *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 472 (9th Cir. 1991).

[77] Sharabi (Ex. 20) 42:17-21.

[78] Defendants' Ex. I.

[79] Wolf (Ex. 29) 157:1-12 (emphasis added); March 28, 2005 email from Ben Wolf to Donna Sievers, Ex. 36.

[80] Stovall (Ex. 25) 104:8-13, 106:23-107:2; Family and Youth Outreach Program referral form (Ex. 44) (emphasis added).

2. Defendants disciplined Charlene for behavior that did not violate SHS's PDA policy and that is tolerated when engaged in by straight students.

That Defendants targeted Charlene for discipline because she is a lesbian is also evident from the fact that she was disciplined for behavior that SHS staff admit does not violate PDA policy. As is discussed above, Charlene and Trang were warned and disciplined for hugging, briefly kissing, and placing one's hand on the other's side in a nonsexual manner.[81] As school officials admit, none of this behavior is inappropriate,[82] and yet, Charlene was repeatedly punished. With only one exception, discussed below, punishment for heterosexual couples, however, was reserved for sexual intercourse and other conduct far more explicit than PDA. This disparity is itself proof of an intent to discriminate and raises a triable issue of fact. *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985) ("Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination"); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1032 (9th Cir. 2006).

Furthermore, even if Charlene had engaged in the conduct that Defendants allege, it remains clear that she was disciplined for behavior that heterosexual couples habitually practiced—and continue to practice—at SHS without consequence. There are roughly 2000 students enrolled at SHS,[83] and at least 50 openly heterosexual couples.[84] By contrast, other than Charlene and Trang, school officials recall only one openly same-sex couple during that year, and no more than four or five during prior years.[85] However, of the three couples who have been disciplined for engaging in inappropriate PDA during prior years, two were same

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[81] Section IIA, *supra.*
[82] Section IIB3, *supra.*
[83] Stovall (Ex. 25) 83:13-14.
[84] Shaw (Ex. 21) 48:9-18.
[85] McCuistion (Ex. 10) 57:7-13; Shaw (Ex. 21) 17:7-11; Garcia (Ex. 4) 45:14-24.

sex couples. The one opposite-sex couple that was disciplined for PDA was with Charlene and Trang at the time they were disciplined, and a reasonable fact finder could conclude they were disciplined only because to do otherwise would have been too obviously discriminatory even for Wolf. Thus, while opposite-sex couples make up less than 4% of couples at SHS, they constitute 67% of those disciplined for PDA, and 100% of those disciplined, when the straight bystanders are excluded. This disparity is substantial objective evidence of discrimination.

The fact that Wolf circumvented normal transfer procedures to separate Charlene and Trang is additional evidence of his discriminatory intent. *Garza v. County of L.A.*, 756 F. Supp. 1298, 1350 (C.D. Cal. 1990) ("Factors that may be probative of a discriminatory purpose include . . . departures from normal procedural sequences"). Similarly, the Defendants' obstruction of the formation of a GSA club is evidence of a discriminatory motive.[86] Diana Hoang Vo, a 2003 SHS graduate, testified that when she attempted to obtain approval from the administration to form a Gay-Straight Alliance club, she was denied twice by Garcia and Wolf because there "wasn't a need for it" and "there was no immediate threat to the students and that it would be the focus of antigay hate crimes."[87]

3. Defendants knew Charlene was gay, although Plaintiffs need not prove that.

Defendants insist, incredibly, that Wolf did not discriminate because he did not know Charlene's sexual orientation. Yet Defendants repeatedly and incongruously argue that Charlene disclosed her sexual orientation on campus simply by engaging in PDA with Trang.[88] Moreover, Wolf's own staff admitted

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[86] Notwithstanding Defendants' assertion, the GSA Network's interest in this litigation extends beyond the formation of the GSA club. The GSA Network, directly and on behalf of its members, has brought equal protection and privacy claims against the Defendants' conduct here. *See Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1105 (E.D. Cal. 2001) (holding that GSA Network has direct and associational standing for suit alleging discrimination and harassment against gay student).

[87] D. Vo (Ex. 26) 27:12-16, 30:20-31:16, 49:5-20.

[88] Def. UMF 5; Defendants' Reply ISO Motion to Dismiss at 13:26-14:3 Ex. 45.

that they identify students' sexual orientation based on their PDA, such as handholding and hugging, with other students.[89] A reasonable fact finder could conclude that Defendants knew Charlene was gay. Regardless, this argument is legally untenable. Professed ignorance of sexual orientation does not provide a free pass to discriminate against homosexual conduct; discrimination based on homosexual conduct is itself prohibited—apart from any issue of perceived sexual orientation. *Lawrence v. Texas*, 539 U.S. 558, 579, 123 S. Ct. 2472, 2484-85 (2003) (O'Connor, J., concurring) (law criminalizing sodomy between two men—but not between a man and a woman—violates equal protection); *Dubbs v. CIA*, 866 F.2d 1114, 1119 (9th Cir. 1989) ("we necessarily decide that a blanket policy of security clearance denials to all persons who engage in homosexual *conduct* would give rise to a colorable equal protection claim.") (emphasis added).

B. A Genuine Issue Of Material Fact Exists As To Whether Defendants Impermissibly Suppressed Charlene's Expression Based On Its Viewpoint.[90]

Defendants attempt to dispose of Charlene's First Amendment claim with the sweeping, unsupported assertion that they "are unaware of law stating that Ms. Nguon has a First Amendment right to engage in PDA at school."[91] The law is clear, however, that government may not engage in viewpoint-based discrimination of speech or expressive conduct. *Rosenberger v. Rector*, 515 U.S. 819, 828-29, 115 S. Ct. 2510. 2516-17 (1995). The law also recognizes that conduct that evinces a student's sexual orientation is expressive conduct protected by the First Amendment.[92]

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[89] Shaw (Ex. 21) 39:20-40:5; Merito (Ex. 11) 62:15-63:1; McCuistion (Ex. 10) 57:7-13; Garcia (Ex. 4) 45:14-24.

[90] This issue is relevant to Plaintiffs' Second and Fifth Claims for Relief.

[91] Mot. at 15:20-21.

[92] *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (right to be openly gay); *Fricke v. Lynch*, 491 F. Supp. 381 (D. R.I. 1980) (right to attend the high school prom with a same-sex date); *Doe v. Yunits*, 2000 WL 33162199, No. 001060A (Mass Sup. Ct.. Oct. 11, 2000) (right to dress in clothing not

Plaintiffs do not contest that a school district has the power to enforce reasonable and equitable rules against inappropriate public displays of affection. What Plaintiffs challenge is the singling out of same-sex PDA for punishment. The fact that the District's vague, unwritten PDA policy is neutral on its face does not preclude the fact that Defendants' enforcement of that policy was discriminatory. *NAACP, Western Region v. Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984) (considering "whether the prohibition on speech, although facially content-neutral, was in effect content-skewed"). In fact, the vagueness of the policy requires heightened scrutiny of Defendants' enforcement of that policy. *Cf. Jauregui*, 852 F.2d at 1136.

C. A Genuine Issue Of Fact Exists As To Whether The Defendants Violated Charlene's Right To Privacy.[93]

1. A factfinder easily could conclude that Wolf explicitly and implicitly conveyed Charlene's sexual orientation to her mother.

While explaining Charlene's suspension to her mother, Wolf matter-of-factly disclosed that Charlene was "gay."[94] Wolf disputes that he said this, but that dispute alone precludes the grant of summary judgment to Defendants. Defendants' other argument – that what Wolf admits to telling Charlene's mother could not be seen as disclosure of Charlene's sexual orientation as a matter of law – must also be rejected for at least the following reasons.

First, Wolf admitted that as part of the two meetings he had with Charlene's mother, he described Charlene's inappropriate and repeated public displays of affection as much more than "kissing." During those meetings, Wolf described Charlene's behavior to her mother as "making out" and "inappropriately touching"

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traditionally identified with the student's biological gender); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003) (right to form gay-straight alliance clubs on high school campuses).

[93] This issue is relevant to Plaintiffs' Third and Sixth Claims for Relief.

[94] Chhun (Ex. 3) 49:24-50:1.

"another girl" on multiple occasions.[95] Moreover, at Wolf's direction, school officials wrote in two disciplinary notices that Charlene had purportedly engaged in "heavy kissing w/ other girls" and in a "[p]ersistent public display of relationship with another girl."[96] These explicit descriptions of Charlene's same-sex affection alone conveyed her sexual orientation to her mother loud and clear.

Wolf's argument that he did not disclose Charlene's sexual orientation solely because he says he did not utter the "L" word ("lesbian") is profoundly out of touch with reality.[97] Same-sex conduct and the status of being gay or lesbian, while theoretically separable, are in reality closely intertwined: so intertwined in fact as to be understood in normal usage, and by the courts, to be one and the same. For instance, in her concurrence in *Lawrence v. Texas* striking down a criminal statute against "homosexual sodomy," Justice O'Connor rejected the State of Texas' argument, similar to the one made by the Defendants here, that there is no legal or real world connection between gay conduct and the status of being gay.[98] Similarly, in jurisdictions where the false assertion that a person is "homosexual" still constitutes defamation *per se*, courts have held that a defendant need not use the words "gay" or "lesbian" to be liable under those laws.[99]

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[95] Wolf (Ex. 29) 217:3-11, 219:17-20, 279:10-280:3.

[96] Stovall (Ex. 25) 104:8-13; Gonzalez (Ex. 5) 41:18-42:10; Family and Youth Outreach Program referral form (Ex. 44).

[97] Indeed, as discussed above, Defendants and Wolf's staff admitted that they assumed that certain students were gay or lesbian merely because they saw the students "hugging" or "handholding" persons of the same gender.

[98] *Lawrence*, 539 U.S. at 583 ("While it is true that the law applies only to [same-sex sexual] conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.") (O'Connor, J., concurring).

[99] *See, e.g., Wilson v. Harvey*, 164 Ohio App.3d 278, 286, 842 N.E.2d 83, 89 (2005) (holding that flyer stating, *inter alia*, that plaintiff was in search of a "male companion" stated claim for libel per quod); *Lewittes v. Cohen*, 2004 WL 1171261 at *3 (S.D.N.Y. May 26, 2004) (reference to plaintiff as "that closeted editor of a certain paper" reasonably implied that plaintiff was gay); *Bohdan v. Alltool Mfg.*, 411 N.W.2d 902, 907 (Minn. 1987) (implying plaintiff was gay sufficient to state a claim for defamation). Of course, Plaintiffs do not suggest that the mere assertion that someone is gay or lesbian should be considered defamatory.

Even if Wolf's descriptions of Charlene's PDA could theoretically have two meanings, it would be error to hold that those statements do not disclose sexual orientation as a matter of law. Where two inferences are possible from one set of facts, it is for the factfinder at trial to decide which is the more credible, rather than for the court to choose one that appears more plausible on summary judgment. *McGregor v. National R.R. Pass. Corp.*, 187 F.3d 1113, 1115 (9th Cir. 1999).[100] Certainly, a parent who is told by a principal that her daughter had repeatedly "kissed," "made out with," and "inappropriately touched" another girl could reasonably interpret those statements to mean that her daughter was a lesbian.[101]

While the Defendants make much of the purported "fact" that Wolf "did not perceive"[102] Charlene to be a lesbian at the time of his conversations with her mother, this "fact" is neither legally relevant nor credible. Proving that the defendant had a requisite subjective belief about the meaning of the disclosed information is not an element of a privacy claim. In any event, a reasonable factfinder could find Wolf's self-proclaimed ignorance of Charlene's sexual orientation to be wholly implausible. Although Wolf characterized all inappropriate PDA as "sexual,"[103] he nonetheless claimed that it did not *even cross his mind* that Charlene's and Trang's parents would understand his descriptions of their same-sex conduct to mean that the students were gay.[104]

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[100] Relatedly, in the context of defamation, courts may not rule that a statement cannot be defamatory on its face "when by any reasonable interpretation the language is susceptible of a defamatory meaning." *Selleck v. Globe International, Inc.*, 166 Cal. App. 3d 1123, 1131, 212 Cal. Rptr. 838 (1985).

[101] *See Steffan v. Perry*, 41 F.3d 677, 699-700 (D.C. Cir. 1994) ("Of course one may safely assume that individuals who engage in homosexual conduct have such an orientation.") (Randolph, J., concurrence in part). To the extent that Wolf now claims that a reasonable person would not interpret that information to mean that her daughter was gay, he should be precluded from doing so as he refused to answer that question during his deposition. Wolf: 289:5-14.

[102] Mot. at 18:25-26.

[103] Wolf (Ex. 29) 131:12-17.

[104] *Id.* at 294:6-18, 298:23-299:21. In a strained attempt to rationalize his disclosure of the gender of the student who Charlene was allegedly engaging in inappropriate same-sex conduct with, in his deposition, Wolf asserted that it never even crossed his mind that when he saw the unusual sight of two male

Indeed, a reasonable factfinder could conclude that Wolf's insistent disclosure of the gender of the other student was not only intentional but calculated to coerce the girls into ceasing the same-sex behavior that a parent had complained about and that his staff "didn't appreciate."[105] School officials have hewed to the party line that Charlene was disciplined for "defiance." Yet a factfinder could find that defiance was not what was on Wolf's mind at the time, or was not the only thing on Wolf's mind, given that contemporaneous documentation of the discipline highlights the allegations that Charlene was "kissing another girl," or "girls," and engaging in displays of affection "with another female student," or "another girl."

A factfinder could also find that Wolf intended to convey Charlene's sexual orientation to her mother based on his frank admission that he was not supposed to convey other kinds of information to her. Wolf acknowledged that he could not tell Charlene's mother the name of the student because "we don't want somebody to get hurt."[106] Wolf also agreed that it would be inappropriate to disclose the race of the other student involved in the inappropriate PDA because "there's not a reason to."[107] Given that the Defendants themselves contend that the gender of Charlene's girlfriend had nothing to do with discipline against her, there is no plausible explanation as to why he could not and did not simply explain that Charlene's behavior occurred with "another student."

Finally, the Court should rebuff Defendants' attempt to relitigate their argument, previously rejected by this Court, that because Charlene was "openly lesbian" on campus, she had no reasonable expectation of privacy with respect to her parents learning her sexual orientation. *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903

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students holding hands on campus, that those students "might be" gay. Wolf (Ex. 29) 280:23-281:6. Wolf also maintained that the statement made on the Boys & Girls Club referral regarding Charlene's "persistent public display of affection with another girl" gave him no reason to believe that Charlene "might be" gay. Wolf (Ex.29) 315:3-316:1.

[105] Nguon (Ex. 14) 223:9-224:7.

[106] Wolf (Ex. 29) 205:11-13.

[107] *Id.* at 205:14-19.

(C.D. Cal. 2005). The facts on this Motion mirror the allegations of the complaint this Court found sufficient: the evidence shows that Charlene was openly gay on campus, that her mother did not know that she was gay, and that her mother had no reason to know about her same-sex conduct. As this Court previously held, "[t]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information." *Id.* (following *U.S. Dept. of Justice v. Reporters Comm.*, 489 U.S. 749, 770, 109 S. Ct. 1468, 1480 (1989)). None of the evidence in the Motion compels a different result from the Court's prior order.[108]

D. A Genuine Issue Of Fact Exists As To Whether Defendants Have An Adequate Policy Preventing Discrimination On The Basis Of Sexual Orientation.[109]

Defendants insist that they have adequate policies to prevent discrimination. Antidiscrimination policies are adequate, however, only if they are disseminated to those enforcing the rules. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136 (9th Cir. 2003) (denying summary judgment where school officials failed to adequately train and notify campus monitors and other employees on policies against sexual orientation discrimination). Defendants do not assert that they disseminate any antidiscrimination policy, and the evidence suggests that they do not. Several SHS staff members indicated that they were unaware of a school policy specifically prohibiting discrimination on the basis of sexual orientation.[110]

Defendants' failure to adopt adequate safeguards against discrimination results also from the vagueness of the PDA rules. *Jauregui*, 852 F.2d at 1136; *see*

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[108] The Defendants' attempt to distinguish the holding in *Reporters Committee* on the ground that the "rap-sheet" at issue there was a "matter of past concern" is misplaced. That fact was only relevant to the government's interest in disclosing the information, and had no bearing on the obvious conclusion that such information is protected by the right to privacy. 489 U.S. at 780.

[109] This issue is relevant to Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief.

[110] Shaw (Ex. 21) 31:14-18; Garcia (Ex. 4) 14:11-24; McCuistion (Ex. 10) 40:15-24.

also United States v. Tabacca, 924 F.2d 906, 913 (9th Cir. 1991) ("A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence of what conduct is prohibited, or if it invites arbitrary and discriminatory enforcement"). Students, as well as those individuals who are charged with enforcing that rule, indicate that although the rule is based on "common sense," there is no real consensus as to the kinds of PDA that are prohibited. As a result, nothing in the rule prevents SHS staff from disciplining same-sex couples for behavior that is tolerated when engaged in by opposite-sex couples. And the evidence indicates that they do.

E. A Genuine Issue Of Fact Exists As To Whether Defendants Had Notice Of Wolf's Discrimination And Took Adequate Remedial Action.[111]

When it denied Defendants' Motion to Dismiss, the Court acknowledged the following allegations stated a discrimination claim under § 1983: 1) Charlene "complained to Schwalm about the allegedly unequal treatment that she received at Santiago High;" 2) "[N]either Schwalm, Baird, nor Lewis took action to stop or remedy the alleged harassment and discrimination;" and 3) "Baird, Lewis and Schwalm failed to enact an 'adequate formal or informal policy to ensure that Santiago High is providing a learning environment free from discrimination,' as required by California Education Code § 260." *C.N.*, 410 F. Supp. 2d at 899-900. Plaintiffs have substantive evidence supporting these allegations.

Defendants suggest that "it must be logical" to infer adequate remedial action from the fact that Charlene was not subject to further discipline during her senior year.[112] However, the case Defendants cite for this proposition fails to support it. Moreover, Defendants cannot point to any specific remedial action that

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[111] This issue is relevant to Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief.

[112] Mot. at 14:4-9 (*citing Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 685, 119 S. Ct. 1661, 1691 (U.S. 1999).

they have taken. Indeed, such an inference would not be "logical" at all, since the school's failure to discipline Charlene could have been the result of her own decision to refrain from PDA when confronted with disparate scrutiny from school officials, combined with the very real threat of additional discipline.

Defendants insist that the individual board members were never notified about Charlene's complaint. The evidence belies that assertion. Defendants Lewis, Baird, Schwalm, and the Board were on notice of SHS's discrimination of Charlene as early as July 2005.[113] In August 2005, Charlene submitted a formal complaint directly to Schwalm, who acted on behalf of the Board as its agent.[114]

Defendants knew it was illegal to discriminate based on sexual orientation.[115] But although Defendants Lewis and Baird assert that they investigated Charlene's claim,[116] they ultimately concluded that Wolf's actions were consistent with Board policy.[117] Although Plaintiffs attempted to discover what actions, if any, the Board subsequently took, Defendants asserted a Brown Act privilege and would not respond to counsel's questions.[118] Defendants admit, however, that the Board has made no effort to create a written PDA policy.[119] Nor did the Board adopt a policy on disclosure of sexual orientation to parents.[120]

Defendants also suggest that they cannot be blamed for failing to remedy the discrimination because Charlene did not complete a formal complaint form or await a formal rejection of her claim by the District. It is well-settled, however, that "a plaintiff does not have to exhaust administrative remedies before bringing a section 1983 action." *Lowe*, 775 F.2d at 1011.

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[113] Schwalm (Ex. 19) 70:1-13; 99:6-20; July 22, 2005 letter from Christine Sun to Principal Ben Wolf (Ex. 40); August 17, 2005 letter from Christine Sun to Laura Schwalm (Ex. 41).
[114] Schwalm (Ex. 19) 98:23-99:3.
[115] Wolf (Ex. 29) 14:11-14; Baird (Ex. 1) 60:23-25.
[116] Def. UMF 137.
[117] Def. Ex. P; Baird (Ex. 1) 62:25-63:15, 69:1-25; Lewis (Ex. 8) 32:22-33:25.
[118] Schwalm (Ex. 19) 99:21-102:4.
[119] *Id.* at 74:1-75:1.
[120] *Id.* at 90:22-91:3.

F. A Genuine Issue Of Material Fact Exists As To Whether Defendants Are Entitled To Qualified Immunity.[121]

In determining whether a government official is entitled to qualified immunity, the court's task is to determine whether the pre-existing law provided "fair warning" that the official's conduct was unlawful. *Cox v. Roskelly*, 359 F.3d 1105, 1112 (9th Cir. 2004).[122] When it ruled on Defendants' Motion to Dismiss, the Court held that the constitutional rights asserted by Charlene were well-established, such that if those rights were violated, Defendants will not be entitled to qualified immunity unless there was "an objectively reasonable basis for the [them] to believe that [their] conduct was lawful." *C.N.*, 410 F. Supp. 2d at 899.

With respect to Plaintiffs' discrimination and free expression claims, Defendants admit that they knew it was illegal to discriminate based on sexual orientation.[123] This fact alone eliminates a qualified immunity claim. Moreover, as is discussed above, Defendants nevertheless implemented and ratified discipline against Charlene for engaging in "affection *with another female student.*"[124]

With respect to Plaintiffs' privacy claims, the law is clear that the constitution protects against disclosure of one's sexual orientation. *Sterling v. Borough of Minersville,* 232 F.3d 190, 197-98 (3rd Cir. 2000) (denying qualified immunity for police officer who threatened to disclose to grandfather the sexual orientation of teenager, who subsequently committed suicide).[125] The Court should reject Defendants' contention that Wolf lacked "fair warning" that disclosing the

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[121] This is relevant to Plaintiffs' First, Second, Third, and Ninth Claims for Relief.

[122] In making its determination, the court should examine a wide range of relevant legal authority. *Frederick v. Morse*, 439 F.3d 1114, 1123-1124 (9th Cir. 2006). In determining whether the law violated was "clearly established," there need not exist any case with identical or even "materially similar" facts. *Hope v. Pelzer*, 536 U.S. 730, 739-741, 122 S. Ct. 2508, 2515-16 (2002).

[123] Wolf (Ex. 29) 14:11-14; Baird (Ex. 1) 60:23-25.

[124] Wolf (Ex. 29) 157:1-12 (emphasis added); March 28, 2005 email from Ben Wolf to Donna Sievers, Ex. 36.

[125] Indeed, Wolf also had ample warning more close at hand, since Defendants have conceded that it is against District policy to disclose a student's sexual orientation without her permission.

gender of the student Charlene allegedly kissed, made out with, and inappropriately touched "a lot" would be an unlawful disclosure of sexual orientation. As discussed above, courts have repeatedly held that one can communicate that another is gay without speaking the words "gay," "lesbian," or "homosexual," and acknowledged that same-sex conduct, especially "sexual" conduct, and gay status are inextricably intertwined.

G. Defendants Are Not Entitled To Discretionary Acts Immunity.[126]

In suggesting that they are entitled to discretionary acts immunity, Defendants rehash the same argument that the Court rejected when it ruled on Defendants' Motion to Dismiss. There, citing *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1389 (N.D. Cal. 1997), Defendants argued that all decisions made by school officials regarding discipline of students are necessarily discretionary.[127] The Court rejected the argument, pointing out that unlike in *Nicole M.*, the discrimination at issue here is alleged to have been conducted by school officials, rather than other students. *C.N.*, 410 F. Supp. 2d at 903.

Now, Defendants do not set forth any facts or evidence to undermine these prior determinations by the Court. Charlene's allegations of discrimination are still directed at school officials, not students, and Defendants have made no attempt to characterize their disciplinary practices as "quasi-legislative policy-making."[128] The Court should confirm its prior determination that Defendants are not entitled to discretionary acts immunity.

IV. CONCLUSION

For the reasons stated above, the Plaintiffs respectfully request that the Court deny Defendants' Motion in its entirety.

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[126] This issue is relevant to Plaintiffs', Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Claims for Relief.

[127] Defendants' Motion to Dismiss (Ex. 38) at 16:22-26.

[128] *C.N.*, 410 F. Supp. 2d at 903 (following *Caldwell v. Montoya*, 10 Cal. 4th 972, 981, 897 P.2d 1320, 1325-26 (1995)).

Dated: September 11, 2006

RESPECTFULLY SUBMITTED,

LATHAM & WATKINS LLP

By _____
Jordan B. Kushner
Attorneys for Plaintiffs
Charlene Nguon and the Gay-Straight Alliance Network

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, CA 92626-1925.

On **September 11, 2006**, I served the following document described as:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

by serving a true copy of the above-described document in the following manner:

BY HAND DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins LLP personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

Dennis J. Walsh, Esq.
Stephan Birgel, Esq.
Law Offices of Dennis J. Walsh, APC
16633 Ventura Blvd., Suite 1210
Encino, CA 91436

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 11, 2006**, at Costa Mesa, California.

Jana Roach

Jana Roach