



December 16, 2016

Dear Superintendent,

The ACLU of Oregon is aware of a profound level of fear among many Oregon students and their families at this time, a troubling uptick in incidents of harassment and bullying of immigrants, students of color, and LGBTQ students at schools, and in some cases, sadly, misinformation by school personnel to students about the rights of students. We, like many of you, are disturbed and heartbroken to learn of the extent of the challenges these students now face just to make it through a school day intact. Some school staff and administrators have reached out to us for assistance and resources.

I. Introduction

Over the past several weeks, students of color have been subjected to bullying and harassment at school, students exercising their First Amendment rights to protest have been discouraged and threatened with discipline, undocumented students have been threatened with the possibility that their right to attend public school will be withdrawn, and LGBTQ students have been told they will no longer be accommodated and supported at school. Since the outcome of the national elections, our country and state have seen an escalation in incidents that threaten the safety and civil rights of minority students.

In an effort to assist schools in confronting these challenges and providing a safe and nondiscriminatory environment for all students, we are sending this advisory to all Oregon school district superintendents. Our goals in sending this advisory are to inform you, parents, students, and community members about the rights of students at school, to provide resources, and to ask that you take appropriate measures to protect the rights of your students.

Because of the delicate balance between civil liberties and every student's right to be educated in a safe, supportive environment, we are writing to provide a brief overview of the legal framework in some of the trickier areas. This is, of course, not an exhaustive discussion of the law and not intended to be legal advice. We want to ensure that you and other key-decision makers have some context for spotting these issues as you are making your day-to-day decisions. But should specific challenges arise in your district regarding student civil liberties, we recommend that you seek legal advice promptly.

We understand that, as superintendent of your district, your goal is to provide a safe, supportive environment in which all students can thrive and civil liberties are protected. We know that balancing the right of free expression with the right of all students to attend school in a safe

environment is not a simple task, and it requires school administrators to exercise strong professional judgement with a close understanding of the facts of every situation.

The ACLU of Oregon appreciates your dedication to the young people of Oregon. Public education is the foundation of our democracy, and you and your leadership team have the power to ensure that all students will learn about, protect, and promote their own civil liberties along with those of their peers. We hope that this letter serves as a resource in your important work, and encourage you to share it with your school communities.

II. First Amendment Rights of Students

The First Amendment is the cornerstone of our democracy. It protects freedom of speech, religion, and association. The Oregon Constitution also protects these essential rights.

A. Student Protest and Political Speech

As you know, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Political speech and peaceful protest are important American traditions that allow people to feel heard, spark conversations and debate about important issues, and create opportunities to form community and connections, which can lead to further organizing and action. See <http://www.aclu-or.org/content/open-letter-mayor-hales-regarding-free-speech>. Since the national election, many Oregon students are choosing to express themselves including through the time-honored venue of peaceable assembly and protest, and their right to do so is protected by the First Amendment.

Schools should have policies regarding student expression so that the rules are clear to students, staff, and families. Such policies should establish reasonable rules regarding the time, place, and manner that students can express themselves. While student protests cannot be substantially disruptive to the orderly operation of the school, students should be permitted venues through which they can express themselves in a peaceful and non-disruptive fashion. School rules cannot treat speech differently based on the viewpoint students are expressing, and all rules must be uniformly applied.

As an educator, you know that many students have strong opinions about important public policy issues. School is an ideal place for students to learn to express themselves thoughtfully, as they prepare to be actively involved adults.

B. Bullying and Harassment

Every student deserves to feel safe and supported at school. We know that students cannot achieve to their full potential if they feel unsafe or unwelcome in their school.

Since the national election, there has been extensive evidence and reporting regarding an increase in bullying and harassment of students of color, immigrant students, students who are

LGBTQ, and students who hold politically unpopular viewpoints in their community. We encourage you to take proactive steps in your school to ensure this does not occur for your students. While it may be tempting to ignore the current political situation in hopes that the passage of time will reduce or eliminate the political and personal tensions now felt, we believe this “hands off” approach will be ineffective. On the other hand, creating opportunities for students with differing views to engage in respectful dialogue can be an effective way to allow students to express themselves in a constructive and productive manner.

Federal law requires that public schools protect students from discrimination or harassment based on race, color, religion, sex, national origin, or disability. *See, e.g.*, Titles IV and VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation of 1973, Titles II and III of the Americans with Disabilities Act, and the Individuals with Disabilities Education Act.

While students may have strong views, schools cannot tolerate bullying, intimidation, or harassment that substantially interferes with a student’s learning environment at school. School officials may not simply turn a blind eye to bullying and harassment of immigrant students (or any student). Schools can be held liable for failure to protect students from bullying and harassment. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1134-35 (9th Cir. 2003). School officials must take seriously the claims of harassment and fully and effectively resolve them. *See Flores* at 1135-36 (“Failure to take any further steps once he knew his remedial measures were inadequate supports a finding of deliberate indifference.”). School districts may violate these federal civil rights statutes and the Department’s implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees. 34 C.F.R. parts 100, 104, and 106. Some schools that have failed to protect students have had to pay hundreds of thousands of dollars in damages. Districts and employees are also prohibited from retaliating against or taking adverse action against students who have asserted or exercised their rights and must not retaliate against others who have supported these students’ rights.

Oregon law requires school districts to have policies regarding bullying. ORS 339.351. This Oregon statute defines “harassment, intimidation or bullying” to mean any act that:

- (a) Substantially interferes with a student’s educational benefits, opportunities or performance;
- (b) Takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop;
- (c) Has the effect of:
 - (A) Physically harming a student or damaging a student’s property;
 - (B) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; or
 - (C) Creating a hostile educational environment, including interfering with the psychological well-being of a student; and
- (d) May be based on, but not be limited to, the protected class status of a person.

Under this law, a “protected class” means a group of persons distinguished, or perceived to be distinguished, by race, color, religion, sex, sexual orientation, national origin, marital status, familial status, source of income or disability. It is clear that students of color, immigrant or undocumented students, Muslim students, and LGBTQ students are all protected by this law.

This law further requires schools to “incorporate into existing training programs for students and school employees’ information related to … the prevention of, and the appropriate response to, acts of harassment, intimidation and bullying and acts of cyberbullying.”

It is important to note that the First Amendment substantially restricts a district’s authority to discipline student speech that occurs *outside* of school or school activities, including on social media. Students should not be censored or punished for off-campus or social media speech even if the content is school-related and considered to be offensive. That does not mean that school administrators have no tools to handle bullying, harassment or intimidation that takes place off campus or on social media.

Should an incident of bullying, harassment, or intimidation occur in your district that is related to our current political environment either on campus or off campus—such as students yelling at, or posting derogatory statements about each other—the ACLU encourages districts to create opportunities for students to have a respectful dialogue. While formal discipline may be appropriate in some circumstances (such as on campus speech that substantially disrupts the educational environment of the school) and unconstitutional in other circumstances (offensive off campus speech that does not substantially disrupt the educational environment of the school), students will learn most effectively if they can continue to talk to one another. One of the important principles of the First Amendment is that continued dialogue is the most effective way to address false, derogatory, or painful speech. “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, L., concurring).

III. Protecting the Rights of All Students Including Minorities

A. Rights of Undocumented and Immigrant Students

The national political dialogue around immigration is creating a frightening environment for many undocumented and immigrant students. While there are a wide variety of views about immigration, no child should feel unsafe or unwelcome at school.

In 1982, the United States Supreme Court established that undocumented students have the constitutional right to attend public school. *Plyler v. Doe*, 457 U.S. 202 (1982). In *Plyler*, the Court found that education is the primary way for a child to become “self-reliant and self-sufficient participant in society,” and that denying some children the right to an education could create “a permanent caste of undocumented resident aliens.” School cannot deny students the

right to attend school, nor can they discourage them from fully participating in school activities because of the student's actual or perceived immigration status. Additionally, the court ruled that public schools may not:

- Deny admission to a student during initial enrollment or at any other time on the basis of undocumented status.
- Engage in any practice that might "chill" a student's right of access to school.
- Treat a student differently in order to determine his or her residency.
- Require students or parents to disclose or document their immigration status.
- Ask students or parents questions that would expose their undocumented status.
- Require Social Security numbers from all students, as this may expose undocumented status.

Under current policy, schools are safe zones where federal officials should avoid immigration enforcement actions. We don't know yet what policies the President-Elect or Congress will put in place regarding immigration enforcement. In the meantime, all current Department of Homeland Security (DHS) policies remain in effect. DHS policy on sensitive locations enforcement, available here: <https://www.cbp.gov/border-security/sensitive-locations-faqs>, instructs immigration and border agents to avoid undertaking enforcement actions at sensitive locations, like schools, recognizing the importance of being safe from fear of immigration enforcement actions at certain locations.

B. Rights of Muslim Students

Muslim students have also reported significant fear given some of the statements—and threats—towards Muslim Americans during the national campaign. As you know, discrimination on the basis of religion is prohibited under federal and state law. Schools cannot discriminate against Muslim students, and should take effective action to address substantiated allegations of bullying, harassment, and intimidation in the school environment. Muslim students should be permitted to wear religious clothing and express their religious views and practices without fear. Educating your school community about Muslims and Islam can be a very effective, proactive way to increase understanding, dispel rumors, and promote a safe environment for all students. See *Educators Guide to Islamic Practices*,
http://www.cair.com/images/pdf/educators_guide.pdf

C. Rights of LGBTQ Students

LGBTQ students are also experiencing increased bullying and fear. Discrimination on the basis of sexual orientation and gender identity is prohibited under Oregon law. ORS 659.850. Schools must take effective action to ensure that LGBTQ students are safe and supported at school. The Oregon Department of Education has also issued guidance entitled "Creating a Safe and Supportive School Environment for Transgender Students":
<http://www.ode.state.or.us/groups/supportstaff/hklb/schoolnurses/transgenderstudentguidance.pdf>.

IV. Complaints and the Appropriate Use of Discipline

A. Complaint Processes Available to Students and Parents

Oregon law requires every school district to have a complaint process that is available to students and parents. OAR 581-022-1941. Complaints should be addressed in a timely and thorough fashion, and no one should be subject to retaliation for filing a complaint. Students whose rights have been violated may also file complaints with the Oregon Department of Education, the U.S. Department of Education, the U.S. Department of Justice, or in courts of law, but it is far preferable for schools to prevent bullying and harassment through education and training of school staff, teachers, and students, as well as addressing issues that do arise swiftly and in accordance with law.

B. The Appropriate Use of Discipline

By encouraging staff members to teach why harassment is wrong, and to teach that equality and respect are essential to a free society, schools may be able to prevent harassment in the first instance. Schools are not required to wait to respond to conduct until it escalates to a point where discipline may be required. Schools may more quickly and effectively respond to such conduct in ways other than formal punishment like suspensions or expulsions. There is no better way to prevent student harassment than to educate students about the impact of slurs and other harassing behavior.

The ACLU urges schools to meet an offending student with restorative justice actions rather than a “Zero Tolerance” response. Recent academic research shows that Zero Tolerance policies don’t make schools more orderly or safe, and have the unintended consequence of disproportionately affecting youth of color. Moreover, there is growing evidence that the most effective schools reinforce positive behavior and respond to behavior problems on a case-by-case basis in ways that suit the individual’s circumstances and needs. The Oregon Commission on Black Affairs, Oregon Advocacy Commission Office, Oregon Department of Education, and Governor’s Office of Diversity and Inclusion recently authored a paper addressing these issues titled “Addressing the Disproportionate Discipline Problem in Oregon Public Schools Using Restorative Justice.” Available at <https://www.oregon.gov/OCBA/PDFs/Allard%20-%20Restorative%20Justice%20in%20Public%20Schools%20report.pdf>.

Finally, we urge that school staff, not resource officers or police, address these issues.

V. Conclusion

As a nation we charge educators not only with teaching our children but also with protecting them while they learn. In times like these, it can only help for school officials to reiterate their firm commitment to inclusion and creating supportive environments for all students, at the same time, maintaining a setting that honors the free speech rights of young people.

Please let us know if the ACLU of Oregon may assist you in this endeavor in any way.

Respectfully,

A handwritten signature in black ink, appearing to read "M-D-S-S-T-O-S".

Mat dos Santos
Legal Director