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20 UNITED STATES DISTRICT COURT
21 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

22 CHARLENE NGUON, et al.,
23 Plaintiffs,
24 v.
25 BEN WOLF, et al.,
26 Defendants.
27

CASE NO. SACV-05-868 JVS (MLGx)
**PLAINTIFFS' SUR-REPLY TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT MOTION**
Date: October 2, 2006
Time: 1:30 p.m.
Courtroom: 10C

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1 Pursuant to the Court's Order dated September 22, 2006, Plaintiffs
2 Charlene Nguon ("Charlene") and the Gay-Straight Alliance Network (the "GSA
3 Network) hereby submit this Sur-Reply to the Defendants' Motion For Summary
4 Judgment, Or Alternatively, Summary Adjudication Of Issues (the "Motion").

5 **ARGUMENT**

6 **I. The conversation between Charlene's mother and Trang's father**
7 **occurred after Defendant Wolf disclosed the students' sexual**
8 **orientation in the meeting about their second suspension and in the**
9 **summer of 2005**

10 As discussed in the Plaintiffs' Opposition brief to the Motion,
11 Defendant Ben Wolf disclosed Charlene's, and her girlfriend Trang's, sexual
12 orientation to their respective parents in a series of meetings about the discipline
13 against them. SJ Oppo. at 10:2 – 11:16. As Defendant Wolf testified in his
14 deposition, on the day that he suspended the students for their public displays of
15 affection in December 2004, he called Charlene's mother to come pick up
16 Charlene from school.¹ When Charlene's mother came to school to pick up her
17 daughter, Wolf told her that Charlene was repeatedly "making out" "with a girl."²
18 In his next meeting with Charlene's mother the day that he suspended Charlene in
19 March 2005, Wolf told Charlene's mother that not only had the girls had been
20 making out, but that they had been "inappropriately touching" each other "a lot."³
21 In his third and last meeting with Charlene's mother, which was about Charlene's
22 blog and his desire to split up the girls, and which occurred when Charlene was
23 serving her second suspension, Defendant Wolf stated to Charlene's mother that
24 her daughter was "gay."⁴

25 Although Defendant Wolf admitted that he had no idea and didn't

26 ¹ Wolf (Ex. 6 to Declaration of Christine P. Sun ISO Sur-Reply ("Sun Sur-Reply
27 Decl.")) 215:5-23.

28 ² Wolf (Ex. 29 Kushner Decl.) 217:3-11, 219:17-20.

³ Wolf (Ex. 29 Kushner Decl.) 279:10-280:3, 294:6-18, 298:23-299:21.

⁴ Chhun (Ex. 3 Kushner Decl.) 49:24-50:13.

1 care whether Charlene's mother knew, prior to these conversations, that Charlene
2 was in a relationship with another girl,⁵ Defendants argue that Wolf could not have
3 disclosed Charlene's sexual orientation to her mother because she had already
4 learned that the students were gay through a conversation with Trang's father.
5 During this conversation, Trang's father explained that he was not pleased with the
6 amount of time that Trang was spending at Charlene's house.⁶ Defendants
7 misleadingly suggest that the two parents had that conversation before Ms.
8 Chhun's meeting with Principal Wolf about Charlene's blog wherein he stated that
9 she was "gay." Defendants' strained, post-hoc attempt to justify Defendant Wolf's
10 disclosures should be rejected for at least the following reasons.

11 First, Defendants fail to mention that the conversation between
12 Charlene's mother and Trang's father occurred in the summer of 2005 many
13 months after all of Defendant Wolf's conversations with Charlene's mother. This
14 timing is confirmed by Charlene's mother,⁷ Trang's father, and Charlene and
15 Trang, who were present during the conversation.⁸

16 _____
17 ⁵ Wolf (Ex. 6, Sun Sur-Reply Decl.) 293:5-23.

18 ⁶ Declaration of Chinh Khac Nguyen (Ex. 1, Sun Sur-Reply Decl.) ¶ 5; Nguon
(Ex. 2, Sun Sur-Reply Decl.) 299:12 – 300:2; Nguyen (Ex. 4, Sun Sur-Reply
19 Decl.) 141: 8 - 145:11); Chhun (Ex. 5, Sun Sur-Reply Decl.) 70:3-14.

20 ⁷ Although the Defendants will likely claim that Ms. Chhun's testimony is not
credible based on the corrections she made to her deposition transcript,
21 Defendants fail to disclose the other parts in her deposition wherein she
explained that the conversation with Trang's father occurred after her meetings
with Principal Wolf. Chhun (Ex. 5, Sun Sur-Reply Decl.) 66:6-14, 86:3-23.
22 Defendants also fail to disclose the numerous problems with the translator for
Ms. Chhun's deposition, who injected his own interpretation of the questions
23 and answers because he believed that Ms. Chhun "don't answer right." Chhun
(Ex. 5, Sun Sur-Reply Decl.) 115:21 – 117:4. Although Defendants' counsel
24 represented that the interpreter was "certified," on voir dire, the interpreter
admitted that he was, in fact, not certified by any board or government agency.
25 *Id.* at 81:21, 115:16 – 116:3. Indeed, the interpreter initially refused to answer
any questions about his qualifications on the ground that Plaintiffs' counsel
26 "want to make some trouble for me." *Id.* at 111:16 - 112:13, 114:15-21.
Despite Plaintiffs' objections to the quality of the translation, Defendants'
27 counsel refused to adjourn the deposition in order to employ the services of a
certified interpreter. *Id.* at 94:21-24.

28 ⁸ Declaration of Chinh Khac Nguyen (Ex. 1, Sun Sur-Reply Decl.) ¶ 5; Nguon
(Ex. 2, Sun Sur-Reply Decl.) 299:12 – 300:2; Nguyen (Ex. 4, Sun Sur-Reply

1 Second, by any account, the conversation between the parents
2 occurred after the meeting about the students' second suspension in which Wolf
3 explained that he was suspending the two girls for repeatedly making out with and
4 inappropriately touching each other "a lot".⁹ As discussed in Plaintiffs' Opposition
5 brief, Defendant Wolf's descriptions of the students' repeated, same-sex conduct
6 conveyed to the girls' parents that their daughters were gay loud and clear. SJ.
7 Oppo. 17:11 – 21:9.

8 A factfinder could easily reject as incredible Defendants' suggestion
9 that the parents should have understood Wolf's disclosures of the students' conduct
10 as reflecting a platonic relationship.¹⁰ Wolf himself characterized the students'
11 conduct as "sexual" and his disclosures occurred in the context of serious
12 disciplinary action against the students. The contention that, as a matter of law, no
13 reasonable parent could have concluded that her daughter was gay based on the
14 information that Wolf disclosed should be summarily rejected. *See* SJ Oppo. 19:1
15 – 20:19. Indeed, given that contemporaneous documentation of the discipline
16 highlights the allegations that Charlene was engaging in PDA with "a girl, with
17 "other girls," and with "a female student," and was not even trying to be "discreet"
18 about her same-sex affection, a reasonable factfinder could conclude that Wolf not
19 only knew of the students' sexual orientation but purposefully disclosed the gender

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22 Decl.) 141: 8 - 145:11); Chhun (Ex. 5, Sun Sur-Reply Decl.) 66:6-14, 72:5-11,
23 86:3-23. The timing of this conversation is also consistent with the reports in
24 August 2005, subpoenaed by the Defendants, reflecting Trang's father's call to
25 the police to retrieve Trang from Charlene's home. Ex. 3, Sun Sur-Reply Decl.

26 ⁹ Wolf (Ex. 29, Kushner Decl.) 279:10-280:3, 294:6-18, 298:23-299:21.

27 ¹⁰ Although the Defendants make much of the testimony wherein Charlene's
28 mother said that she did not initially believe that Charlene was gay based on
Principal Wolf's descriptions of the two girls' public displays of affection, her
disbelief was not premised on her interpretation of the disclosures as platonic.
Rather, Charlene's mother did not believe Principal Wolf's disclosures about
her daughter being gay because she had never seen Charlene "like that," i.e.,
kissing another girl, and because prior to his disclosures, she thought that
Charlene was "just [an] ordinary kid." Chhun (Ex. 5, Sun Decl.) 41:13-25,
75:20-76:2, 55:20-25.

1 to the parents as a way to stop them from being openly lesbian on campus. *Id.*
2 20:1-19; 9:15-19.

3 In sum, summary judgment in Defendants' favor should not be
4 granted under these facts. As discussed above, the conversation between Charlene
5 and Trang's parents occurred in the summer of 2005 and subsequent to Defendant
6 Wolf's disclosures of the students' same-sex, "sexual" conduct.

7 **II. The disciplinary records do not indicate equal treatment of heterosexual**
8 **couples, and in fact, further support Plaintiffs' discrimination claims.**

9 The Court should also summarily reject the assertion that disciplinary
10 records demonstrate that the Defendants treat gay and straight PDA in the same
11 manner. During discovery, Plaintiffs requested all information relating to
12 discipline against any Santiago High student for inappropriate PDA or for
13 "defiance" of a PDA prohibition. In response, the Defendants admitted that they
14 kept no records of the verbal reprimands given to students for inappropriate PDA.¹¹
15 The only records produced by Defendants were those of Charlene and Trang,
16 Sandy and Paul (the heterosexual bystanders), and the records attached as Exhibit
17 BB, documents 464-468, of Defendants' Exhibits ISO Reply to the Motion.
18 Contrary to the Defendants' assertions, those records do not support their claim
19 that they punished similar PDA by opposite-sex couples.

20 Documents 464 and 465 refer to the December 2001 suspensions of
21 Alex Ho and Samantha Juan, another lesbian couple, for purported "defiance" of
22 public display of affection "rules."¹² Document 466 refers to the suspension of a
23 student who was "Truant 1st period" who also happened to be making out with
24 another student inside a parked car while she was skipping school. Documents
25 467-468 refer to the suspensions, after Plaintiffs filed their lawsuit, of a
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27 ¹¹ See, e.g. Defendants' Interrogatory Responses (Ex. 39, Kushner Decl.) No. 12.

28 ¹² See also Merito (Ex. 11, Kushner Decl.) 49:23-53:13; Declaration of Alex Ho
(Ex. 30 to Kushner Decl.); D. Vo (Ex. 26 to Kushner Decl.) 121:6-9.

1 heterosexual couple for engaging in a sex act on campus.¹³

2 A factfinder could conclude that these documents reinforce, rather
3 than refute, Plaintiffs' claim of discrimination. Documents 467-468 are irrelevant
4 in that even Defendants' counsel do not assert that Charlene and Trang were
5 engaged in sexual intercourse on campus, and this suspension occurred only after
6 the Plaintiffs filed their Complaint. Document 466 is irrelevant because it refers to
7 a suspension for being "Truant," and not for defiance of warnings about public
8 displays of affection.

9 In contrast, the suspension forms of Alex Ho and her girlfriend,
10 documents 464 and 465, further show that the Defendants' reliance on ill-defined
11 and idiosyncratic "rules" against PDA permit Santiago High School officials to
12 unlawfully punish one type of affection—same-sex affection—while similar
13 behavior by heterosexual students goes unpunished, or unnoticed altogether. *See*
14 *C.N. v. Wolf*, 410 F. Supp. 2d 894, 899 (C.D. Cal. 2005) ("Supervisory liability is
15 imposed against a supervisory official in his individual capacity for his own
16 culpable action or inaction in the training, supervision, or control of his
17 subordinates, for his acquiescence in the constitutional deprivations of which the
18 complaint is made, or for conduct that showed a reckless or callous indifference to
19 the rights of others."). Thus, to the extent that the records cited by Defendants in
20 their Reply are relevant, they support Plaintiffs' discrimination claims.

21
22 Dated: September 27, 2006

RESPECTFULLY SUBMITTED,
ACLU OF SOUTHERN CALIFORNIA

23
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25 By 
26 CHRISTINE P. SUN
Attorneys for Plaintiffs

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28 ¹³ See also *Wolf* (Ex. B, Defendants' Exhibits ISO Motion) 128:25-129:24.

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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 27, 2006, I served the following document described as:

PLAINTIFFS' SUR-REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT MOTION

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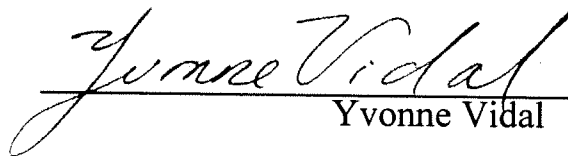
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing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

Executed on September 27, 2006, at Costa Mesa, California.


Yvonne Vidal