Appellate Case No. D047199

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MEGAN DONOVAN AND JOSEPH RAMELLI,
Plaintiffs, Respondents, Cross-Appellants,

vs.

POWAY UNIFIED SCHOOL DISTRICT, et al.,
Defendants, Appellants, Cross-Respondents.

San Diego County Superior Court Case No. GIC 823157
The Honorable Steven R. Denton, Judge

COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

Case Name: Donovan, et al. v. Poway Unified School District

Court of Appeal No: D047199

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

In schools across the nation, gay and lesbian students face harassment, bullying, ridicule and abuse. (GLSEN, *The 2005 National School Climate Survey* (2006) p. 14 <http://www.glsen.org/cgi-bin/iowa/all/library/record/19 27.html> [as of October 30, 2006].) Recent surveys indicate that well over 200,000 students in California are harassed every year based on their actual or perceived sexual orientation. (Cal. Safe Schools Coalition, et al., *Safe Place to Learn Report* (January 2004) at p.6 <http://www.casafeschools.org/tools.html#trainingtools> [as of October 30, 2006].) This harassment greatly increases dropout rates and causes serious psychological harm, including an elevated likelihood to consider suicide. (Garafolo, et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, Pediatrics, Vol. 101, No. 5 (May 1998); Cal. Safe Schools Coalition, et al., *Safe Place to Learn Report, supra,* at p. 8.)

Against this backdrop the California Legislature passed the California Student Safety and Violence Prevention Act of 2000 to protect gay and lesbian students from harassment and abuse at school. (Stats 2000, ch. 587 [AB 537, now codified at Ed. Code § 200 *et seq.*].) The bill's author explained that the amendment was "necessary to prevent discrimination and harassment against gay and lesbian students and those students perceived to be gay or lesbian" and to protect them from "escalating" levels of violence. (AB 537 Senate Floor Analysis (Sept. 8, 1999) at p. 3 <http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0501-0550/ab_537_cfa_19990908_231050_sen_floor.html>.)

Joey Ramelli's and Megan Donovan's experiences at Poway High School were all too typical of gay and lesbian students in California. Joey became the target of incessant verbal and physical harassment and had to endure anti-gay slurs on campus almost continuously beginning with his sophomore year. (Reporter's Transcript ("RT") 717-19, 728.) He was physically assaulted – including being knocked to the ground and slammed into lockers – and even found notes

threatening his life left on his car in the school parking lot. (RT 735, 778-779, 2267.) Joey repeatedly reported the harassment to faculty and administration without any results. (RT 732.)

Megan Donovan experienced similar trauma at Poway High School. She had to face anti-gay slurs like "fag," "dyke" and "faggot" nearly every day on campus. (RT 413.) She was targeted personally, as when she was physically attacked by a student wearing a "homosexuality is a sin" t-shirt during an on-campus anti-gay event called "Straight Pride Day." (RT 552, 800.) When Megan told Assistant Principal Ed Giles that she is a lesbian and sought his support in dealing with the unrelenting anti-gay hostility, he responded by expressing his personal anti-gay animus directly to his student. (RT 565.)

Both Megan and Joey reported the on-campus harassment to Appellants or other school employees numerous times. (RT 455 – 57, 732, 2372.) Both of them provided Principal Fisher with written logs describing incidents of harassment on campus. (RT 830, 2618, Exh. 7.) Appellants chose not to follow up with Respondents regarding their complaints and failed to ask for more specific information about the incidents reported in their students' logs. (RT 732, 830, 832, 1184, 1201, 2375.) Other faculty and staff at Poway High School also reported the ongoing harassment of Joey and Megan to Appellants, but the school officials did not pursue or otherwise follow up on these reports either. (RT 1786, 1357, 1415, 2309, 2388.) Joey and Megan also informed the Superintendent of the Poway Unified School District of the ongoing anti-gay abuse with which they were struggling and requested his help, but he decided to do nothing about it, ostensibly because the students' plea for help was not submitted using district-approved forms. (RT 1926, 1944.)

The anti-gay atmosphere on campus drove both Megan and Joey from Poway High School, with its many extracurricular programs and social activities, before graduating. Both had to finish their studies through an at-home program. (RT 699, 2976.)

Joey and Megan filed suit against Appellants, arguing that the responsible school officials had abundant notice of the pervasive anti-gay harassment at Poway High School and failed to take even rudimentary steps to address it and to protect them. (Clerk's Transcript ("CT") 1-32.) The matter came to trial before Judge Steven R. Denton on April 19, 2005. On June 8, 2005 the jury returned a verdict in favor of Respondents. (CT 781.) After nearly six weeks of testimony, ten out of twelve jurors found that Appellant Fisher had acted with deliberate indifference to the harassment of Megan Donovan, and nine out of twelve jurors found that both Mr. Fisher and Mr. Giles had acted with deliberate indifference to the harassment of Joey Ramelli. (CT 774.) The jury awarded Megan $125,000 in damages and awarded Joey $175,000. The trial court also awarded attorneys' fees under 29 U.S.C. § 1988, but declined to award fees under California Code of Civil Procedure Section 1021.5. (RT 3897.)

Having failed to convince the jury that Appellants had responded adequately to the ongoing anti-gay harassment of students under their charge, Appellants now try to re-litigate this matter at the appellate level. Appellants attempt to circumvent settled appellate law by arguing that this Court may review the jury's finding of "deliberate indifference" *de novo*. Well-settled law forbids this approach. Jury findings are reviewed under the "substantial evidence" rule. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139].) To obtain a reversal of the jury's findings, Appellants would have to demonstrate that there is no evidence in the 4,000-page record of this matter that would support the verdict, even when all reasonable inferences are made in favor of affirming the findings of the jury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].) As Respondents show with the representative examples from the record set forth in this brief, Appellants do not come close to clearing this extremely high hurdle.

Appellants attempt to challenge the jury's findings by shirking their legal duty to summarize and present all evidence that would tend to support the verdict. Appellants fail to acknowledge that Appellant Fisher did not adequately investigate the threats of physical violence against Megan. (RT 670.) Appellants also fail to mention that they did nothing to investigate the allegations contained in Megan's log of harassment. (RT 548.) Appellants likewise withhold evidence that Appellant Giles actually told Joey to stop reporting incidents of harassment because his pleas for help were becoming annoying. (RT 2671-73.) Appellants' failure to investigate Joey's written complaint of having been spat on is similarly omitted from Appellants' improperly one-sided recitation of the facts, and other physical assaults are misleadingly minimized. (RT 1308-09.) Finally, Appellants grossly mischaracterize the testimony of Respondents' expert witness, Dr. Lynn Covarrubias, who offered expert testimony regarding school safety and student harassment. (RT 2726-27.) Dr. Covarrubias testified that Appellants were not taking adequate steps to correct "hot spots" on campus where harassment was likely to occur, nor did they provide adequate follow-through in their anti-harassment efforts. (RT 2730-34, 2767, 2772.) Appellants' materially incomplete and argumentative recitation of the facts constitutes a waiver of any "substantial evidence" challenge. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr.162].)

Appellants also challenge a handful of jury instructions, implausibly arguing that, had the trial court not offered a few of these instructions, the jury would not have returned its nine to three verdict against them. The first instruction Appellants challenge informed the jury that Section 220 of the California Education Code imposes liability on school administrators who fail to take appropriate corrective action to stop student-on-student harassment. Appellants argue that the California Education Code must import the less demanding federal standard, which only imposes liability on school administrators who act with "deliberate indifference" to known acts of harassment. (*Davis v.*

Monroe County Bd. of Ed. (1999) 526 U.S. 629 [119 S.Ct. 1661].) This argument fails on multiple fronts. First and foremost, all laws must be interpreted to give them meaning and effect. (*Select Base Materials, Inc. v. Bd. of Equalization* (1959) 51 Cal.2d 640, 646 [335 P.2d 672].) Appellants' reading of California law would render the anti-harassment provisions of the California Education Code a mere duplication of existing federal law and would rob the Code of its intended, additional impact, violating both the Legislature's intent and fundamental rules of statutory interpretation. (See, e.g., Stats. 2000, ch. 587, § 2(a)(3) ["To combat this problem we must seriously examine these grim statistics and *take immediate action* to ensure all students are offered equal protection from discrimination under California law."] [emphasis added].)

Furthermore, the jury affirmatively found that Appellants *did* act with "deliberate indifference" to known bias-motivated harassment (CT 776 – 781.) Thus, even if Appellants' suggested standard of liability were to apply, the federal standard was satisfied and the trial court's instruction would have been harmless error.

Appellants also object to the trial court's decision to provide a jury instruction containing a verbatim portion of the California Education Code, which provides that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment" and that "California's public schools have an affirmative obligation to combat racism, sexism and other forms of bias, and a responsibility to provide equal educational opportunity." (Ed. Code § 201.) Appellants ignore the rule that jury instructions that accurately reflect the actual language of an applicable statute are presumed to be proper. (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520 [95 Cal.Rptr.2d 336].) Because the challenged instruction gave the jury nothing more than the language of an applicable statute, Appellants' objection is without merit.

Appellants' final objection to the jury instructions complains that the trial court erred by informing jurors that Appellants' failure to provide any anti-

harassment training to employees may demonstrate "deliberate indifference" to discrimination and harassment, which can support a finding that Appellants violated the Equal Protection Clause of the United States Constitution. This argument is particularly difficult to understand. The Ninth Circuit has held unequivocally that the failure to provide anti-harassment training may demonstrate "deliberate indifference." (*Flores v. Morgan Hill Unified School Dist.* (9th Cir. 2003) 324 F.3d 1130.) Appellants' objection to an instruction drawn directly from the text of a controlling federal decision is therefore clearly improper and should be disregarded.

Appellants actually have waived their claim that certain points made by counsel for Respondents during closing argument mentioning Appellants' affirmative duty to fight discrimination and harassment justify reversal, because Appellants did not object to these arguments at trial. (*Horn v. Atchison, T. & S.F. Railway Co.* (1964) 61 Cal.2d 602 [39 Cal.Rptr. 721].) But even if the objection had been properly preserved, it would be of no merit. The "affirmative duty" language comes directly from the California Education Code. (Ed. Code § 201.) The reasoning applied to assessing jury instructions dictates that quoting a relevant statute during closing argument cannot constitute reversible error.

The only actual error in this matter was the trial court's failure to grant attorneys' fees under California Code of Civil Procedure § 1021.5, which provides for an award of fees when a private lawsuit procures a significant benefit for the general public or a large class of persons. Harassment of gay and lesbian students is pervasive in California, and any lawsuit clarifying and advancing the rights of students who have been subjected to bias-motivated abuse certainly confers benefits on a large class of vulnerable young people. (See Cal. Safe Schools Coalition, et al., *Safe Place to Learn Report, supra,* at p. 6.) Respondents' suit involved the first successful trial of claims under the provisions of the California Education Code forbidding anti-gay harassment. Respondents' suit thus provides critical guidance by making tangible the rights of harassed pupils and the duty of

school officials to take appropriate preventive action to protect targeted students before hostile situations escalate. This alone justifies an award of fees. (*Godinez v. Schwarzenegger* (2005) 132 Cal.App.4th 73 [33 Cal.Rptr.3d 270].) Accordingly, the trial court's denial of fees under Code of Civil Procedure § 1021.5 is the only portion of the trial court's judgment that merits reversal.

In a particularly telling portion of their opening brief, Appellants argue that "[a]t the very least, the weight of the evidence presented a strong case against a finding of liability." (Appellants' Opening Brief at p. 69.) In that passage, Appellants themselves underscore the central weakness of their appeal. An appeal from a jury verdict is not an opportunity to reweigh the evidence. Appellants' dubious assertion that they presented a "strong case" is not grounds for reversal. Evidence on appeal is assessed on a very narrow basis, to determine whether the record can support the verdict. As demonstrated below, the jury was presented with copious evidence that anti-gay harassment was pervasive at Poway High School and that Appellants either did nothing to intercede to protect its targets, or relied on anti-harassment measures that they knew had proved useless in the past, despite the availability of effective measures. This evidence plainly supports the jury's finding that Appellants acted with deliberate indifference to the verbal and physical attacks on both Megan Donovan and Joey Ramelli. Having been held responsible by the jury that heard the evidence, Appellants are not entitled to retry the facts at the appellate level.

In summation, Appellants argue that the jury got it wrong, but they fail in their obligation to highlight the ample evidence that the jury got it right. Appellants argue that the proper standard of liability is "deliberate indifference to known harassment," while failing to acknowledge that such "deliberate indifference" is precisely what the jury found. Appellants also argue that the trial court erred in telling the jury that educators in California have an "affirmative duty" to fight harassment, despite the fact that the affirmative duty is clearly

spelled out in the California Education Code. Accordingly, the verdict of the trial court must be upheld.

STATEMENT OF FACTS

I. JOEY RAMELLI EXPERIENCED CONSTANT HARASSMENT AT POWAY HIGH SCHOOL.

Joey Ramelli has lived in Poway since he was in fifth grade. (RT 699.) Joey realized that he was gay about the time he began high school, and he told his mother, Patricia Ramelli, during his freshman year. (RT 701.) His mother was supportive and accepted Joey's being gay without problems. (*Id.*)

In his first semester at Poway High School (hereafter "Poway High") Joey maintained a 3.5 grade point average. (RT 703.) He earned a 3.3 or 3.2 grade point average during his second semester. (*Id.*) But his high school experience went downhill from there.

A. Harassment In Gym Class

Other students began to harass Joey for being gay during his freshman year at Poway High. (RT 705.) Students called him "fag," "faggot," "queer," "homo," "fudge packer," "sissy," "pansy" and other anti-gay slurs. (*Id.*)

In gym class some boys with whom he was unfamiliar threatened Joey in the locker room, saying "watch your eyes, you stupid fag." (RT 707.) Joey responded by turning to his locker and avoiding the other boys until he could "get out of there real quick." (RT 707 – 708.) He reported the incident to one of his teachers, Ms. Zaragoza, who later informed the gym teacher. (RT 708 – 709.) Later in that same year, a friend told Joey that some "jocks" were going to "kick [Joey's] ass because he is gay." (RT 709.) Joey immediately reported the threat to the discipline office at Poway High. (RT 710.) He filed a written complaint naming the student who had relayed the threat and the student who initially had expressed the threat. (RT 711.)

The administration's only proposal to address the gym class harassment and threats was to suggest that Joey change clothes in the Physical Education office

rather than the locker room and involved no intervention to address the harassers. (RT 712.) Joey declined the offer because he was "a 14-year-old boy" and it was "hard enough to change, period, so surrounded by a bunch of grown men, it was difficult enough" and he was "uncomfortable with the whole situation." (RT 713.) Joey never took gym class again after his freshman year. (*Id.*)

B. Harassment In The Hallways And Classrooms

During his sophomore year Joey continued to be confronted by anti-gay slurs throughout Poway High. (RT 717.) His fellow students unceasingly used anti-gay epithets "in the hallways, in the lunchroom, in the quad.....just about anywhere on campus." (RT 718.) One of Joey's harassers slammed him into a locker, saying "watch out, fag" as he assaulted Joey. (RT 720.) Once or twice per week students would "make eye contact" and utter anti-gay slur. (RT 718.) Joey described the problem of the abusive language to Ms. Tracy Barker-Ball, the director of the Poway High School Wellness Center, but she just told him to "brush it off." (RT 719.)

Joey's junior year at Poway High "was like hell." (RT 728.) He had to endure hate language "every single day" – an aggressive drumbeat of hostile terms such as "fag," "faggot," "queer," "fudgepacker," "pansy," "sissy" and "homo." (RT 729.) He heard this intimidating soundtrack both in class and on the school grounds. (*Id.*) The ever-present harassment scared Joey, particularly because he felt it "coming directly at" him "more on a continuous basis." (*Id.*)

Joey sought help from the authority figures around him, to no avail. For example, when he heard anti-gay terms being used in his history class and complained to the teacher, Julie Lopez, she claimed not to have heard the slurs and took no steps to investigate. (RT 731.) He notified various school administrators about the pervasive anti-gay language on campus; these included Assistant Principal Ed Giles, Principal Scott Fisher and former Assistant Principal Tom Pack. (RT 732.) Mr. Fisher's initial response was simply to tell Joey that

pejorative language is against the rules. (*Id.*) Joey never saw Mr. Fisher or any other administrator do anything specific to act on these complaints. (*Id.*)

Later in his junior year, another student assaulted Joey while he was walking by the office of teacher Kristin Solo. (RT 734.) Joey testified that a student had walked by him, put his arm out, and "deck-checked" Joey while warning him, "watch out, you fucking faggot." (RT 735.) On another occasion, two students walked past Joey on either side of him, extended their arms, and knocked him to the ground, while sneering "fucking queer." (RT 744.) Joey reported the incident to Ms. Barker-Ball, but she did nothing. (*Id.*)

During the second semester of his junior year, Joey heard anti-gay slurs nearly every day. (RT 740.) Joey reported the language to administrators and teachers. (RT 741.) Twice during that semester students attached anti-gay notes to Joey's back. (RT 741-742.) The first note said, "Kick me, I'm a fucking faggot." (RT 742.) The second note said, "Fucking queer." Joey brought the second note to Ms. Barker-Ball's attention. (*Id.*)

Students threw food at Joey on several occasions during his junior year. (RT 757.) Early in the year a student screaming "you fucking queer" hit Joey with fruit. (RT 760.) Another time, a student threw a bagel and hit Joey, while calling him a "fag." (*Id.*) He reported the incident to Ms. Barker-Ball. (*Id.*)

C. Witnesses To Joey's Harassment

Other students witnessed Joey's harassers targeting and tormenting him at school. Fellow student Lindsey McCall Riddlespurger testified that she heard Joey being called names like "faggot" and saw him shoved into a locker. (RT 2267.) Nicolle Garwood testified that she heard hate language directed at Joey three or four times per week during their sophomore year, and almost every day during their junior year. (RT 2570, 2573.) She testified about Joey showing her a threatening note that had been left on his car. (RT 2581.)

Susanna Beeman, who was in the same class as Joey and Megan and attended Poway High from 2000 through 2004, witnessed Joey being harassed

because he is gay and saw him shoved into a locker. (RT 2871, 2873, 2879.) She heard hate language being used on campus daily. (RT 2875.) She spoke with Ms. Barker-Ball about the problems Joey was having at Poway High during their junior year. (RT 2878.)

II. MEGAN DONOVAN EXPERIENCED UNRELENTING HARASSMENT AT POWAY HIGH SCHOOL.

Megan Donovan came to Poway High School as a freshman in 2000, and it was generally known to her classmates that she iss a lesbian by the middle of her sophomore year. (RT 413.) Megan testified that she faced hostile comments – including terms like "fag," "dyke," [1] and "faggot" – on campus just about every day and in every class. (RT 414.) She encountered this anti-gay language "in [her] classroom, walking through halls, walking through the quad . . . [i]t was everywhere." (RT 415.) She heard the phrase "that's so gay" used as a pejorative "all the time" on campus and in class. (*Id.*) She heard anti-gay statements directed at her personally about once a week, as other students called her "dyke" and "fag" and "carpet muncher." (RT 425.) And, like Joey, she was threatened with physical violence due to her sexual orientation. (*Id.*)

Once at lunch a group of girls walked by Megan and one of them screamed at her: "I'm going to kick your ass, you fucking dyke." (RT 427.) Megan reported the incident to the duty supervisor, who was carrying a walkie-talkie. (*Id.*) The duty supervisor did not take her name, take any notes, call anyone on his walkie-talkie, or indicate to Megan that he would take any other steps to investigate the matter. (*Id.*)

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[1] The term "dyke" "is a "disparaging and offensive" term for a lesbian. (Random House, *Dictionary.com Unabridged (v. 1.0.1)* (2006) <http://dictionary.reference.com/browse/dyke> (as of Nov. 14, 2006).) The Reporter's Transcript uses the spelling "dike" rather than "dyke." This brief will use the corrected spelling.

A. Harassment In Woodshop Class

Megan was harassed relentlessly in woodshop class, where the term "faggot" was used routinely by her classmates. (RT 429, 432.) She reported the behavior three or four times to the woodshop teacher, Mr. Gene Tallon, who was hearing impaired and likely to have difficulty overhearing harassment as it took place. Mr. Tallon denied hearing the pejorative comments personally, but then took no action to investigate. (RT 432-433, 3055.) Megan testified that the use of anti-gay language was so pervasive in woodshop that she heard anti-gay epithets no less than five times during every class during the four semesters she took woodshop. (RT 443.) Megan specifically reported the problems in her woodshop class to Assistant Principal Ed Giles, including the names of specific students who had used anti-gay language. (RT 460, RT 1535 – 1536.) To the best of Megan's knowledge, no faculty member or administrator at Poway High ever took steps to discipline any of these harassing students. (RT 460.) Mr. Giles never asked Megan for more specific information to assist with any investigation, nor did he follow up with her regarding the abusive environment in the woodshop class. (RT 461, 1536.) The use of hostile and ostracizing anti-gay language in this school setting did not decrease at all as a result of her having reported the behavior to Mr. Giles, a school administrator. (RT 461.)

B. Harassment On The Softball Team

Before other students came to know she is a lesbian, Megan had been a star softball player who had set the school record for stolen bases and had tied the school record for most runs. (RT 498.) After her sexual orientation became common knowledge, Megan noticed that the attitudes of her fellow players toward her became cold. (RT 505.) Eventually she was cut from the team. (*Id.*) Megan filed a complaint with Assistant Principal and Athletic Director Tom Pack explaining that other players on the softball team had harassed her based on her sexual orientation. (RT 523; Exh. 19.) Mr. Pack never interviewed Megan during his investigation of the complaint. (RT 530.) He also failed to interview either

Melissa Meyer or Tanya Rodriguez, both of whom Megan had identified in her written complaint as students who had harassed her. (RT 1406.) Mr. Pack did confirm that another player had used the term "faggot" in front of Megan, but Mr. Pack did not discipline either player and merely told her that her language was inappropriate. (RT 1402-1403.) Mr. Pack did nothing to determine whether or not the anti-gay sentiments of other softball players had influenced their treatment of Megan on the field. (RT 1410-1411.)

C. Megan's Other Reports of Harrassment

During her junior year, Megan faced anti-gay epithets on campus every day. (RT 453.) When she walked with her girlfriend on campus, other students screamed at them, "you fucking dykes." (RT 454.) Megan continuously heard the phrase "that's so gay" used as a pejorative. (RT 455.) She reported the language multiple times to Assistant Principal Ed Giles, but as far as she knows no action ever was taken. (RT 456-457.)

During the first semester of her junior year, Megan told Assistant Principal Giles that she is a lesbian. (RT 565.) Mr. Giles responded by telling her "God created Adam and Eve" and "that's the way God intended it to be." (*Id.*) Mr. Giles admits that he lectured Megan about his personal beliefs regarding sexual morality, including his belief that sex should be limited to heterosexual marriage. (RT 1528 – 1529.) Principal Fisher confirmed that Mr. Giles had expressed his negative opinion about homosexuality to Megan. (RT 1184.)

Megan later told Ms. Barker-Ball that she was uncomfortable and upset due to this conversation with Mr. Giles. (RT 2372.) Ms. Barker-Ball brought the issue to Mr. Giles' attention. (*Id.*) Mr. Giles confirmed that he responded with references to the Bible when Megan told him she is a lesbian and that he had told Megan that she was "confused" about her sexual orientation. (*Id.*) Ms. Barker-Ball also informed Lynnell Antrim, an assistant principal, about the events that had transpired between Megan and Mr. Giles, but neither Principal Fisher nor anyone from the school district followed up with Ms. Barker-Ball to discuss her

concerns. (RT 2375.) In fact, Principal Fisher never discussed the issue with Ms. Barker-Ball until Megan and Joey had left Poway High School and filed this lawsuit. (*Id.*)

III. THE DAY OF SILENCE

The Day of Silence is a day when students agree not to speak, raising awareness of harassment and bullying based upon sexual orientation. (RT 721.) The point of the Day of Silence is to make other people "realize how many people are either in fear or who can't be who they really want to be." (*Id.*) On the Day of Silence, students who choose to remain silent hand out a statement expressing their support for gay and lesbian students. (RT 1031.)

Joey first participated in the Day of Silence in 2002, during his sophomore year at Poway High School. (RT 721.) During the Day of Silence, Joey was spat on from behind. (RT 722.) Joey reported the incident to the discipline office. (*Id.*)

In 2003, the Day of Silence took place on April 1. (RT 812.) A rally was scheduled for lunchtime. (RT 811.) A number of students made crude anti-gay comments during the rally. (RT 812.) That same day, another student threw an orange at Joey, hitting him while he was walking through the center of the campus. (RT 758.)

Before each Day of Silence Mr. Fisher met with his Administrative Cabinet to discuss the event. (RT 1028.) The Administrative Cabinet was made up of the principal, the assistant principals, athletic director, Associated Student Body ("ASB") Director and their attendance coordinator. (*Id.*) Mr. Fisher did not, however, provide any guidance to the student body generally about their role or appropriate behavior during the Day of Silence. (RT 1028, 1350.) Mr. Fisher did explain to participants in the Day of Silence what behavior he expected from them during the day. (RT 1022.) He did not, however, give any direction to the remainder of students at Poway High about how they should interact with students who were participating. (*Id.*) Although Mr. Fisher testified that he had generally told students "how to address difficult situations," he did not explain why he

considered a day during which students express support for gay and lesbian people to be a "difficult situation." (*Id.*)

Mr. Fisher also never specifically advised faculty on how to handle pejorative remarks made on the Day of Silence, but merely told them how to "handle remarks made in their room in general." (RT 1023.) He never had any discussions with his entire staff, or used any other means to instruct the responsible adults regarding how to respond to issues that could be expected to arise during the Day of Silence. (RT 1024.)

After Joey and Megan had left school, the administration worked to change the Day of Silence, not by giving better guidance to staff and the student body, but by reducing the number of students allowed to express their support for gay people by participating. (RT 2847.)

IV. 4THEPOWAYKIDZ.COM WEBSITE

Soon after the Day of Silence in 2003, Megan and another friend, Lindsey, told Joey about a website called "4thePowayKidz." (RT 456.) The website contained a bulletin board where students posted anti-gay statements and announced a "Straight Pride Day" to be held at Poway High on April 18, 2003. (RT 752, 898-901.) Joey posted a message to the website defending a girl identified as "Lauren" after someone identified as "Drew" posted a threat to kill her for supporting gay students. (RT 755.) After Joey posted his message, a number of students replied personally threatening him. (RT 752-755.)

Joey told Ms. Barker-Ball and Ms. Solo about the web site and the plans for "Straight Pride Day." (RT 754, 815.) He testified that he believes he also told Mr. Fisher about it. (RT 754.) Joey felt very fearful about the threats posted on the website personally targeting him. (*Id.*) Ms. Barker-Ball told Mr. Giles about the website and viewed it with him. (RT 2362-2364.) She also alerted Ms. Antrim to the contents of the website and brought a printout of threatening language on the website to the administration's attention. (RT 2366, 2400-2401.) The boy identified as "Drew" was disciplined for posting the threat to kill Lauren, but no

other students were disciplined for making anti-gay statements or threats on the "4thePowayKidz" website. (RT 901.)

V. "STRAIGHT PRIDE DAY"

Anti-gay harassment escalated on "Straight Pride Day." (RT 558.) The abuse included name-calling, spitting, and pushing students into lockers. (RT 558 – 559.) On "Straight Pride Day," many students wore shirts proclaiming "homosexuality is a sin" or with other anti-gay slogans or depictions. (RT 797, 800.) While Joey, Megan and a group of their friends were sitting in the school's quad approximately ten feet from Mr. Fisher, an unidentified student approached and accosted them, saying "Joey is a fucking fag." (RT 798.) Joey and Megan went immediately to Mr. Fisher and reported the anti-gay harassment and sought his help. (RT 1042.) But rather than addressing the hostile provocation, he responded, "Guys, it is best to leave the quad." (RT 1042, 1053.) Thus, the principal's approach was that those targeted for bias-motivated abuse should be the ones who had to disperse, despite his recognition that Joey and Megan had done nothing to create the problem. (RT 1052.)

A. Megan Is Assaulted

Another student, Breanna Rankin, approached Joey and Megan wearing a shirt saying "Straight Pride, One Way" and "Homosexuality is a Sin, You Are All Going to Hell" (RT 552, 800.) Breanna called Joey, Megan and their friends "fags" (RT 555, RT 798) and called Megan a "dyke." (RT 556.) Breanna "pushed through" the students Megan and Joey were sitting with and started circling them, chanting "fucking fags, fuck you guys, stupid dyke, stupid dyke." (RT 800.) Megan did not provoke Breanna (RT 553), but a scuffle ensued when Breanna "slammed her body" into Megan and threatened her, saying, "let's go, you fucking dyke." (RT 552, RT 800.) Joey pulled Megan away from Breanna. (RT 552.) Megan then fell to the ground, crying and "overwhelmed with emotions." (RT 556 – 557, RT 801.) When Joey attempted to call Megan's mother, Mr. Pack, the

assistant principal at the time, interceded to tell Joey to get off his cell phone, rather than inquiring why Megan was distraught. (RT 560 – 561, 802.)

B. Giles Fails To Investigate

Assistant Principal Giles later was put in charge of investigating the incident involving Megan and Breanna. (RT 1055.) Such an investigation typically would involve taking witness statements from students who were in the area of the incident. (*Id.*) But after this incident, neither Principal Fisher nor Assistant Principal Giles contacted Joey to do even a cursory investigation of the matter. (RT 805-806.) Nor did Mr. Giles attempt to interview any of the other students who had been with Megan and Joey at the time, despite knowing the students' names. (RT 1543.) Mr. Giles did, however, talk to Breanna's brother Jordan to get his version of events. (RT 1542.) Both Breanna and her brother claimed that Megan had pushed Breanna, and Megan received a three-day suspension for the incident. (RT 564; Exh. 27.) Yet ultimately it was acknowledged that Megan had not initiated the confrontation. (RT 1544, 1586-1587.)

VI. MARCH 28, 2003 MEETING WITH SCOTT FISHER

Megan, Joey and their mothers met with Principal Scott Fisher after school on March 27, 2003. (RT 830.) The meeting lasted for about thirty minutes. (*Id.*) Megan, Joey and their mothers all told Principal Fisher that Megan and Joey did not feel safe on campus and explained why. (RT 1173-1174, 1178.) Mrs. Ramelli reported that "Joey [was] being called names repeatedly" and complained that the school's officials "didn't take him seriously." She insisted that she just wanted "some type of protection" for Joey so that the persistent harassment would "be addressed and taken seriously because [she] was in fear that Joey was going to end up getting seriously hurt." (RT 2621.) During the meeting Mr. Fisher minimized Ms. Ramelli's concerns, saying "he wasn't aware of anything going on and that Joey had a tendency to blow things up and that it was high school and . . . he

needed names of the people that were calling [Joey] names or pushing him from behind." (RT 2621.)

A. Joey Provides A Log Of Harassment Incidents

During the meeting Joey gave Mr. Fisher a log of anti-gay harassment he had experienced or witnessed at Poway High School. (RT 830, 2618; Exh. 7.) Joey had started compiling the log around January 28, 2003 from notes he had made on events that happened to him on campus. (RT 761.) The purpose of the log was to help administrators understand what, and how much, was happening on campus. (*Id.*) Joey reconstructed some of the events from memory, but many were recorded contemporaneously on sheets of paper he kept in his backpack. (RT 761-762.) The log included notations such as "January 28, 2003: called fag seven times today at school, was shoved in the hallway while walking...from fourth period to lunch." (RT 762; Exh. 7.) The log reflects that on seventeen days within a two-month period, Joey was called "fag" no fewer than sixty-five times. (RT 763 – 773; Exh. 7.)

Joey's log entry for February 19 stated, "Was called a fag 12 times today, a new record for me. An announcement was made about the GSA [gay-straight alliance] meeting on Thursday, and I heard someone say 'I bet that fag will be there.' Also, my car window was smashed at my house. We believe it was a hate crime, considering all the harassment I around the house." (RT 768; Exh. 7.) Joey's log also related the fact that on January 6, 2003 while on his way to a gay-straight alliance meeting someone screamed, "Look, it is that fag going to his fag meeting, you fudge packer." (RT 766; Exh. 7.) The log further stated that on February 11 the sign stating "I'm a fag, kick my ass" was attached to Joey's back (RT 768; Exh. 7), and that one saying "I am a fucking faggot" was attached to him on March 7. (RT 770; Exh. 7.)

Joey's log recorded the fact that a trashcan was placed on his car in the school parking lot on March 20, 2003. (RT 772; Exh. 7.) When alerted to that incident, Mr. Fisher did not seek more information from Joey, such as where his

car had been, and did not ask any other personnel to speak to Joey about the incident, nor ask anyone else whether they had observed the vandalism to Joey's car. (RT 1206 – 1207.) Mr. Fisher did not have the school offer a reward for information that might reveal who had vandalized Joey's car, despite the fact that rewards had been offered for such information in other situations. (RT 1207 – 1208.)

B. Principal Fisher Fails To Follow-Up

Mr. Fisher assured Joey and his mother that he would have Assistant Principal Giles look into the problems documented in Joey's log, but Mr. Giles never followed up with Joey about any of them. (RT 832.) No administrator asked Joey to provide any additional written information concerning the contents of his log. (RT 830.) Neither Mr. Fisher nor any other administrator asked Joey to try to identify harassing students by pointing them out on the school quad or elsewhere on campus. (RT 833.) Joey never received any written response to his log or the overall problem described during the March 27 meeting. (*Id.*) Moreover, Mr. Fisher made no independent efforts to ascertain the names of the students responsible for the incidents related in Joey's log, testifying that he simply had assumed that "Joey would have listed a name had there been a name involved with the incident." (RT 1215.)

C. Megan Provides A Log Of Harassment Incidents

Like Joey, Megan also had maintained a log of anti-gay harassment on campus that she gave to Mr. Fisher at the March 27 meeting. (RT 2618; Exh. 7.) Megan's log includes numerous dated and detailed accounts of specific incidents, with names of perpetrating students, as well as of teacher witnesses. (See, e.g., RT 1186, 1187–1188, 1190, 1193, 1195 and Exh. 7.) Despite his promise to do so, Mr. Fisher entirely abdicated his responsibility to follow up with the witnesses and teachers or otherwise to investigate or intervene on Megan's behalf. As just one example, Megan's log describes an incident on March 25th when another student walking by Megan and a friend threatened Megan, saying, "I'm going to beat your

ass, you fucking lesbian." (RT 1195; Exh. 7.) Megan stated that she thought the harasser was a freshman, and that Megan's friend would recognize the girl if she saw her picture. (RT 1096.) Despite having been given these details, and having been told that Megan felt unsafe and very distressed, Mr. Fisher did nothing to even try to determine who had threatened her. (RT 1201.)

D. Principal Fisher Fails To Follow-Up

Mr. Fisher's primary follow-up regarding Megan's complaint and request for help was to ask Ms. Barker-Ball about which logged incidents "might be exaggerated" --despite the fact that Ms. Barker-Ball had not been a witness to any of the events in question. (RT 1184.) There is no evidence in the record that Mr. Fisher followed up in any way concerning Megan's written record and verbal explanation of the harassment she was experiencing personally, and the pervasively anti-gay environment in the school.

VII. JOEY'S CAR AND PARKING

A. Joey's Car Is Vandalized

The first incident involving Joey's car occurred when Joey and another student found Joey's car covered with soda. (RT 744.) Joey reported the incident to Ms. Barker-Ball.

On April 30 of his junior year Joey's car was vandalized again in the school parking lot. (RT 781.) Joey made a formal report to Mr. Giles' office about the vandalism. (RT 1566 – 1567; Exh. 14.) Mr. Giles, however, did not make any attempt to find any witnesses to the vandalism. (RT 1567.) Mr. Giles admitted at trial that he could have attempted to find witnesses to the event, but that he had not, despite the fact that he knew approximately when the vehicle had been vandalized and could have checked to see which students had received hall passes for the times in question. (RT 1567 – 1569.)

In late April or the beginning of May Joey received a serious specific threat. (RT 776.) He found a note stuffed into a crack in his car's window stating, "fucking faggot, you think that window was an accident? I'm going to kick your

fucking ass, faggot." (RT 778 – 779.) He reported the contents of the note to Ms. Barker-Ball. (RT 779.)

B. Giles Refuses To Give Joey A Safe Parking Space

In April 2003 Joey asked Mr. Giles for a different parking place because he was being harassed in the parking lot and his car was being vandalized. (RT 792.) Mr. Giles admitted at trial that he was resistant to providing Joey a more secure parking spot. (RT 1571.) Apparently Mr. Giles was hesitant to provide Joey with a safer spot to park his car because he found Joey's demeanor and persistence annoying. He explained having waited to provide Joey with any sort of accommodation by saying it would be difficult for him "to say to my campus supervisors who were very, very vigilant in the fact that this [parking] is a right for kids who qualify, for me to say to them, 'I am going to allow a student to park in the visitors [spot] after, in fact, the student treated me and my campus supervisor with the disrespect, the rudeness and the attitude in which he did.'" (RT 1688.) Joey was not given a safer parking space until his mother asked for one. (RT 792.)[2] Even then, the safer parking space came with the condition that "Joey not come in and interrupt [Giles] constantly with complaints." (RT 2627.)

VIII. JOEY AND MEGAN ARE THREATENED AGAIN

On April 18, 2003, Joey was driving home with Megan and their friend Kelly when a white mustang pulled up next to Joey's car and someone in the car yelled, "you fucking faggots, fuck you guys, fucking queers." (RT 780, 1374-1375; Exh. 12.) Joey reported the incident to Ms. Barker-Ball and Mr. Giles. (RT 780.)

The incident occurred on the only road leading to and from Poway High, and the white mustang had a Poway High School parking permit. (RT 807, 808.)

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[2] One of Joey's teachers, Julie Lopez, had previously offered Joey her parking space, but Joey declined based on the fact that Mr. Giles had already told Joey that there would be "no exceptions" to the parking rules at Poway. (RT 837.)

Joey provided a partial license plate number to help identify the vehicle in question. (RT 807; Exh. 12.)

Joey testified that he reported the incident in writing to Mr. Giles in the disciplinary office. (RT 1560; Ex. 12), but Mr. Giles did not follow up with him afterwards. (RT 808.) In fact, Mr. Giles testified that he had not even reviewed Joey's written complaint until he was preparing paperwork requested by his attorneys in connection with Joey's lawsuit. (RT 1563.) Principal Fisher also was made aware of the incident, but did nothing to determine, or to instruct his staff to investigate, whether or not the vehicle in question belonged to a Poway High School student and, if so, to take appropriate corrective action. (RT 1209.)

IX. THE SUPERINTENDENT OF SCHOOLS WAS AWARE OF THE HARASSMENT REPORTS AND DID NOTHING.

Dr. Donald Phillips is the superintendent of the Poway Unified School District. (RT 1852.) Dr. Phillips conceded at trial that harassment of students based on sexual orientation is "not to be tolerated." (RT 1854.)

Dr. Phillips received a letter at the end of April 2003 providing him with details of the sexual orientation-based harassment Megan and Joey faced at Poway High School. (RT 1875, 1926, 1942; Exh.1.) He acknowledged that the letter raised serious concerns. (RT 1876.) Dr. Phillips admitted that he had not personally followed up on the letter by setting a meeting with Megan, Joey or their parents, or otherwise soliciting further information from them, but claimed he had requested that the Assistant Superintendent of Poway Unified School District, Margaret Ann Guinn, look into the matter. (RT 1876, 1946.) Yet Ms. Guinn testified that she did not recall ever having seen the complaint letter prior to her deposition in this lawsuit. (RT 1731, 1738.) Dr. Phillips was unaware of whether Ms. Guinn met with Megan's or Joey's parents regarding the complaint. (RT 1878.) Ms. Guinn admitted that she had no ongoing discussions with Principal Fisher regarding the harassment to which Joey and Megan were subjected. (RT

1739.) Ms. Guinn did nothing to work with the staff at Poway High School to make Megan and Joey safer. (RT 1740.)

Dr. Phillips testified that he did not consider the letter to be a "complaint" requiring any particular action because it was not in the proper form. (RT 1926, 1944.) He testified that he had not treated the letter as a complaint despite its containing issues of serious concern because "there [was] nothing in [it] that says this initiates the formal complaint procedures of the school district, and it is saying that they hope to resolve the issues at the site level." (RT 1944.) The Poway Unified School District provides parents with approximately 50 different types of "notifications" that are to be used when filing a complaint, a number Dr. Phillips admitted "could be a bit overwhelming." (RT 1927.)

X. FACULTY AND STAFF AT POWAY HIGH SCHOOL WERE AWARE THAT MEGAN AND JOEY WERE BEING HARASSED AND REPORTED THE HARASSMENT.

Many members of the faculty and staff at Poway High School reported the anti-gay targeting of Joey and Megan, but these reports did not spark any discernible action or follow-up from those in charge of Poway High School. During Joey's junior year, for example, Ms. Barker-Ball informed Assistant Principal Lynnell Antrim about some of the harassment plaguing Joey at Poway High, including the threatening note that had been placed on his car. (RT 1772, 1786, 1827.) Ms. Antrim did nothing to follow up on that conversation. (RT 1786.)

Julie Lopez is a history teacher and chair of the social science department at Poway High School. (RT 2018.) Joey informed her that he was having problems navigating the school safely. (RT 2026.) During her deposition, Ms. Lopez testified that Joey had told her he was being called "fag" and "faggot." (RT 2028.) Ms. Lopez testified that she had been interested in helping Joey, and even had offered to allow him to park in her parking space. (*Id.*) She spoke with Principal Fisher about Joey's safety concerns. (RT 2032.) Mr. Fisher, however, did not

follow up with her personally regarding her concerns, nor did he designate one of his subordinates to speak with her further about her concerns and what the school could to address the problem. (RT 2035.)

Kristin Solo is an English teacher at Poway High School. (RT 2301.) During his junior year, Joey told her that his car had been vandalized and a threat left on the car. (RT 2303.) Ms. Solo reported the threat to Ms. Barker-Ball, Assistant Principal Antrim, and Principal Fisher. (*Id.*) Ms. Solo also told Ms. Barker-Ball and "the front office" that Joey had reported being pushed into a locker and called "fag." (RT 2304.) Neither Ms. Antrim nor Principal Fisher, however, told her what steps, if any, they would take to address the harassment. (RT 2309.)

Mr. Pack, an assistant principal, was made aware of incidents of harassment directed toward Joey, including being told that Joey had been pushed into lockers and that his car had been vandalized. But Mr. Pack was never asked by his superiors, nor did he take it upon himself, to investigate Joey's reports of trouble and requests for help. (RT 1415-1416.)

Tracy Barker-Ball maintained the Poway High School Wellness Center as a safe haven for gay and lesbian students. (RT 2340, 2345.) During the 2002- 2003 school year, she began preparing an information packet for faculty and staff at Poway High regarding the challenges faced by gay and lesbian students. (RT 2345.) Ms. Barker-Ball worked with Assistant Principal Antrim on the packet, but Ms. Antrim wanted the packet to be general, and not to focus on issues faced by gay and lesbian students in particular. (*Id.*) The packet included strategies on how to handle the use of derogatory words like "fag" and "faggot" in the classroom. (RT 2346.) Although Ms. Barker-Ball added other material to meet Ms. Antrim's directions and completed the training packet, it was never distributed. (*Id.*)

Ms. Barker-Ball testified that during the spring semester of Joey's junior year he came to her with complaints about harassment once or twice weekly and frequently would spend many hours in the Wellness Center where he would lie

down, saying he felt ill. (RT 2391, 2394.) Ms. Lopez and Ms. Barker-Ball discussed Joey's feeling unsafe during that period. (RT 2391.) Ms. Barker-Ball took two written complaints from Joey to Mr. Giles during Joey's junior year, one involving Joey's car having been scratched and one involving another student's spitting on Joey. (RT 2388.) Ms. Barker-Ball was unaware of any action taken by Mr. Giles in response to these complaints. (*Id.*)

Ms. Pam Higgins, an academic counselor, also told Mr. Fisher that she had become concerned because Joey was so worried about his lack of safety and security on campus. (RT 1357.) Due to those concerns, Ms. Higgins prepared a specific academic plan for Joey, which she shared with Principal Fisher. (*Id.*) It was unusual for a counselor to go to the trouble to draw up such a plan or to show it to the principal. (*Id.*) Mr. Fisher, however, did not recall ever asking Ms. Higgins why she took such an unusual step. (*Id.*)

XI. POWAY HIGH SCHOOL'S PROPOSALS

The administration at Poway High School repeatedly balked at offering any workable solutions to the harassment Joey and Megan faced. In fact, the few measures that were offered generally were impractical suggestions advanced by lower-level teachers and staff. Neither Mr. Fisher nor Mr. Giles offered any sort of meaningful plan to address and reduce the direct threats and pervasively hostile environment on campus.

During Joey's junior year, Tracy Barker-Ball offered to arrange a student escort to go with him between classes. (RT 835.) Joey declined the offer, believing that "it would just be another student watching [him] get shoved to the ground." (RT 836.) Joey reasoned that there were "students all over that campus" and their presence did not prevent him from being harassed. (*Id.*) In fact, Susanna Beeman, a student peer counselor who was a friend of Joey's, walked through the halls with him on a regular basis, but her presence never deterred those who routinely abused Joey in the hallways and other public places. (RT 2871, 2873,

2879, 2884.) Given his experience, a student escort, in Joey's words, "didn't make sense." (RT 830.)

Joey's embarrassment and hesitation at the idea of being "escorted" around campus hardly can be surprising, particularly considering that the escort would even have accompanied him into the restroom. (RT 2304.) Ms. Solo once offered the even more embarrassing measure of escorting Joey to the restroom herself and waiting outside. (*Id.*) To avoid that level of infantilization, Joey ended up just going to the bathroom before 7:30 a.m., going after school, using the facility in the health office at lunch, or going home if the health office wasn't available, as a more dignified and practical solution than what any of the adults at Poway High offered him. (RT 983.)

Ms. Barker-Ball, Ms. Solo, and several other teachers also offered to let Joey stay late in class and arrive late to his next class, to avoid abuse in the hallways. (RT 836.) Joey did not consider that proposal a meaningful solution either, as it would make him chronically late for his classes and would draw attention to his inability to function as the other students. (*Id.*) In addition to the questionable educational effect, Joey felt that he was just being "isolated from the students like I was the bad person," and he did not understand why he had to be "isolated from everyone else." (*Id.*) Furthermore, Joey feared that if he was in a hallway without other students around and he encountered one who disliked him, "then he has a free hallway with no administration and no security whatsoever around, so then it [would be] pretty much a fend-for-yourself-kind of situation." (RT 836-837.)

Poway High School sponsors "Camp Humankind," a retreat for students that includes a diversity component. (RT 3483.) Participation in "Camp Humankind" was, however, entirely voluntary. (RT 2561, 2833.) Appellants note that Joey and Megan attended "Camp Humankind" (Appellants' Brief at p. 8), as if their interest in the program was a reasonable effort by the school to address their concerns. But Joey and Megan were not the ones doing the bullying, and it is

hard to imagine how a voluntary program for Poway High School's students who expressed an interest in diversity and tolerance is any sort of antidote for harassment. Appellants further point to the existence of "Titan Ties" as an example of Poway High School's commitment to diversity. "Titan Ties" is described as an event where students from "all walks of life" get together to discuss issues, including issues of prejudice and diversity. (RT 969.) But again, participation in Titan Ties is voluntary and available to only a select few students who wish to participate. (RT 834.) It is not a corrective program for those determined by the administration to need its lessons in mutual understanding and tolerance.

Mr. Giles admitted that he had not attended any on-campus diversity training since coming to Poway. (RT 1495.) Furthermore, in his six years at Poway High School he had not seen anyone offer diversity training for students. (RT 1496.) Poway High School failed to offer such training even though school officials knew that Twin Peaks Middle School, in the same district, provides such training for its students. (RT 1497.) Mr. Giles admitted that one of the purposes of the training at Twin Peaks was to change the campus climate. (*Id.*) He offered no reasons why such training could not be implemented at Poway High School to change the climate there as well.

XII. THE HISTORY OF ANTI-GAY HARASSMENT AT POWAY HIGH SCHOOL.

Joseph Sago attended Poway High School from 1999 until 2002. (RT 2076.) Joseph was a member of Poway's Gay-Straight Alliance Club. (RT 2077.) During the 2000-2001 school year, Joseph reported anti-gay harassment he had experienced to a number of school officials. (RT 2078.) He submitted written complaints and spoke to administrators in the school's discipline office. (RT 2079.) He also reported the harassment to Tracy Barker-Ball and his biology teacher, Mr. Cheskaty. (RT 2079 – 2080.)

Joseph Sago's mother, Debra McGraw, testified that she had made complaints to officials at Poway about her son experiencing harassment due to his sexual orientation. (RT 2059.) She estimated that she complained to teachers, counselors or the principal at least monthly while her son was at Poway High School. (RT 2060.) She reported the harassment frequently to Ms. Barker-Ball and to Principal Fisher. (RT 2061.) The complaints included incidents of students calling her son names, spitting on him, throwing food at him, and pushing him into lockers. (*Id.*) She raised these issues on at least twenty occasions during the first semester of the 2000-2001 school year, including four phone calls and one in-person visit with Principal Fisher. (RT 2061 – 2063.) She attempted to speak with the assistant principals, but they were not responsive to her complaints. (RT 2074.) Ultimately Mr. Fisher simply stopped returning Ms. McGraw's calls. (*Id.*) Like Joey and Megan, Joseph did not complete Poway High School and instead had to withdraw and finish his high school education at the New Directions independent study program. (RT 2083.)

XIII. PLAINTIFFS' EXPERT

Plaintiffs introduced the testimony of Dr. Lynn Covarrubias, a licensed educational psychologist, as an expert on "support issues" and "school climate issues." (RT 2726 – 2727.) Dr. Covarrubias has over 20 years of experience in public education, has experience assisting school systems in issues involving student support, and has served on several statewide committees to evaluate student support systems. (RT 2726-2728.) Dr. Covarrubias had never testified as an expert witness before this case. (RT 2728.) After reviewing the depositions, the California Healthy Kids Survey for Poway High School and various documentation prepared by the Poway Unified School District (hereafter "PUSD"), Dr. Covarrubias concluded that the district "had the lingo down," when it came to preventing harassment, but, at least at Poway High School, "there wasn't follow-through." (RT 2730-34, 2772.)

Dr. Covarrubias further criticized the administration at Poway High School for failing adequately to monitor "hot spots," where harassment was likely to take place. (RT 2766.) Significantly, the school failed to keep records of where administrative staff member were placed during lunchtime and break time. (RT 2826.) Dr. Covarrubias testified that "if you have a problem with bullying or harassment on campus, part of the scientific research around bullying indicates that there are certain steps that you ought to be taking in order to be following scientifically-proven programs, [including] finding out where the hot spots are, in other words, finding out where – it might be around a corner or it might be in a hallway at a certain time – and then doing things to prevent those hot spots from occurring." (RT 2767.) When asked if she saw any evidence that the administration at Poway was attending to the hot spots, she flatly said "no." (*Id.*)

Dr. Covarrubias testified that Ms. Barker-Ball attempted to provide in-service training and to educate the staff at Poway High School regarding issues of student-on-student harassment, but was thwarted and could not get the issue on the agenda. (RT 2766.) Dr. Covarrubias testified that the school failed to implement "responsive reporting" measures to encourage the reporting of bullies. (RT 2767.) She testified, "you want to have students feel that you are going to respond once they report [bullying]." (RT 2768.) In a school with responsive reporting measures in place, Dr. Covarrubias "would expect to see things like boxes where students could put forms and then somebody would get back to them" and "advertisements about how to report harassment." (*Id.*) Dr. Covarrubias did not see such simple, standard measures in place at Poway High School. (*Id.*)

Dr. Covarrubias testified that the discipline investigation plan at Poway High School was not proactive. (RT 2769.) She further explained that she did not see administrators reaching out in commonly expected ways to appropriate resources. (RT 2770.) While she recognized that the school had some appropriate discipline policies for changing behavior, she testified that it lacked the "education side" when dealing with abusive treatment of gay and lesbian youth. (RT 2771.)

Furthermore, Dr. Covarrubias determined that there was poor communication between the district office and the school administration regarding procedures and goal planning. (*Id.*)

Dr. Covarrubias stated that prevention and intervention strategies can affect school climate and that she observed problems in how the school was mishandling discrimination and harassment on campus. (RT 2784.) These problems included the administration's failure to attempt even to measure appropriately the effects of what they believed they were doing. (*Id.*)

PROCEDURAL HISTORY

On December 22, 2003 Megan Donovan and Joseph Ramelli filed suit in San Diego Superior Court against Appellants Poway Unified School District, District Superintendent Dr. Donald Phillips, Poway High School Principal Scott Fisher and Poway High School Assistant Principal Ed Giles. (CT 1-32) Megan and Joey alleged that they had been subject to years of anti-gay harassment at Poway High School and that Appellants had failed in their duty to take appropriate steps to curb the direct harassment and improve the school environment so these students could have a fair chance to complete their high school education with their class. (*Id.*)

Respondents asserted causes of action under 42 U.S.C. § 1983, claiming that Appellants had violated their rights to due process and equal protection under the United States Constitution. (CT 19-25.) Respondents further asserted violations of California's Education Code and the Unruh Civil Rights Act. (CT 27-30.)

The matter was tried to a jury. At the close of evidence, the trial court granted Appellants' motion for nonsuit as to the Unruh Act claims and due process claims, but allowed Respondents' other claims to proceed to the jury. (RT 3631, 3642, 3651-52.) After hearing the testimony of thirty-three witnesses over the course of nearly six weeks, ten out of twelve jurors found that Appellant Fisher had acted with deliberate indifference to the persistent harassment inflicted on

Megan Donovan, and nine out of twelve jurors found that both Mr. Fisher and Mr. Giles had acted with deliberate indifference to the unrelenting abuse of Joey Ramelli. (CT 774.) The jury awarded Megan $125,000 and awarded Joey $175,000 in damages. (CT 781)

Defendants subsequently moved for a new trial and, after it was thoroughly briefed and argued, that motion was denied. (CT 932-940, 1082, 1114-15.) Respondents filed a motion for an award of attorneys' fees under § 1021.5 of the California Code of Civil Procedure and 42 U.S.C. § 1988. (CT 860-79.) The trial court granted fees under 42 U.S.C. § 1988, but denied fees under Cal. Code Civ. Proc. § 1021.5. (CT 3897–3911.)

Appellants Poway Unified School District, Fisher and Giles filed a timely Notice of Appeal. (CT 1095-1097.) Respondents filed a timely Notice of Cross-Appeal from the order denying attorneys' fees under Cal. Code Civ. Proc. 1021.5. (CT 1122-23.)

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE STANDARD OF LIABILITY IMPOSED UNDER CALIFORNIA'S EDUCATION CODE SECTION 220.

A. Federal Title IX Standards Of Liability Are Inapplicable To The California Education Code.

The trial court acted properly by instructing the jury that the California Education Code provides students with greater protection than federal Title IX standards. The United States Supreme Court restricted liability under Title IX--in contrast to the liability standards commonly employed in state law--because Title IX was derived pursuant to Congress' limited power under the federal Spending Clause, which contains a quasi-contractual funding penalty rather than explicitly providing for individual remedies. Such restrictions do not exist with regard to the California Education Code, which is based upon the state legislature's plenary powers and provides for the usual state law remedies of complaints and civil action.

Thus, Appellants' reliance on Title IX's liability standard is misplaced because the U.S. Supreme Court, in the line of cases arriving at and reinforcing the "deliberate indifference" standard for that particular law, emphasized the quasi-contractual nature of the funding involved, in that federal assistance under Title IX is conditioned upon compliance and noncompliance may result in "termination of funding...to give effect to the statute's restrictions." (*Davis, supra,* 526 U.S. at 638-39.) Explaining the rationale for limiting federal involvement in a traditionally state-controlled area, the Court noted, "When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" (*Davis, supra,* 526 U.S. at 640, 1670 [citations omitted].) Twenty U.S.C. § 1682 provides for administrative enforcement of Title IX's primary provision, 20 U.S.C. § 1681. Agencies may enforce regulations issued pursuant to §1682 by terminating financial assistance or refusing to grant continued financial assistance to an educational program found to be noncompliant, or "by any other means authorized by law," through extensive administrative proceedings including an opportunity for a hearing, findings, written reports, and additional time periods. (20 U.S.C. § 1682.) The administrative enforcement process has been characterized as "carefully crafted and rather cumbersome," and designed to ensure that termination of funds is used as an enforcement mechanism "of last resort." (*Storey v. Bd. of Regents* (W.D. Wis. 1985) 604 F. Supp. 1200, 1202-05.) Furthermore, in the absence of a stated individual remedy within Title IX, the U.S. Supreme Court had to find an implied right to bring any individual action for damages based upon officials' poor response to peer harassment. (See *Davis, supra,* 526 U.S. at 639-40, 1669-1670, citing *Gebser, supra,* 524 U.S. at 283; see also *Cannon v. Univ. of Chicago* (1983) 460 U.S. 1013 [103 S.Ct. 1254]; *Franklin v. Gwinnett County Public Schools* (1992) 503 U.S. 60 [112 S.Ct.1028].)

The legal context and remedies of California's Education Code could not be more different. The Education Code clearly states that its protections exist "to

prohibit acts which are contrary [to equal rights and opportunities] ...*and to provide remedies therefore.*" (Ed. Code § 200 [emphasis added].) Acting pursuant to its plenary authority, the California legislature has set forth a fully formed framework for prohibiting and preventing bias-motivated harassment, replete with individual remedies.[3] In contrast to the federal, quasi-contract administrative design, the state statute specifically designates the availability of an individual complaint system (see Ed. Code § 262.3(a)-(c)) and explicitly provides that in addition to complaints, "[t]his chapter may be enforced through a civil action." (Ed. Code § 262.4.)

Significantly, California law imposes upon school officials an "affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity." (Ed. Code § 200(b).) The existence of an "affirmative obligation" by the statute's plain meaning commands more extensive responsibility than a deliberate indifference standard. The "affirmative obligation" the California Education Code creates specifically requires schools to address students' behavior and individual rights due to the "urgent need" to protect pupils by reducing peer abuse. (Ed. Code § 201(d), (e).)

Fully consistent with the trial court's determination that a standard more protective than Title IX's must apply under California law, the Education Code identifies an affirmative agenda: "to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools" (Ed. Code § 201(d)), based on the Legislature's findings

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[3] Under analogous California law, employers are liable for co-worker harassment where they "know or should have known of this conduct and failed to take immediate and appropriate corrective action." (*Singleton v. U.S. Gypsum Co.* (2006) 45 Cal.Rptr.3d 597, 603 [140 Cal.App.4th 1547]; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 27 Cal.Rptr.2d 457, 466 [22 Cal.App.4th 397]; *Fisher v. San Pedro Peninsula Hosp.* (1989) 262 Cal.Rptr.842, 851 [214 Cal.App.3d 590].) The trial court correctly applied this California standard, as opposed to the narrow federal Title IX standard.

concerning serious problems in this state. The Education Code thus specifies that "[i]t is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." (Ed. Code § 201(f).)

The law's plain language also addresses the "urgent need to teach and inform pupils in the public schools about their rights, as guaranteed by the federal and state constitutions, in order to increase pupils' awareness and understanding of their rights and the rights of others, with the intention of promoting tolerance and sensitivity in public schools and in society as a means of responding to potential harassment and hate violence." (Ed. Code § 201(e).) Again, the express statutory requirements that schools and their officials act to "prevent" and respond meaningfully to bias incidents, and to take action to defuse "potential harassment," manifest affirmative obligations inconsistent with the minimally protective deliberate indifference standard adopted for Title IX enforcement actions.

In appropriately distinguishing the California Education Code, it is significant to note that harassment was not explicitly referenced at all in Title IX; the U.S. Supreme Court in *Gebser* had to engage in statutory interpretation and construe harassment to be a covered form of "discrimination." (See *Gebser*, *supra,* 524 U.S. at 285.) Reaching peer-on-peer harassment required yet another interpretation of the federal law's actual language. (See *Davis,* 526 U.S. at 641.) In contrast, California's Education Code specifies that it prohibits harassment and consistently invokes the protections of California's various existing laws against such behavior, independent of federal standards. Further, the state education law expressly contemplates official responsibility to act against harassment, and it references the need to teach pupils of the rights of others, demonstrating unmistakable intent to extend to student-on-student harassment. (Ed. Code § 201.)

In fact, the documented, dire consequences of bias-motivated peer harassment were practically the raison d'etre of entire sections of the Education Code. For example, the Code mandates that schools instruct those in their charge in a manner that will "counter discriminatory incidents on school grounds and, within constitutional bounds...minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." (Ed. Code § 201(f).) Such language makes clear yet another component of the "affirmative obligation" of schools and school personnel in the anti-discrimination and anti-harassment arenas—again, inconsistent with a standard of deliberate indifference.

Various provisions of the California Code of Regulations (hereafter "CCR") reinforce still further the conclusion that in enacting Education Code § 220, the Legislature provided students with a level of protection superior to the minimum standards held to apply under federal law. The regulations provide that each school must fulfill its affirmative obligation by assuming "primary responsibility to ensure compliance" with anti-discrimination laws and regulations. (5 CCR § 4620.) The regulations additionally require schools to root out and take action against discrimination and harassment by "adopt[ing] policies and procedures...for the investigation and resolution of complaints." (5 CCR § 4621(a).) Such provisions indicate an active and assertive role for schools and administrators and affirmative responsibilities inconsistent with the lower expectations expressed by a deliberate indifference standard. The regulations also declare as their purpose "to ensure compliance with federal and state nondiscrimination laws in any program or activity conducted by an educational institution. Therefore, no person in the State of California shall be subjected to discrimination, or any other form of illegal bias, including harassment." (5 CCR § 4900(a).) Again, the invocation of "state nondiscrimination laws" provides yet more support for the standard used by the trial court here to assess liability for ignoring peer harassment, because the reference to other state nondiscrimination

laws applies to students, as students are the "participants" and "beneficiaries" of an educational "program or activity." (*Id.*)

The legislative history of AB 537, the California Student Safety and Violence Prevention Act of 2000, which was enacted after the U.S. Supreme Court established the Title IX liability standard for peer harassment in federally funded educational programs, further supports the trial court's adoption of a liability standard more protective than that derived in the Title IX cases. Amending the Education Code, the 2000 law exists specifically to protect lesbian, gay, bisexual, and transgender students, as well as heterosexual students who may be targeted based upon perceptions about their sexual orientation or gender identity; the Legislature premised the Code's new requirements upon "legislative findings relative to violence among young people, the need for safe, secure and peaceful schools, and the issue of violent discrimination and teen suicide." (Sen. Com. on Ed., Analysis of Assem. Bill. No. 537 (1999-2000 Reg. Sess.) p. 2 <http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0501-0550/sb_537_bill_19990907_enrolled.html> (as of Nov. 18).)

As explained by its author, AB 537 was

> necessary to prevent discrimination and harassment against gay and lesbian students and those students perceived to be gay or lesbian. Anti-gay violence and harassment affects all youth. In a survey funded by the Center[s] for Disease Control [and Prevention] of over 8,000 high school students, one in 13 students had been attacked or harassed because they were perceived to be gay. Four out of five of those students attacked or harassed for being perceived to be gay were actually heterosexual. Like their gay and lesbian peers, straight youth who are assaulted or harassed because they are thought to be gay or lesbian are also at greater risk of dropping out of school or committing suicide. Recent data also indicates that violence against gay and lesbian youth and those perceived to be gay or lesbian seems to be escalating. As a society we all pay the price when young people are assaulted and told in subtle and not so subtle ways that their lives are worthless. This bill simply ensures that all students have access to an education free from intimidation, violence, and fear.

(*Id.*)

Again, preventing the severe consequences of anti-gay peer harassment was core to the new state law protections, as evidenced by the statement of the California Child, Youth and Family Coalition, cited in arguments in support of AB 537:

> This basis of discrimination is not simply a "gay and lesbian issue." Discrimination in any form poisons the environment of the public schools and undermines basic principles of justice. When students are permitted to express fear and hatred toward any group, they learn the wrong lesson. They learn that freedom is a "sometime thing," available only to those in the safe majority. They learn that intolerance is tolerated. They learn to hide their own vulnerabilities. And, perhaps most devastating for communities as a whole, students who are permitted to practice persecution in school become more comfortable with the part of their natures that is least compassionate, least human.
>
> (*Id.* at p. 3.)

In obvious contrast to our legislature's explicit determination to use its plenary authority to require significant changes in the conditions of California's schools, the U.S. Supreme Court in *Davis* itself recognized it was imposing a special set of atypical limitations on Title IX liability because of the restrictions peculiar to that law. The Court noted the difference between the constrained liability standard it held to be appropriate under federal law and common state use of negligence standards in the student peer-abuse context, collecting cases dating back over a half-century: "In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers." (*Davis*, *supra*, at 644 and 1671-72, citing *Rupp v. Bryant* (Fla. 1982) 417 So.2d 658, 666-667 [35 A.L.R.4th 253]; *Brahatcek v. Millard School Dist.* (1979) 202 Neb. 86, 99-100 [273 N.W.2d 680]; *McLeod v. Grant County School Dist. No. 128* (1953) 42 Wn.2d 316, 320 [255 P.2d 360].)

And in fact, a long line of California cases confirms the propriety of using a negligence standard to assess the responsibility of school officials for ineffectively

supervising students and allowing peer harassment to escalate into a pervasively hostile environment. "Under well established principles, such general allegations of negligence, proximate causation and resulting injury and damages suffice to state a cause of action." (*Hoyem v. Manhattan Beach City School District* (1978) 22 Cal.3d 508, 514 [585 P.2d 851], citing 3 Witkin, Cal. Proc. (2d ed. 1971) [school district could be held liable for injuries to a student-truant hurt after leaving school grounds, if proximately caused by negligent supervision].) Even while acknowledging that "school districts and their employees have never been considered insurers of the physical safety of students," the California Supreme Court has long imposed a duty of ordinary care on school officials not just to supervise, but to do so effectively, as they attend to students in their charge who may pose a risk of harm to each other. (*Dailey* v. *Los Angeles Unified School District* (1970) 2 Cal.3d 741,747 [470 P.2d 360] [citing cases].)

It follows that, when called upon to derive liability standards in situations parallel to the one at hand, other state courts similarly have rejected Title IX's deliberate indifference standard. Last year the Supreme Court of Vermont interpreted the state's Public Accommodations Act in a case that found liability against a high school principal for student-on-student harassment. (*Washington v. Pierce* (Vt. 2005) 895 A.2d 173.) The court considered both that Title IX does not contain an express right of action and that it was enacted pursuant to Congress' limited Spending Clause authority (*Id.* at ¶ 29.), while "[b]y contrast, the [Vermont Public Accommodations Act] is a remedial statute aimed at 'protect[ing] the citizens of Vermont from 'a number of serious social and personal harms.'" (*Id.* at ¶ 29.)

Similarly, a New Jersey court last year rejected the Title IX deliberate indifference standard in a case like this one, in which when school officials sought to evade responsibility for failing to curtail peer harassment based on sexual orientation, in violation of that state's Law Against Discrimination. Just as the trial court did here, the New Jersey court appropriately derived harassment

standards from the state's well-developed employment law, explaining: "We are further convinced that the principles for determining whether such harassment constitutes a violation ... should be substantially the same as those that are employed to determine whether sexual harassment creates a hostile work environment." (*L.W. v. Toms River Regional Schools Bd. of Ed.* (2005) 886 A.2d 1090, 1102 [381 N.J. Super. 465], *cert. granted* (Apr. 13, 2006) 186 N.J. 605 [897 A.2d 1060].) The New Jersey court directly confronted oft-quoted language from *Davis*:

> We recognize that in certain respects "schools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults." (*Davis, supra*, 526 U.S. at 651.) Nevertheless, we do not believe that the Legislature intended that students in our schools would be entitled to less protection from bias-based harassment than individuals in the workplace.

(*L.W., supra,* 886 A.2d at 1103.) In sum, the *L.W.* court declined to adopt the federal Title IX restriction because (1) it found students entitled to no less protection than workers, who are protected by the negligence standard, (2) the remedies clearly made available in state law allowing individuals to pursue action to redress harassment and discrimination starkly contrast with the remedies and the basis for limiting remedies outlined with regard to Title IX, and (3) standards derived from other state discrimination provisions "more effectively advance" the goal of the state's anti-discrimination law. (*Id.* at 1104.)

Finally, it should be noted that the deliberate indifference standard is virtually unknown in California law, and is completely alien to California anti-discrimination law. In general, the phrase "deliberate indifference" is generally only found in California cases applying federal law, most frequently in the context of federal civil rights claims filed by criminal suspects and convicts. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133 [29 Cal.Rptr.3d 553] [holding that a county did not act with deliberate indifference where it had been slow to perform a DNA test that could have cleared plaintiff of a rape charge]; *People v.*

Collins (2004) 115 Cal.App.4th 137 [8 Cal.Rptr.3d 731] [holding that inmate had failed to prove that state acted with deliberate indifference to medical needs of inmate when administering visual body cavity search]; *Ley v. State of California* (2004) 114 Cal.App.4th 1297 [8 Cal.Rptr.3d 642] [rejecting the claim of a convict sentenced to a treatment facility where a fellow inmate attacked him].) Indeed, the California Courts have routinely applied the federal "deliberate indifference" standard in a wide array of cases involving the federal rights of accused criminals and inmates. (See, e.g., *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154 [47 Cal.Rptr.3d 702]; *Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133 [29 Cal. Rptr.3d 553]; *Wright v. State* (2004) 122 Cal.App.4th 659 [19 Ca.Rptr.3d 92]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058 [135 Cal.Rptr2d 775]; *In re Walton* (2002) 99 CalApp.4th 934 [122 Cal.Rptr.2d 87].) Although the California courts are familiar with the "deliberate indifference" standard, counsel for Respondents cannot find a single California case where that standard used to apply any of California's anti-discrimination laws. The lone California discrimination case even mentioning deliberate indifference does so only in a passing reference to *Davis*, without anywhere positing that the federal approach should be adopted to restrict liability under California's anti-discrimination laws. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153,164 [134 Cal.Rptr.2d 492].) Given our legislature's stated goal of requiring affirmative efforts by school officials to reduce a severe problem and provide safety for California's students, it makes no sense to infer that the Legislature intended to insert into the Education Code – through indirect implication, no less – a concept completely alien to California anti-discrimination jurisprudence. Accordingly, Appellants' claim that the anti-discrimination protections of the California Education Code should be governed by the federal Title IX standard is misguided, and reversal on that ground would be improper.

B. Principles Of Statutory Construction Require Reading The Detailed Commands Of The Education Code To Have Purpose, Meaning And Effect.

The plain language, stated purpose, remedial structure, and overall legislative history of California's Education Code, including in particular the California Student Safety and Violence Prevention Act of 2000 (AB 537), mandate a standard of liability more protective than the federal "deliberate indifference" standard. Core principles of statutory construction dictate that the California Education Code's broader and more detailed protections against peer harassment in particular require more than federal Title IX protections. The Legislature's findings of urgent public need for remediation in California's schools, the statute's explicit imposition of affirmative duties on school officials, the law's implementing regulations further clarifying those duties, and the long-settled rule of statutory construction requiring that meaning and effect be given to the entire text of a law, all confirm that the trial court did not err in using a standard of liability consistent with other state anti-discrimination laws.

Appellants overread the provision of the California law that requires that the Education Code's protections be construed in a manner "consistent with" a raft of federal and state anti-discrimination provisions (Ed. Code § 201(g)), proposing an interpretation of the anti-discrimination provisions of the California Education Code that would render those provisions completely superfluous. Yet the California Supreme Court has held clearly that "[w]e do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 [276 Cal.Rptr. 303], citing *People v. Craft* (1986) 41 Cal.3d 554, 560 [715 P.2d 585]; *Gates v. Salmon* (1868) 35 Cal. 576, 587; see also *Select Base Materials, Inc. v. Board of Equalization* (1959) 335 P.2d 672, 676 [51 Cal.2d 640].) In the face of the significant differences between the state and federal laws, suggesting that the Education Code's protections – including the recently enacted ones – do no more than Title IX would rob the state law of its explicit significance, contravening the

fundamental principle of statutory interpretation requiring that statutes be read to have meaning and effect, consistently with their enactment history.

Indeed, it makes little sense to suggest that the Legislature made express findings about school violence and teen suicide in California, and thereupon enacted new anti-discrimination protections for California students that underscored the affirmative duties of school official in this state, without intending those protections to have legal effect beyond the protections in place in federal law. Accordingly, Appellants' suggestion that the California Education Code's expressly broader protections merely parrot the constrained federal protections found in Title IX also fails as a basic matter of statutory construction.

As the United States Supreme Court has held, federal civil rights laws provide a floor beneath which state protections may not drop, not a ceiling above which they may not rise. (*Cal. Fed. Savings and Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683].) (holding that a California statute requiring employers to provide leave to pregnant employees was not preempted by Title VII.) The requirement of "consistency" with regard to Title IX more reasonably means simply that Title IX provides a federal minimum of protection, beyond which the state can and has provided additional protections. In fact, California Legislature expressly recognized various other federal and state anti-discrimination provisions having set standards beyond which the Legislature intended the Education Code to reach in multiple ways: it mandated that the Education Code be construed consistently with other anti-discrimination laws "except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes." (Ed. Code § 201(g).) Accordingly, well-established rules of statutory interpretation further confirm that the trial court correctly concluded that the Education Code's anti-discrimination provisions serve the stated goal of helping to create safe and equal educational opportunities for all students in this state, by providing them with enhanced

protections over the federal minimum, consistent with other California laws against discrimination.

II. EVEN IF THE TRIAL COURT HAD INSTRUCTED THE JURY ERRONEOUSLY AS TO THE STANDARD OF LIABILITY UNDER CALIFORNIA EDUCATION CODE SECTION 220, THE ERROR WOULD HAVE BEEN HARMLESS.

Appellants' argument that the court below should have applied a different standard of liability is not only unfounded, but additionally would be of no moment in this case, given the jury's finding of deliberate indifference. Appellants contend that the federal "deliberate indifference" standard for liability under Title IX should apply under California's law, rather than the standard that applies under relevant California anti-discrimination law. But even were Appellants correct, the state-law-based instruction given in this case would constitute harmless error, as the jury indeed concluded that Appellants *had* manifested deliberate indifference to the harassment that injured Megan Donovan and Joey Ramelli. The jury's resounding finding that Appellants actually were aware of the pervasive harassment, and that Appellants had been deliberately indifferent to that harassment, resulting in compensable damages to both students, renders Appellants' arguments inconsequential.

Appellants here fail to make any showing of prejudicial error, without which the trial court's judgment may not be disturbed on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 962 [43 Cal.Rptr.3d 468] [an appellate court "must presume the judgment is correct in the absence of an affirmative showing of prejudicial error"].) The fundamental requirement that Appellants demonstrate *prejudicial* error derives from California's constitutional mandate that

> [n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const. art. VI, Sec. 13.)

The test of reversible error inquires into the likelihood that an improper instruction actually prejudiced the jury's conclusion. (*Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 703 [17 Cal.Rptr.3d 397]; see also *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 [67 Cal.Rptr.2d 16] [a judgment is reversible based on erroneous instructions only "where it seems probable that the error prejudicially affected the verdict"]; *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1231 [31 Cal.Rptr.2d 776] [instructional error is prejudicial only "when it appears probable that the improper instruction misled the jury and affected the verdict"].) As demonstrated in Section VI of this brief, the jury received copious trial testimony and documentary evidence supporting its conclusion that PUSD school officials had demonstrated deliberate indifference. After hearing the evidence in the case at hand, the jury returned a special verdict form that clearly indicated that all defendants had "actual knowledge" of the harassment of Megan Donovan (CT 784) and Joey Ramelli (CT 786) that was "so severe, pervasive, and offensive" that it "effectively deprived [them] of equal access to educational opportunities or benefits at Poway High School." (CT 784, 785.) The jury further indicated that Appellants had "act[ed] with deliberate indifference to the known acts of harassment" (CT 783, 786), and that Appellants' deliberate indifference had "cause[ed] harm" to the plaintiffs, Ramelli and Donovan. (CT 785.) Therefore, even if this court were to accept Appellants' legally unsound suggestion that the rationale of Title IX for limiting liability only to cases of deliberate indifference, as set forth in *Gebser v. Lago Vista Independent School Dist.* (1998) 524 U.S. 274 [118 S.Ct. 1989] and *Davis v. Monroe County Board of Education* (1999) 526 U.S. 629 [119 S.Ct. 1661], should apply under California's Education Code — which it should not — the trial court's supposed "error" would be harmless.

III. APPELLANTS SUBSTANTIAL EVIDENCE CHALLENGE RELIES ON A MISTAKEN LEGAL STANDARD, WAS WAIVED, AND FAILS ON THE MERITS.

A. Jury Findings Are Reviewed Under The Substantial Evidence Rule, Not *De Novo*, On Appeal.

Appellants make the baseless suggestion that this Court may review the jury's finding that Appellants acted with deliberate indifference *de novo*, asserting that "[i]n the appropriate case, the court may determine whether a district acted with 'deliberate indifference' as a matter of law." (Appellants' Opening Brief at p. 41.) For this novel view of state appellate law, Appellants cite the federal Title IX case, *Davis*, but fail to quote fully the relevant passage from that decision, which states, "[t]here is no reason that courts, *on a motion to dismiss, for summary judgment, or for a directed verdict*, could not identify a response as not clearly unreasonable (thus demonstrating deliberate indifference) as a matter of law." (*Davis, supra,* 526 U.S. at 649 [emphasis added].)[4] This appeal does not, however, seek review of a motion to dismiss, directed verdict, or summary judgment. This is an appeal from a jury verdict following a six-week trial of vigorously disputed facts with a great many credibility determinations. "A jury's findings on questions of disputed fact are reviewed under the substantial evidence rule." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139].) Accordingly, the substantial evidence rule is the only appropriate standard of review for the jury's findings in this case. As explained in detail in Section V below, in a substantial evidence challenge the judgment is presumed to be correct, and Appellants bear the heavy burden of demonstrating that there is no evidence in the record supporting the verdict below.

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[4] Appellants cite also to *Vance v. Spencer Cty. Pub. Sch. Dist.* (6th Cir. 2000) 231 F.3d 253, on this point, but fail to mention that the *Vance* court *upheld* a jury finding of discrimination. In so doing, the court did not employ the substantial evidence rule because it was not evaluating the basis for the jury's finding of disputed facts. *Vance* does not stand for the proposition that an appellate court can review a finding of fact *de novo*, as Appellants suggest.

(See, Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group, 1997) ¶¶ 8:38 to 8:43, pp. 8-16 to 8-18.)

B. Appellants Have Waived Their "Substantial Evidence" Challenge.

1. A Party Challenging Sufficiency Of The Evidence Must Set Out All Evidence On Point, Or Waive The Challenge.

A party challenging the sufficiency of the evidence is "required to set forth in [its] brief *all* the material evidence on the point and *not merely [its] own evidence*. Unless this is done the error is deemed to be waived." (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr.162], quoting *Kruckow v. Lesser* (1952) 111 Cal.App.2d 198, 200 [244 P.2d 19]) [emphasis in original].) Complying with this rule becomes even more crucial in cases involving voluminous, complex records. (See *W. Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290 [130 Cal.Rptr.2d 436], citing *Akins v. California* (1998) 61 Cal.App.4th 1, 17 [71 Cal.Rptr.2d 314].) Indeed, an appellate court may refuse even to consider a "substantial evidence" challenge where, as is the case here, the length of the record demonstrates that all of the issues were "exhaustively tried." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev., Co.* (1977) 66 Cal.App.3d 101, 152 [135 Cal.Rptr. 802].)

This is plainly a case involving a weighty, complex appellate record. The reporter's transcript of the trial in this matter contains nearly four thousand pages of testimony from thirty-three witnesses taken over the course of six weeks. This court is under no obligation to review the entire trial transcript in this matter in an attempt to ferret out the considerable evidence that Appellants improperly have failed to cite that supported the verdict. (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 403 [325 P.2d 475].) Rather, Appellants bear the burden to summarize all relevant evidence that might support the verdict. They plainly failed to meet that burden. Out of the lengthy record of the trial Appellants offer only a heavily biased synopsis of the testimony and suggest that nowhere in the

four thousand pages of the reporter's transcript is there any substantial evidence of Appellants' wrongdoing. This assertion is nearly unbelievable on its face.

a. Appellants Fail Forthrightly To Present Evidence Related to the Harassment Of Joey Ramelli And Megan Donovan.

Appellants' recitation of the facts is a one-sided attempt to re-litigate this matter on appeal. It would be impossible to catalog all of the relevant portions of the thousands of pages in the reporter's transcript omitted by Appellants, but a brief sampling amply demonstrates that Appellants have not met their burden to set forth *all* the material evidence supporting Respondents' claims.

To begin with, Appellants mischaracterize the evidence related to the harassment of Joey Ramelli and fail in their obligation to brief all facts tending to establish his claims in this matter. For example, Appellants state that Mr. Fisher told Joey to report immediately all instances of harassment to Mr. Giles (Appellants' Brief at p. 20), but they fail to mention that Joey's mother testified that Mr. Giles actually told her that Joey needed to stop complaining to him. (RT 2671-2673.) Requiring Joey to report harassment to an administrator who protested that he did not want to listen is unmistakable evidence of "deliberate indifference" to the harassment. On the same page of their brief Appellants make a point of noting that the school called a police officer to take a report regarding the vandalism of Joey's car, but they fail to mention that Mr. Giles only agreed to call the police after Joey pressed him to do so. (RT 1671.) Appellants likewise fail to mention that Joey filed a written, dated complaint about having been spat upon, containing detailed information useful for initiating an investigation, but that Mr. Fisher claimed he was not even aware that the complaint had been filed, let alone of its contents, and that he undertook no investigation. (RT 1308-1309; Ex. 13.)

Appellants argue that Joey wrongfully refused an offer to change his clothes in the Physical Education office to avoid locker room harassment (Appellants' Brief at p. 15), but they fail to mention that Joey testified that the

reason he declined to do so was that he was uncomfortable changing clothes in a room full of adult men. (RT 712-713.) Appellants also fail to note that, other than the offer to change in an office full of adults rather than in the locker room like the other students, the staff at Poway High School did nothing to help Joey, and specifically took no steps to curtail Joey's harassment in gym class. Appellants claim that Mr. Fisher and the Poway High administration were incapable of following up on the many reports of harassment contained in Joey's log because the log did not contain sufficient identifying information. (Appellants' Opening Brief at p. 19.) But they fail to acknowledge that Mr. Fisher testified that he actually did not follow up or even adequately review Joey's complaints because "it wasn't a time period where I was going to be able to internalize what the log was saying." (RT 1297-1298.) Mr. Fisher's decision to prioritize other tasks over Joey's repeated requests for help to cope with the anti-gay targeting and escalating harassment is telling evidence of indifference, and Appellants' failure to mention this testimony is a further example of their failure to brief all facts relevant to their claim of error due to lack of substantial evidence.

Likewise, numerous portions of the trial transcript indicate that Appellants similarly failed to follow-up on Megan Donovan's complaints of chronic harassment in any meaningful way. For instance, Megan testified that she was physically threatened by other students who made such threats as, "I'm going to beat your fucking ass, you lesbian," and that she reported the harassment to Mr. Fisher. (RT 670.) Mr. Fisher never followed up with Megan to investigate this complaint. (RT 670.) After Megan submitted her written log of pervasive anti-gay harassment on campus, neither Mr. Fisher nor any other school administrator ever met with Megan to discuss the many incidents she described. (RT 548.) By omitting the evidence of these and numerous other incident supporting the jury's verdict, Appellants have waived their substantial evidence challenge.

b. Appellants Focus On Evidence Irrelevant To This Appeal.

Appellants devote two full pages of their opening brief to evidence regarding Joey's damages, despite the fact that the issue of damages is not raised on appeal. (Appellants' Brief at pp 25-26.) Appellants selectively describe details of Joey's home life, even though such information has no bearing on the issues before this court. Appellants attempt to make an appeal issue of the fact that, like many teenagers, Megan smoked cigarettes (RT 658), could be rebellious at times (RT 662), and dressed in black. (RT 2740) (Appellants' Brief pp. 16, 25-26, 27.) Whatever Appellants' views of smoking and other typically adolescent behavior may be, they are completely irrelevant to the issues on appeal. They certainly cannot contend that only unfailingly deferential and conservatively groomed students enjoy legal protection against bias-motivated targeting by their peers. While it would be a stretch to suggest that the "background" Appellants cite regarding Megan might reflect upon her credibility, credibility is, in any case, wholly an issue for the jury. (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237 [255 P.2d 65].) Appellants similarly attempt to tarnish Joey's credibility, despite the fact that credibility determinations are made by the fact-finder, and not revisited on appeal. (Appellants' Brief at p. 20.) Again, Appellants focus more on attempting to smear Joey and Megan and to re-litigate the facts at the appellate level than on their obligation to provide this court with an unbiased recounting of *all* facts supporting the jury's findings below.

c. Appellants Mischaracterize Evidence Regarding Their Alleged Efforts To Fight Harassment.

Appellants' repeated misstatements of the testimony and other evidence at trial further undermine their substantial evidence challenge. The following examples are just a sample of the misleading representations in Appellants' brief: They assert that Tracy Barker-Ball "has found through her own informal surveys that the majority of PHS students feel safe." (Appellants Brief at p. 6, citing RT

2473, 3434.) In actuality, the cited testimony refers to a single survey by Barker-Ball, in which merely eleven percent of the students participated—patently not enough to assert that "the majority" feel safe. Further, more than fourteen percent of the few who responded answered the question about whether they felt safe by saying "sometimes" or "no." (RT 2473, 3434.)

To support their claim that "[m]ost students who witness the use of [homophobic] language do not report it to school personnel" (Appellants Brief at p. 9, citing RT 2277, 2874, 2570), Appellants cite testimony that actually refers to three individual students who heard homophobic comments but did not report them. And when Appellants state that "PUSD plays a leadership role at the local, state, and federal levels" (Appellants Brief at p. 10, citing RT 1894), they fail to make clear that the school's leadership is in the area of technology in the classroom, rather than in anything related to the harassment at issue in this lawsuit.

In an apparent attempt to suggest that the New Directions program — to which the students were driven after a prolonged period of unchecked harassment — might actually be attractive, Appellants assert "New Directions is a very successful program and boasts high graduation rates." (Appellants Brief at p. 12, citing RT 3482.) Yet, the cited testimony simply states the number of students who graduate per year—with no reference to the quality of the program or, indeed, to the number of students who fail to graduate. And the assertions that students are "more likely" to talk with their peers, such that other students "are often the first to report" to staff about student problems (Appellants Brief at p. 12, citing RT 3445) is completely unsupported by the testimony cited in Appellants' brief.

Appellants also improperly disregard testimony demonstrating that they failed adequately to respond to complaints regarding the anti-gay atmosphere at Poway High School. In a telling passage from Joey's testimony, he relates that he had spoken to Mr. Giles approximately four times regarding his problems, saying that he "would go up to [Giles] and say 'kids are using [anti-gay hate speech] all the time.' I mean, if it is not directed at me, they are still using it on a continuous

basis, and I don't understand why somebody doesn't stop and, you know, say 'Don't say that.' And there is no punishment for it ... [i]t seemed like if you walked around saying cuss words like 'fuck' on campus, you are going to get in trouble, but if you use the word 'fag' or 'that's so gay' they just keep walking by in one ear and out the other, and it seemed like there was nobody to stop and say 'hey, that's not appropriate.'" (RT 3532-3533.) Appellants completely ignore such testimony.

In addition, Appellants misleadingly emphasize Poway High School's annual "rollout," during which administrators go to classes and discuss the contents of the student handbook. (Appellant's Opening Brief at p. 6.) They fail to mention that the only discussion of hate language during the rollout was a brief statement to the effect of "don't use hate language." (RT 3537 –3538.) Appellants' attempt to recharacterize this cursory instruction at the beginning of the school year as a comprehensive anti-harassment program is another glaring example of their failure appropriately to brief *all* relevant evidence demonstrating Appellants' deliberate indifference to harassment.

d. Appellants Fail Forthrightly To Present Evidence Offered By Plaintiffs' Expert Witness.

Some of the most disturbing portrayals of the record relate to experts who testified on behalf of the students. For instance, when Appellants state that "Overall, Dr. Covarrubias testified that PUSD was headed in a good direction in terms of safety" (Appellants Brief at p. 13, citing RT 2740), the portion of the record they cite actually includes Dr. Covarrubias' reference to data indicating that 9th and 11th graders were getting into *more* fights—which certainly does not suggest improved school safety. And in any case, the testimony upon which Appellants rely was the subject of their own counsel's objection as to relevance — which was sustained. (RT 2740.)

Appellants also note that Dr. Covarrubias testified that PUSD had "everything in place as far as appropriate regulations" (Appellants' Opening Brief

at p. 13), but fail to mention that she also concluded that "there was no evidence of systematic support at the school site." (RT 2762.) The school's deficiencies included a lack of a "clear procedure for the referral of students who are having problems." (RT 2762.) Dr. Covarrubias further testified that "because there wasn't that support happening....the school was not fulfilling its obligation ... specifically as it regards to school climate." (RT 2764.) Appellants further fail to mention that Dr. Covarrubias specifically criticized the lack of a planning process surrounding in-service training. (RT 2765.) Appellants claim that Dr. Covarrubias "acknowledged that Poway High School administrators did position themselves in "hot spots" or high traffic areas during class breaks and lunchtime (RT 2766-2767, 2826), but they fail to include that when asked if Poway administrators were doing things to prevent these "hot spots" from occurring, she flatly testified, "No." (RT 2767.) Dr. Covarrubias also testified that "since discipline was being looked at on a very individual level, the reaction of the administration tended to be toward blowups and planning after the fact for incidents rather than taking a systematic and a proactive look at how am I going to deal with climate on this campus." (RT 2769.) She further testified that there was poor communication between the district office and the school regarding procedures, goals and planning. (RT 2771.) And she specifically testified that Poway High School lacked "follow-through." (RT 2772.) Although Dr. Covarrubias opined that Poway Unified School District used the "right lingo" in their policies, she faulted the officials because "it is not happening at the site, and the site is where the education happens." (RT 2772.) Appellants make no mention of any such criticism.

Appellants mischaracterize the record still further by stating that Dr. Ellen Stein, a psychologist and expert witness for the students, "noted that [Ramelli's] earlier counseling focused on stress at home, pressure with school work, and his busy schedule." (Appellants Brief at p. 25, citing RT 2190.) The section of testimony they cite, rather than representing the expert's experience or opinion, is instead a portion where Dr. Stein quotes an entirely different witness's report at

the request of Appellants' counsel. Appellants also state that Dr. Stein "opined that Donovan ... had a tendency to make herself out as a victim" (Appellants Brief at p. 33, citing RT 2227), when again, the cited testimony has Dr. Stein reading from another person's report at Appellants' request. In neither of these instances is there any indication within the record that the cited statement was Dr. Stein's opinion. Appellants' presentation is misleading at best, and falls far short of what is required to substantiate a substantial evidence challenge.

2. Appellants' Lack Of Candor Constitutes A Waiver Of Their "Substantial Evidence" Challenge.

The construction of this appeal is strikingly similar to the presentation before the court in *Estate of Palmer* (1956) 145 Cal.App.2d 428 [302 P.2d 629], in which the court found the appellant's challenge was waived because:

> [i]nstead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondent. An appellant is not permitted to evade or shift his responsibility in this manner.

(*Id.* at p. 431.) Here, as in *Estate of Palmer*, Appellants' recitation of the facts would require the reviewing court to undertake an independent review of the entire record to search out evidence supporting the verdict. Appellants may not shift their burden in this way. Accordingly, Appellants have waived any "substantial evidence" challenge.

The Sixth District recently underscored that an appellant's failure candidly to recount all evidence supporting a verdict acts as a waiver of a "substantial evidence" challenge. (*Ajaxo, Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21 [37 Cal.Rptr.3d 221].) In *Ajaxo* the court was presented with the transcript of a seven-week trial comparable to the six-week trial in the case at bar. (*Id.* at p. 224) The *Ajaxo* court held:

> In a case such as this, where there are 23 volumes of trial transcript and 32 volumes of appendix and supplemental appendix, we find

> E*Trade's recitation of the facts lacking in fairness and completeness. E*Trade's slanted presentation of the facts reads more like argument. Accordingly, we deem that E*Trade has waived this issue on appeal because of its failure to carry its burden of providing the court with a fair and complete summary of the evidence.

(*Id.*)

As in *E*Trade*, Appellants here have taken a lengthy trial transcript and distilled it into an argument rather than an unbiased recitation of the facts supporting the verdict. Appellants ignore relevant facts, while including irrelevant material apparently related to issues such as credibility of witnesses and damages that are not subject to challenge on this appeal. This grossly improper presentation is more than sufficient to constitute a waiver of any appeal based on an alleged lack of "substantial evidence."

B. Appellants Misstate The Test For "Substantial Evidence."

After a six-week trial the jury in this matter found that Mr. Giles and Mr. Fisher each had actual knowledge of harassment based on sexual orientation at Poway High School and that both Joey and Megan had been victims of harassment. (CT 776-778.) The jury further found that Mr. Fisher acted with deliberate indifference to Megan's harassment, and that both Mr. Fisher and Mr. Giles acted with deliberate indifference to Joey's harassment. (CT 778, 780.)[5] In light of these findings, judgment was entered in favor of Respondents and against Appellants Fisher, Giles and Poway Unified School District. Appellants have filed this appeal arguing that nothing in the transcript of the six-week trial in this matter demonstrates "substantial evidence" of deliberate indifference to harassment.

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[5] It is important to note that Appellants only claim that the jury lacked "substantial evidence" to support a finding of "deliberate indifference." Appellants, therefore, have waived the right to appeal the other jury findings, such as the finding that Poway Unified School District failed to take immediate and appropriate corrective action, that independently support the verdict in favor of Respondents. (CT 777.)

This Court's role is not to re-weigh the evidence, as Appellants suggest, but only to determine whether the record contains the minimum level of evidence necessary to support the jury's verdict:

> When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, *contradicted or uncontradicted*, which will support the determination.

(*Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040 [68 Cal.Rptr.2d 758] [emphasis added].) Although Appellants are correct that a reviewing court applying the substantial evidence rule must look at the record as a whole, they neglect to mention that this Court must review that record "in a light most favorable to the prevailing party and resolve all evidentiary conflicts and draw all reasonable inferences in favor of the judgment." (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518]; see also *Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280 [38 Cal.Rptr.3d 845], citing *Bd. of Ed., v. Jack M.* (1977) 19 Cal.3d 691, 697 [139 Cal.Rptr. 700]; *County of Mariposa v. Yosemite West Assoc.* (1988) 202 Cal.App.3d 791, 807 [248 Cal.Rptr. 778].)

Appellants argue that this Court must review the record as a whole and attempt to locate any evidence whatsoever that might challenge the accuracy of the verdict, when this Court's duty is precisely the opposite. The mere presence of evidence in the record that contradicts the jury's finding does *not* support a reversal for lack of substantial evidence. To the contrary, if the entire record demonstrates *any* substantial evidence in support of the appealed judgment or order, the appellate court must affirm notwithstanding contrary evidence in the record. "If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874 [197 Cal.Rptr. 925] [internal citations omitted].)

Finally, the court's analysis of whether a judgment is supported by substantial evidence must begin "with the presumption that the record contains evidence to sustain every finding of fact" (*Foreman*, *supra*, 3 Cal.3d at 881, quoting *Tesseyman v. Fisher* (1952) 113 Cal.App.2d 404, 407 [248 P.2d 471]), and "where the evidence is in conflict, an appellate court will not disturb the findings of the trial court." (*Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 564 [78 Cal.Rptr. 25], citing *Laymon v. Simpson* (1964) 225 Cal.App.2d 50, 52 [36 Cal.Rptr. 859].) The appellate court thus has "'no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn there from.'" (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518 [189 Cal.Rptr. 377], quoting *Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370 [210 P.2d 757].) As this court has held:

> [A]ll of the evidence must be examined, but it is not weighed. All of the evidence *most favorable to the respondent must be accepted as true,* and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. *If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.*

(*Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1542 [41 Cal.Rptr.2d 104] [emphasis in the original, internal citations omitted].) When the entire record is reviewed according to the correct, highly deferential "substantial evidence" standard, it becomes manifestly obvious that the verdict of the jury must be upheld.

C. The Jury Was Presented With Substantial Evidence Supporting its Finding That Appellants Fisher And Giles Acted With Deliberate Indifference To Anti-Gay Harassment At Poway High School.

A logical place to begin the assessment of Appellants' argument concerning what is and is not "deliberate indifference" is the jury instruction requested by

Appellants in this matter. That instruction defined "deliberate indifference" as follows:

> "Deliberate indifference," means that the defendant's response to the alleged harassment or lack of response was clearly unreasonable in light of all the known circumstances. A response by the Defendant that is merely inept, erroneous, ineffective, or negligent does not amount to deliberate indifference. However, an official cannot simply turn a blind eye and do nothing and must respond in a prompt, timely and reasonable manner to a Plaintiff's allegations of discrimination.
>
> For deliberate indifference to occur where one student harasses another student, the harassment must take place in a context subject to the individual Defendant's control, and the individual Defendants must have disciplinary authority over the person who is harassing the plaintiff.

(CT 740, citing, Fed. Jury. Inst. § 177.35; *Davis, supra,* at 645; *Gebser, supra,* at 290; *Alton v. Texas A&M Univ.* (5th Cir. 1999) 168 F.3d 196; *Mercer v. Duke Univ.* (M.D.N.C. 2001) 181 F.Supp.2d 525.)

Based on this simple instruction provided by Appellants, the jury found that both Mr. Fisher and Mr. Giles acted with deliberate indifference to the harassment of Joey and Megan. And indeed the jury had plenty of material from which to draw. As detailed in the Statement of Facts above, both Mr. Fisher and Mr. Giles were told on numerous occasions that Joey and Megan were being harassed and were requesting adult help. Joey began telling Mr. Fisher and Mr. Giles that he was being harassed during the first semester of his junior year. (RT 732.) When he told Mr. Giles and Mr. Fisher that anti-gay slurs were being routinely used on campus, they responded by saying that such language was "against the rules" (RT 732), conflating the existence of a rule with the enforcement of a rule. The mere fact that the rule existed clearly did nothing to stop the harassment, but Mr. Fisher and Mr. Giles were content to take no action. The jury was justified in finding "deliberate indifference" based on this fact alone.

In *Vance* the Sixth Circuit considered the meaning of "deliberate indifference" in the context of student-on-student harassment, holding that

> where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

(*Vance*, *supra*, 231 F.3d at 261.) The *Vance* court went on to uphold a jury finding of deliberate indifference, noting that the actions of the administrators "although ineffective, remained the same," demonstrating a "willingness to repeat ineffective measures time and time again." (*Id.* at p. 264.) As the Sixth Circuit confirmed while applying the federal *Davis* standard, this is the essence of deliberate indifference.

Here the school defended itself with reference to its annual "rollout," during which administrators essentially go through the student handbook and make some generalized comments about the importance of students engaging in respectful behavior. (RT 3525.) Joey characterized the harassment component of the "rollout" as an administrator simply saying, "don't use hate language." (RT 3537-3538.) Not surprisingly, this minimal discussion of harassment issues once a year did little to quell anti-gay animus at Poway High School. The "rollout" did not appear to have accomplished anything to stem the relentless harassment of Joseph Sago during the 2000-2001 school year. (RT 2078.) That failure certainly begs the jury to question why, since Appellants were on notice that the "rollout" did little to protect gay and lesbian students during the 2000-2001 school year, the Appellants could think it would be effective in later years. Appellants' willingness to rely on tried-and-failed approaches to curb anti-gay harassment is substantial evidence of deliberate indifference under the standard articulated in *Vance*, and therefore the jury's verdict must be upheld.

In two related decisions, the United States District Court for the District of Kansas emphatically underscored that the issue of deliberate indifference to the harassment of gay and lesbian students should be left for a jury to decide, and that repeated use of ineffective measures constituted deliberate indifference. (*Theno v. Tonganoxie Unified School Dist.* (D. Kan. 2005) 377 F.Supp.2d 952; *Theno v. Tonganoxie Unified School Dist.* (D. Kan. 2005) 394 F.Supp.2d 1299.) In that matter, a student was "pervasively harassed" by "name calling, teasing, and crude gestures with various sexual overtones." (*Theno*, *supra*, 377 F.Supp.2d at 953.) As is the case here, parents met with school administrators and presented them with a log detailing anti-gay harassment at the school. (*Id.* at p. 959.) In *Theno,* as is the case here, "[t]he board of education had adopted written policies prohibiting sexual harassment, and the school's policies prohibiting sexual harassment were also embodied in the school's code of conduct and the student handbook." (*Id.* at p. 961.) But, in *Theno*, the school took steps to stop known harassers and those steps were, on the whole, effective. The court noted, "each time the school disciplined a known harasser, to the best of the school's knowledge that particular harasser ceased harassing plaintiff." (*Id.* at p. 964.) The *Theno* court denied defendants' motion for summary judgment, however, holding that "a rational trier of fact could find that the school's response to known harassment was clearly unreasonable because this is not a case that involved a few discrete incidents of harassment . . . [i]t involved severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped." (*Id.* at pp. 965-966.) The court concluded that "[w]hile the court recognizes that the school was not legally obligated to put an end to the harassment a reasonable jury could conclude that at some point during the four-year period of harassment the school district's standard and ineffective response to known harassment became clearly unreasonable." (*Id.* at p. 966.) Here, as in *Theno,* the question of whether the school's response to harassment was "'too little, too late' is a question for the jury." (*Id.*)

After the jury in *Theno* returned a verdict for the plaintiffs, finding that the defendants had been deliberately indifferent to harassment based on sexual orientation, the district court properly declined the invitation to overturn the verdict as a matter of law. (*Theno* 394 F.Supp.2d at 1312.) The court noted that "[t]he record reflects that a sufficiently significant number of school administrators essentially turned a blind eye to the harassment by ignoring, tolerating or even trivializing the harassment," which resulted in "a school culture in which many students appeared to have felt at ease making inappropriate comments to plaintiff openly in front of teachers and other students, even during classes. As such, the court cannot find that the school district took prompt remedial action." (*Id.* at p. 1311.) The record in this case supports the same jury finding. Megan, Joey and other students at Poway High School testified that they heard anti-gay epithets on a regular basis. (See, e.g., RT 453, 705, 717-718, 2267, 2750, 2573, 2875.) Appellants undertook no efforts to address the campus environment. (RT 2771.) Appellants' apathy and resistance when presented with complaints of specific acts of anti-gay harassment support a finding of "deliberate indifference." As was the case in *Theno*, the finding of the jury should not be disturbed as a matter of law.

Similar facts recently presented to the federal Ninth Circuit Court of Appeals also illustrated school administrators' deliberate indifference, leading to that court's ruling that, where facts are in dispute, the extent of school administrators' awareness of their students' difficulties is a question of fact precluding summary adjudication as a matter of law. (*Flores v. Morgan Hill Unified School Dist.* (9th Cir. 2003) 324 F.3d 1130, 1135.) Some of the incidents of anti-gay harassment in the *Flores* case, and the half-hearted responses of the school administrators, mirror the facts of the present case. In *Flores*, the Ninth Circuit described one such incident and the school's response as follows:

> Plaintiffs CL and HA, two female students, allege that other students began making anti-gay comments and other sexual gestures at them

> when they began dating during their senior year at Live Oak High School. On one occasion, a group of boys in the school parking lot shouted anti-gay slurs and threw a plastic cup at the girls. CL and HA reported the incident to defendant Assistant Principal Maxine Bartschi. Bartschi told the girls to report the incident to a campus police officer, *and did not follow-up with them or conduct her own investigation of the incident.*

(*Flores, supra,* 324 F.3d at 1133 [emphasis added].)

The record in this matter is replete with similar examples of student harassment followed by a lack of any substantial follow-up on the part of administrators. One of the most obvious examples of such neglect is Mr. Fisher's and Mr. Giles' reaction to the logs prepared by Joey and Megan. Mr. Fisher was presented with logs listing dozens of instances of anti-gay harassment. (RT 830, 2618, RT 2618; Exh. 7.) The jury was presented with evidence that Mr. Fisher and Mr. Giles both failed to follow up with Megan and Joey to ask for more details about the logged incidents. (RT 830, 832, 1201.) Indeed, the only investigation spurred by the logs appears to be Mr. Fisher's attempt to search for anything that might suggest that Joey and Megan's complaints were exaggerated. (RT 1184, 1212.) While Appellants may not have been required to succeed in finding out who the harassers were in each instance, they were obligated at least to try to identify and to take corrective steps regarding some of these perpetrators. They failed utterly in that obligation. As in *Flores*, the failure of the administration to mount an adequate investigation into reported instances of bias-motivated abusive conduct constitute evidence of deliberate indifference.

Another close parallel to the *Flores* case can be seen in the way school administrators in both that case and the present case failed to deal with the issue of harassment in the school locker room. In *Flores*, the federal court noted that:

> JD alleges that she also complained to a teacher that her classmates in physical education class called her "dyke" and "queer," and made comments such as "Oh, I don't want [JD] to touch me. I don't want

> her to look at me. I don't want to be her [weight training] partner." According to JD, the teacher failed to take action against the harassers, and instead suggested that JD change clothes away from the locker room so that her classmates would not feel uncomfortable.

(*Flores, supra*, 324 F.3d at 1133.) This is precisely the same failing approach touted by Appellants to address the locker-room threats and other harassment of Joey. (Appellants' Brief at p. 15.) When Joey was threatened in gym class, and reported the problem to his teachers and an assistant principal, the school's officials failed to investigate, let alone to take action to curtail the harassment . (RT 707-708.) Instead, they sought to segregate Joey from other students by having him change clothes in an office full of adults. (RT 712.) Here, as in *Flores*, segregating gay students was not a solution to anti-gay harassment. Appellants' apparent contentment to offer Joey a humiliating alternative to harassment, and then to throw up their collective hands when he expressed his discomfort and declined, is evidence of deliberate indifference to Joey's plight.

In yet another parallel to this case, the *Flores* court ruled that where the assistant principal "failed to follow up or conduct an independent investigation after two of the plaintiffs reported that they had been assaulted by a group of students in the . . . High School parking lot . . . [and the assistant principal] took no action to locate or discipline the harassing students . . . [t]he jury may find deliberate indifference despite [the assistant principal] referring the girls to the campus police." (*Id.* at p. 1135.) The anemic responses of Mr. Fisher and Mr. Giles to anti-gay harassment and assaults on the Poway High campus again mirror those of the defendants in *Flores*. On "Straight Pride Day," Mr. Fisher addressed the problem of anti-gay harassment by asking the gay students to leave the school's common quad, rather than confronting and correcting the anti-gay students whom Mr. Fisher acknowledges were "hoping that a scene would be created that day." (RT 1044, 1053.) When Megan and Joey chose not to leave the quad, Megan was assaulted by an anti-gay activist named Breanna. (RT 522,

800.) Following the assault, Mr. Giles was put in charge of mounting an investigation. (RT 1055.) A typical investigation would include gathering witness statements from the students and adults who had been in the area at the pertinent time. (RT 1055.) Mr. Giles, however, only obtained a one-sided collection of witness statements from Breanna (the student who had assaulted Megan), Breanna's brother, and another anti-gay activist named "Brenan." (RT 1057, 1058, 1542-1543.) Mr. Fisher did not bother to follow up with Mr. Giles to make sure he had obtained witness statements from the range of people who had been present that day. (RT 1060.) Mr. Giles ultimately concluded that Breanna had initiated the confrontation with Megan, but Megan nevertheless was given a three-day suspension after the assault based on Mr. Giles' slanted investigation of the matter. (RT 564, 1544, 1586-1587; Exh. 27.) The *Flores* case demonstrates that "deliberate indifference" is commonly shown not by what school officials do, but what they fail to do. In *Flores*, "[the principal] failed to take any further action after [students] complained that the atmosphere in the school was hostile," and his "failure to take any further steps once he knew his remedial measures were inadequate supports a finding of deliberate indifference." (*Flores, supra,* 324 F.3d at 1135-1136, citing *Vance, supra,* 231 F.3d at 262.) In this matter, Joey and Megan, as well as Joseph Sago before them, reported ongoing harassment and a pervasively anti-gay climate at Poway High School. (RT 456-457, 717, 2078.) Despite having notice of the hostile, bias-infused climate at the school, the Poway High administration continued to rely on the same ineffective measures year after year.

Appellants tout Poway High School's sponsorship of "Camp Humankind" as a solution to harassment, but student participation in Camp Humankind was voluntary. (RT 2561.) A reasonable jury certainly could have concluded that a voluntary program most likely would attract only tolerant students and would be highly unlikely to affect the students engaging in harassment who do not attend. Appellants also put forth "Titan Ties" as a harassment-fighting measure, but

"Titan Ties" also is a voluntary program, and the number of students who can attend is limited. (RT 969.) Again, the jury would have acted well within its discretion in dismissing "Titan Ties" as a program geared more toward "preaching to the choir" than to effective intervention and transformation of an environment that had become toxic by unchecked anti-gay bias and bullying. The continued reliance on such limited, voluntary programs to counter widespread harassment could certainly serve as "substantial evidence" that Mr. Fisher and Mr. Giles were deliberately indifferent to the abuse of gay and lesbian students at Poway High School.

Indeed, it appears that the administration not only relied on failed methods, but they also discouraged the implementation of harassment-fighting programs that might have succeeded and failed to implement other harassment-fighting techniques that Appellants knew were more effective. Ms. Barker-Ball worked on an in-service training for faculty to help them learn how to curb anti-gay harassment, but she could not get administrative approval to move forward with the training. (RT 2766.) In a previous job, Mr. Giles actually helped implement a diversity-training program called "Building Bridges" at Twin Peaks Middle School that was designed to change the campus climate. (RT 1496.) No similar program was ever implemented at Poway High School. (RT 1497.)

The record contains other parallels between Appellants' inaction and the inaction of school administrators in *Flores,* in which the Ninth Circuit noted,

> When two students reported harassment by other students and a campus monitor to [the assistant principal] he acknowledged that the students had a hard time on campus because they were gay. The extent of his response, however, was to refrain from disciplining the two students for being in the hall without a hall pass. [The assistant principal]'s failure to take any steps to investigate and stop the harassment would justify a finding of deliberate indifference.

(*Flores, supra,* at 1136, citing *Monteiro v. Tempe Union High Sch. Dist.* (9th Cir. 1998) 158 F.3d 1022, 1034.) The *Flores* court went on to note that "[t]he record contains evidence that [the assistant superintendent] took no action to stop the

harassment [the student had] reported, including the defacing of her locker and the placing of notes and pornography inside it .... [the assistant superintendent]'s failure to do anything about the harassment supports an inference of deliberate indifference." (*Id.*, citing *Monteiro, supra,* 158 F.3d at 1034.) The record in the present matter demonstrates similarly perfunctory responses and inaction by Mr. Giles and Mr. Fisher. When Megan and Joey were threatened by students in a car bearing a Poway High School parking permit, neither Mr. Fisher nor Mr. Giles tried to identify the harassers, despite having been given a description of the car and a partial license plate number. (RT 807, 1209.) Likewise, when he learned that Joey's car had been vandalized, Mr. Giles made no effort to try to find the perpetrators. (RT 1567.) He could have tried to find out what students had been out in the parking lot area at the time the vandalism took place, but he did not do so. (RT 1567-1569.) After the window on Joey's car was broken and a note left in the cracked window saying, "fucking faggot, you think that window was an accident? I'm going to kick your fucking ass, faggot," Joey reported the damage and the threat to Ms. Barker-Ball. (RT 778-779.) Ms. Barker-Ball reported the threat to Mr. Fisher. (RT 2303.) Yet the record contains no evidence that Mr. Fisher or any other school administrator investigated the incident in any way. In light of the Poway High School administration's consistent lack of effective responses or preventive action, the jury was entirely reasonable in finding that the school officials had been deliberately indifferent to the harassment of gay and lesbian students on campus. A dispassionate review of this record bars any serious dispute that substantial evidence supports this conclusion. Accordingly, the judgment of the lower court should be affirmed.

The Northern District of Ohio recently adjudicated a matter that sheds still more helpful light on this case because it involved similar facts, including a student who was relentlessly harassed because of his outspoken support of gay rights and the perception that he was gay. (*Schroeder v. Maumee Bd. of Ed.* (N.D. Oh. 2003) 296 F.Supp.2d 869.) There, as here, the defendants claimed that they

"investigated each of the incidents" and that "the school took appropriate action in each case in light of the information it received from the students, plaintiff, his mother, and . . . teachers and administrators." (*Id.* at p. 872) Despite defendants' claims that they were doing all that they could, the federal court specifically held that anti-gay statements made by a school administrator "could be found by the jury to have manifested homophobic animus, resulting in deliberate indifference . . . to plaintiff's complaints about how and why he was being treated as he was." (*Id.* at p. 875.) In this matter, it is uncontested that Mr. Giles made remarks reflecting his general disapproval of gay people. (RT 565, 1184.) Certainly when taken with all of the other evidence of failed, ineffectual, or nonexistent responses to sexual orientation-based harassment at Poway High School, Mr. Giles' personal expression of anti-gay animus is more than sufficient to support a finding that Poway High's administration acted with "deliberate indifference" to the harassment of Megan and Joey.

As a whole, the record demonstrates that both Mr. Giles and Mr. Fisher were well aware of anti-gay harassment at Poway High School and knew of many specific incidents of harassment of Joey and Megan due to their sexual orientation. The record further demonstrates that neither Mr. Giles nor Mr. Fisher took any adequate steps to investigate or counter the specific harassment or the hostile environment it created. They frequently failed even to investigate incidents that had been directly reported to them. Appellants relied on voluntary programs to educate students on the importance of tolerance, despite the fact that intolerant students would be highly unlikely to attend such programs and they took no steps to identify individual perpetrators of harassment or to require them to attend. Appellants' "rollout" at the beginning of each year included only the most cursory anti-harassment efforts. The record demonstrates that even after Joey's and Megan's mothers confronted school officials, pressing them to protect their children, Mr. Giles and Mr. Fisher still failed to take any effective measures to reduce the omnipresent anti-gay hostility and harassment at Poway High School or

to investigate the many incidents of harassment of which they had been informed. Rather, they criticized and rejected such reports, dismissing their sources as prone to exaggerate, rude or otherwise unworthy of belief or administrative concern. This evidence, when taken as a whole, is more than sufficient to meet the very deferential "substantial evidence" test and to warrant a decision upholding the jury's finding of deliberate indifference.

IV. APPELLANTS' BASELESS SPECULATION AS TO THE JURY'S UNDERSTANDING OF A PROPER JURY INSTRUCTION CANNOT DEMONSTRATE A "MISCARRIAGE OF JUSTICE."

Appellants argue that the trial court's decision to deliver a jury instruction directly quoting relevant portions of the California Education Code resulted in a "miscarriage of justice." This amazing assertion fails on two fronts. First, a jury instruction containing merely language from relevant portions of the California Code is unassailably proper. Secondly, even if the instruction were improper in any respect, providing it to the jury was harmless error in this case.

Appellants object to Jury Instruction No. 3, which stated "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment. California's public schools have an affirmative obligation to combat racism, sexism and other forms of bias, and a responsibility to provide equal educational opportunity." (CT 730.) The language in question is a verbatim recitation of the contents of Education Code § 201.

Not surprisingly, California courts have held that "[i]nstructions in the language of an applicable statute are properly given." (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520 [95 Cal.Rptr.2d 336], citing 7 Witkin Cal. Procedure (4th ed. 1997) Trial, § 280, p. 326.) Appellants, however, argue that Education Code § 201 is a statement of policy and that it is thus prejudicial to share it with a jury. Appellants cannot cite a single decision supporting this novel argument, which seems to imply that legal provisions reflecting legislative policy are somehow irrelevant verbiage to be disregarded when applying the statutes in

question. This notion is contrary to California law. "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose, i.e., the object to be achieved and the evil to be prevented by the legislation." (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 8 [255 Cal.Rptr. 412].) The fact that the language in question supports a broader understanding of the anti-harassment provisions of the California Education Code than Appellants might prefer is of no importance. The instruction in question reflects the Legislature's stated intentions concerning the scope of this statute, and it was absolutely proper to provide the instruction to the jury.

Even if the instruction in question had been given in error, however, the error would have been completely harmless. A judgment may not be reversed for instructional error in a civil case "unless, after examination of the entire case, including the evidence, the court is of the opinion that the error complained of has resulted in a miscarriage of justice." (*Krotin v. Porsche Cars of N.A* (1995) 38 Cal.App.4th 294, 303-4 [45 Cal.Rptr.2d 10]; Cal. Const., art. VI. § 13.)

Appellants claim that the instruction in question created a "miscarriage of justice" because it led jurors to believe that the proper standard of liability was less stringent than "deliberate indifference." As briefed at length in Section I, Appellants are incorrect in their assertion that the federal "deliberate indifference" standard applies under California anti-discrimination law. Yet, even if Appellants' were correct and the federal standard applied, the error would be harmless, because nine out of twelve jurors actually found that the Appellants acted with "deliberate indifference" to the harassment of Appellees. (CT 774.)

Appellants must demonstrate that, absent the instructional error, there is a reasonable probability that the jury would have reached a different verdict. (*Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 574 [34 Cal.Rptr.2d 607].) Attempitng to meet this burden Appellants engage in a bit of mind-reading, suggesting that the challenged instruction created a "strict liability" standard in the

minds of jurors. (Appellant's Brief at p. 62.) Of course, there is no way that Appellants can read the minds of jurors, so the argument is nothing but conjecture. The instruction in question says nothing that would imply strict liability. It merely states that Appellants had an affirmative obligation at least to attempt to protect the children in their care from harassment.

The jury was instructed that Appellants would be liable only if they failed to take immediate and appropriate corrective action to stop known harassment. (CT 732.) Evidence was presented that convinced nine out of twelve jurors that Appellants were, in fact, deliberately indifferent to harassment.[6] Accordingly, the jury returned a verdict finding Appellants liable. This was not a "miscarriage of justice," it was merely an outcome with which the Appellants, not surprisingly, disagree. The verdict of the jury must, therefore, be upheld.

V. APPELLANTS WAIVED ANY OBJECTION TO CLOSING ARGUMENT BY FAILING TO OBJECT AT TRIAL.

Appellants claim the students' trial counsel made prejudicial statements during closing argument that warrant reversal of the jury verdict. Specifically, Appellants object to counsel's references to the school officials' affirmative duties to address the anti-gay discrimination against the pupils in their care. By failing to object contemporaneously to these statements, however, Appellants waived the objection they advance here.

As a rule, a claim of attorney misconduct cannot survive "unless the record shows a timely and proper objection and a request that the jury be admonished," which gives the trial court the opportunity to correct the problem. (*Sabella v. Southern Pacific Co.* (1969) 70 Cal.2d 311, 318 [74 Cal.Rptr. 534], citing *Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721] [citing cases].) "One of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate

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[6] The fact that the verdict was not close also weighs in favor of finding that any instructional error was harmless. (*Krotin, supra,* 38 Cal.App.4th at 305.)

the necessity of a new trial." (*Sabella*, *supra*, 70 Cal. 2d at 320, citing *Horn, supra*, 61 Cal. 2d at 610.) Prompt objections and, where appropriate, admonitions to the jury, are vital tools to avert the need for new trials. (*Sabella*, *supra*, 70 Cal. 2d at 320.)

The *Sabella* court found plaintiff's counsel in a personal injury case "guilty of deplorable misconduct which might well have been prejudicial" (*Id.* at p. 318), including repeated references to defendant as "'inhuman' and heartless, sending plaintiff 'down the tubes' and casting him on the 'human trash pile,' as 'cheapskates' attempting to put up a 'smoke-screen' of perjury and deceit, so as to deprive plaintiff of his just due and put the money instead into defendant's 'coffers.'" (*Id.* at p. 317.) Yet because the defendant had not objected contemporaneously, much less requested an admonition, the appellate court found it "unnecessary to reach ... the merits" of the belated complaint. (*Id.* at p. 319.) As the *Sabella* court noted, admonitions are effective "[e]xcept perhaps in cases of highly emotional or inflammatory language or reference to extremely prejudicial circumstances not in evidence." (*Id.* at p. 320.)

In the case at hand, Appellants' failure to object to any of the allegedly prejudicial statements recounted in the students' initial brief allowed the course of argument to continue without interruption or the possibility of an admonition. Appellants' passivity at trial cannot be rewarded upon appeal without undermining core trial processes. By failing to object to the remarks Appellants now assert materially tainted the jury's deliberation, they deprived both the trial judge and the students' counsel of any opportunity to argue Appellants' objection immediately and, if necessary, to correct any actual misconduct. The concept of waiver is based upon this line of reasoning. Thus Appellants' belated opposition to references to school officials' obligation to address discrimination must fail, because counsel did not object even once to statements they now characterize as prejudicial.

The *Sabella* court acknowledged that "[e]ach case must ultimately rest upon a court's view of the overall record, taking into account such factors, *inter alia*, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." (*Sabella, supra,* 70 Cal.2d at 320-21.) But case law indicates that regardless of how serious the misconduct may be, the party claiming prejudice still must object at the time or forfeit the objection. (See 7 Witkin Cal. Pro. Trial § 224 (Lexis, 2006); see also *Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 733-34 [203 Cal.Rptr. 748] [rejecting argument that a tactical decision not to object is sufficient to preserve issue for appeal].)

And certainly the record here, where there has been no suggestion that the judge failed to control the trial and Respondents' counsel's contested statements were far from inflammatory, and in fact merely tracked the evidence and jury instructions, provides no basis to disregard the long-established rule that an offended party must object and request an admonition promptly to preserve an issue for appeal.

In sum, Appellants' failure to raise any timely objection to Respondents' references to the governing law and key evidence creates a scenario in which it would be improper to consider upsetting the verdict. Rather, raising the issue for the first time now, on appeal, is merely a variation of Appellants' expressed dismay over the liability standard applied by the court, treated in Section II of this brief. If the jury instructions regarding the standard do not undermine the validity of the verdict for the reasons stated above, then closing arguments tracking the evidence aligned with the instructions logically cannot do so either. In the absence of a proper objection and request for admonition at trial, Appellants cannot recycle their mistaken objection to the legal standard in this fashion.

VI. THE TRIAL COURT DID NOT INSTRUCT THE JURY ERRONEOUSLY REGARDING RESPONDENTS' EQUAL PROTECTION CLAIMS.

A. Appellants' Failure To Train Faculty And Staff To Fight Harassment Supports Respondents' Equal Protection Claim.

Appellants objected to a portion of a jury instruction concerning the failure of the Appellants properly to train faculty and staff with respect to harassment despite an obvious need for such training. (RT 3679, CT 737-38.) The instruction in question, however, was drawn directly from a controlling federal decision and was absolutely proper.

In *Flores,* the Ninth Circuit held that a failure to train could support a deliberate indifference argument as part of an equal protection claim. The *Flores* plaintiffs sued the defendant school district, administrators and school board members under 42 U.S.C. § 1983, alleging the defendants' response or lack of response denied them equal protection. (*Flores*, *supra*, 324 F.3d at 1132.) The Court of Appeals agreed with the District Court that the plaintiffs had presented evidence sufficient to raise an inference of deliberate indifference as to each of the administrators. (*Id.* at p. 1135.) The Court also concluded the plaintiffs had produced enough evidence that the defendants had failed adequately to train teachers, students and campus monitors about the school district's policies prohibiting harassment based on sexual orientation. (*Id.* at p. 1136.) As is the case here, the district's "training regarding sexual harassment was limited and did not specifically deal with sexual orientation discrimination." (*Id.*) The *Flores* court held that, given the evidence in that case, a jury could conclude that there had been an obvious need for training and that the harassment the plaintiffs faced was a highly predictable consequence of the defendants not providing the training. (*Id.*) The instruction Appellants complain of is drawn directly from the controlling appellate decision in *Flores*, and therefore Appellants' objection lacks merit.

Other decisions have held that a failure to train subordinates properly to prevent harassment can demonstrate deliberate indifference to known acts of

harassment. In *Estate of Amos v. City of Page, Arizona*, the Ninth Circuit again held an equal protection claim could be maintained based on a deliberate indifference theory supported by evidence of inadequate training. (*Estate of Amos v. City of Page, Arizona* (9th Cir. 2001) 257 F.3d 1086.) The issue before the *Estate of Amos* court was whether a deficient police search for a runaway driver involved in a vehicle accident was actionable. (*Id.*) The plaintiff contended the city had violated the Equal Protection Clause by withholding services from Amos because they believed he was a Native American. (*Id.* at pp. 1092-93.) The plaintiff argued, among other things, that the defendant's inadequate police training evidenced a deliberate indifference to his constitutional rights and caused him injury. (*Id.*) The Court held the plaintiff sufficiently argued the city maintained policies that amounted to deliberate indifference and that the policies were the moving force behind the constitutional violation. (*Id.*at 1095.)

The Ninth Circuit clearly has held that a public official's failure to train subordinates to prevent harassment and discrimination can demonstrate deliberate indifference to harassment and discrimination that result. Accordingly, the instruction including "failure to train" as one element among many that might give rise to a finding of "deliberate indifference" to discriminatory harassment was entirely proper.

B. Appellants Fail To Demonstrate A Lack Of Substantial Evidence That Their Deliberate Indifference To Harassment Harmed Respondents.

Appellants suggest that the record is devoid of evidence demonstrating that their failure adequately to train employees directly harmed Respondents. This characterization of the record is both incorrect and irrelevant. The verdict form does not indicate whether or not the jury considered Appellants' failure to train faculty and staff properly when determining that Appellants acted with deliberate indifference to known acts of harassment that caused Respondents great harm. Because the verdict form does not record a specific finding either way concerning

the officials' failure to train their subordinates, there is no way to determine to what degree members of the jury may have based their finding that the officials were deliberately indifferent on the patently inadequate training of Poway High staff about hate language and bullying, or whether they were persuaded entirely by the evidence concerning the other factors they were instructed to consider in making their determination. (CT 778-780.) As discussed in Section IV and VI above, the trial record contained an abundance of evidence supporting the jury's finding that the officials knew of and intentionally disregarded, their students' needs. Accordingly, Appellant's argument about the role a lack of proper training may have played is both without merit and irrelevant to this appeal.

VII. EVEN IF THE TRIAL COURT HAD GIVEN A MISTAKEN INSTRUCTION REGARDING RESPONDENTS' EQUAL PROTECTION CLAIMS, ANY SUCH MISTAKE WOULD HAVE BEEN HARMLESS ERROR.

Appellants propose a novel standard of appellate review by arguing that "the weight of the evidence presented a strong case against a finding of liability, and therefore it is reasonably likely that absent the "failure to train" instruction, the jury would not have found Fisher or Giles liable for violating Plaintiffs' equal protection rights." (Appellant's Opening Brief at p. 69.) The "weight of the evidence," however, has nothing to do with the issues presented in this appeal.

As discussed in Section VII above, a judgment may not be reversed for instructional error in a civil case "unless, after examination of the entire case, including the evidence, the court is of the opinion that the error complained of has resulted in a miscarriage of justice." (*Krotin v. Porsche Cars of N.A* (1995) 38 Cal.App.4th 294, 303-4 [45 Cal.Rptr.2d 10]; Cal. Const., art. VI. § 13.) In determining whether or not the asserted error could be prejudicial, this Court should look to factors including the degree of conflict in the evidence, whether the jury requested a rereading of the challenged instruction or related evidence, whether or not the verdict was close, and the effect of other instructions in remedying the claimed error. (See, Eisenberg et al., Cal. Practice Guide: Civil

Appeals and Writs, *supra*, ¶ 8:300, p. 8-136.) In this instance, the jury did not request that the particular instruction be reread, nor is there any other evidence that the jury focused on the issue of Appellants' failure to train their subordinates properly to intercede and effectively reduce on-campus harassment. The actual instruction, when read in context, contains a lengthy recitation of various facts other than a failure to train that could support a finding that Appellants were liable for violating the Respondents' equal protection rights. Accordingly, the breadth of the eEqual protection instruction would have addressed any error regarding the portion of the instruction regarding a failure to train. Finally, the jury was not closely divided. Ten out of twelve jurors found that Appellant Fisher acted with deliberate indifference to the harassment of Megan Donovan, and nine out of twelve jurors found that both Mr. Fisher and Mr. Giles acted with deliberate indifference to the harassment of Joey Ramelli. (CT 774.) Accordingly, Appellants' arguments are without merit.

VIII. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR A NEW TRIAL.

Following the six-week trial of this matter, Appellants moved for a new trial on the grounds (1) that an employee of their counsel's law firm claimed to have overheard one of the jurors, Carren Lindsay-Dial, commenting to a public bus driver that the jury had awarded damages to Joey and Megan, and that her son did not feel safe at Poway High School, and (2) that another juror had accused Ms. Lindsay-Dial of having commented that Poway High has a problem with white supremacist gangs and of exerting disproportionate influence on the jury's deliberations. (RT 948.) Respondents submitted contrary sworn statements from jurors whose impression was that Ms. Lindsay-Dial had not harbored any preexisting bias against Appellants. (RT 1049-1057.) After holding a hearing on the new trial motion, the superior court denied it. Appellants' argument that the trial court erred, and that the jury's verdict should be reversed and the case retried as a result, mistakes the applicable standard of review and lacks substantive merit.

A. A Trial Court's Findings Regarding Alleged "Juror Misconduct" Are Reviewed for Abuse of Discretion.

Whether to grant a new trial based on allegations of juror misconduct is an issue left to the broad discretion of the trial judge. (*Bell v. State* (1998) 63 Cal.App.4th 919, 930 [74 Cal.Rptr.2d 541].) The rationale for this rule is obvious.

> [T]he trial judge is familiar with the evidence, witnesses and proceedings, and is therefore in the best position to determine whether in view of all the circumstances, justice demands a retrial. Where error on some other ground is established, his discretion in granting a new trial is seldom reversed. The presumptions on appeal are in favor of the order, and the appellate court does not independently redetermine the question whether an error was prejudicial, or some other compelling ground. Review is limited to the inquiry whether there was any support for the trial judge's ruling, and the order will be reversed only on a strong affirmative showing of abuse of discretion.

(8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 139, p. 640.)

Appellants bear the burden of establishing that an abuse of discretion took place. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 [216 Cal.Rptr. 718].) To establish an abuse of discretion, the appellant must demonstrate that the trial court engaged in a "clear case of abuse" resulting in a "miscarriage of justice." (*Blank, supra,* 39 Cal.3d at 331; *Denham v. Super. Ct.* (1970) 2 Cal.3d 557, 566 [86 Cal.Rptr. 65].) The trial court remains within the scope of judicial discretion so long as it avoids "arbitrary determination, capricious disposition or whimsical thinking." (*In re Cortez* (1971) 6 Cal.3d 78, 85 [98 Cal.Rptr. 307].) An abuse of discretion only exists when the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham, supra,* 2 Cal.3d at 566.)

Appellants avoid setting forth the appropriate standard of review by citing solely to cases involving appellate courts that *upheld* lower court findings of juror

misconduct,[7] which do not support Appellants' argument that the lower court's decision here should be *reversed*. Unlike the decisions Appellants cite, the issue before this court whether or not the trial judge abused his discretion by failing to grant a new trial based on Appellants' allegations of juror misconduct. Appellants' authorities actually support Respondents on that point. For example, in *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803 [89 Cal.Rptr.2d 505], a Nigerian man had filed a claim alleging discrimination on the basis of race and national origin. (*Id.* at p. 807.) During the trial, a juror sent a note to the judge informing him that another juror had told the jury she had sought the advice of her spouse on the issue of retaliation. (*Id.* at p. 812.) Exercising its discretion, the trial court excused the juror and substituted an alternate juror, but denied a motion for a new trial. (*Id.* at p. 820.) There was no finding of an abuse of discretion on the part of the trial court. This Court likewise should hold that the trial court here acted well within its broad discretion in denying Appellants' request for a new trial based on disputed speculation about one juror's possible bias.

Similarly, in *Wiley v. Southern Pacific Transportation Co.*, the trial court exercised its discretion and granted a motion for a new trial based on a juror's failure to disclose his prejudice in plaintiff's favor, despite having been asked directly to do so. (*Wiley, supra,* 220 Cal.App.3d 177, 189 [269 Cal.Rptr. 240].) As in *Iwekaogwu*, the Court of Appeals respected that exercise of the lower court's broad discretion and affirmed. (*Id.*) And yet again, in *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98 [95 Cal.Rptr. 516], the Supreme Court held that the trial court's decision to grant a new trial based on allegations of juror misconduct rested squarely within its sound discretion. Because both *Weathers*

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[7] E.g. *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803 [89 Cal.Rptr.2d 505]; *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177 [269 Cal.Rptr. 240]; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98 [95 Cal.Rptr. 516].

and *Wiley* upheld a decision within the discretion of the trial judge, rather than overturning such a decision as Appellants urge here, these cases illustrate proper application of the rule and highlight Appellants' error.

B. The Trial Court Acted Well Within Its Discretion When It Disregarded the Allegations of a Biased Witness Regarding a Conversation She Allegedly Overheard While Seated on a Noisy Public Bus.

Not long ago, this court observed that

> [a]n attorney who prosecutes an appeal from an order addressed to the trial court's sound discretion is confronted with more than a daunting task. This is an uphill battle, which, absent unusual circumstances, may be equated with confederate General John Bell Hood's attempt to capture 'Little Round Top' at the battle of Gettysburg in the Civil War. General Hood did not succeed.

(*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448 [77 Cal.Rptr. 2d 463].) Appellants do not come close to carrying this burden.

Appellants contend that on June 8, 2005 Jennifer McKee, an employee of counsel for Appellants' law firm, overheard a conversation between a juror (later identified as Carren Lindsay-Dial) and the driver on a public bus. (RT 948.) Ms. McKee reported to the trial court that she had been seated some four rows behind the driver. (RT 948.) She did not mention whether or not the bus was crowded, but she admitted that the conversation she allegedly overheard lasted for five to ten minutes. (RT 948.) Since the conversation was described as having lasted so long, it is safe to assume that the bus must have been operating for at least part of it, and that Ms. McKee would have had to eavesdrop over the noise of a moving city bus. Nevertheless, Ms. McKee claimed that she overheard Ms. Lindsay-Dial tell the bus driver that the jury had awarded damages to Joey and Megan and comment that her son did not feel safe at Poway High School after the terrorist attacks of September 11, 2001. (RT 948.) Appellants also submitted a declaration from a juror who claimed that Ms. Lindsay-Dial had "set the tone" for the jury's deliberations and that Ms. Lindsay-Dial had expressed a belief that Poway High

School has a problem due to the presence of white supremacists. Respondents submitted contrary declarations from two other jurors attesting that their experience with Ms. Lindsay-Dial gave no indication that she harbored any preexisting bias against Appellants. (RT 1049-1057.)

Based on the slender reed of conflicting speculation of possible jury bias, Appellants asked the trial court to vacate the verdict reached by nine out of twelve jurors after nearly six weeks of trial and a week of deliberations. (CT 774.) The trial court conducted a hearing on Appellants' motion for a new trial on September 2, 2005. (RT 3913-3997.) The court reviewed the relevant witness declarations, noting "there is no information in the record or otherwise that would suggest that the jury had any substantial disputes between them or that any juror acted in a manner that was other than appropriate for jurors to act, given their respective assignments and the instructions of the court." (RT 3934.) The court ultimately concluded "[t]here is no declaration submitted, nor is there any proof, that indicates that after instructions by the Court, that the jury in any way did not follow the Court's instructions," and further concluded that the declarations did not provide evidence of "conduct which rises to the level that this Court would describe as misconduct by the jury." (RT 3934-3935.) This decision to deny the motion for a new trial after careful consideration of the proffered basis rested well within the sound discretion of the trial court.

Counsel for Respondents have located only one published California decision regarding allegations of juror misconduct that might arguably be remotely similar to the case at bar, *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983 [144 Cal.Rptr.629]. In *Johns* the plaintiffs moved for a new trial in a wrongful death action based on two statements signed by jurors. One statement alleged that a juror had failed to disclose racial bias and had said "I wonder how long these lawyers shopped to get this black Judge." (*Id.* at p. 991.) A second juror filed a statement claiming that she had overheard another statement expressing racial bias. (*Id.*) The remaining jurors filed affidavits claiming that the offending

comments had not been made. (*Id.* at p. 992.) Based on this highly speculative evidence of juror misconduct, the court granted a new trial, but the appellate court reversed, finding that overturning a jury verdict based solely on two contradicted affidavits containing vague allegations of bias was an abuse of discretion on the part of the trial court. (*Id.* at p. 999.)

Johns is instructive for the present matter, in that the trial court here was presented with a statement signed by an obviously non-neutral employee of Appellants' lawyers claiming she had overheard a comment on a public bus suggesting that Ms. Lindsay-Dial's child sometimes felt unsafe at Poway High School. (CT 947-949.) A second statement of concern came from a juror who asserted that Ms. Lindsay-Dial had made an arguably inappropriate comment about white supremacist activity at Poway High School. (CT 944 – 946.) As in *Johns*, those suggestions of bias were disputed by two other jurors who filed sworn statements averring that Ms. Lindsey-Dial had not exerted any disproportionate influence on the jury deliberations and that they had no reason to believe that Ms. Lindsay-Dial harbored any sort of bias. (RT 1049-1057.) When presented with similar vague allegations of possible juror misconduct and contradictory statements, the reviewing court in *Johns* held that it was an abuse of discretion to *grant* a new trial. (*Johns*, *supra,* 17 Cal.App.3d at 999.) Accordingly, it strains logic for Appellants to argue here that the trial court abused its discretion by refusing to grant a new trial. Based on the holding of *Johns*, it would seem that the trial court would arguably have abused its discretion had it granted Appellants' motion. The decision of the trial court to allow the verdict of nine jurors to stand must be affirmed.

IX. THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEYS' FEES UNDER THE PRIVATE ATTORNEY GENERAL STATUTE.

On July 21, 2005, following the entry of judgment in their favor, Respondents/Cross-Appellants Megan Donovan and Joseph Ramelli filed a Motion for Reasonable Attorneys' Fees under both California Code of Civil

Procedure § 1021.5 and 42 U.S.C. § 1988. (RT 807.) The motion for attorneys' fees was fully briefed by the parties and argued on August 18, 2005. The trial court granted attorneys' fees under 42 U.S.C. § 1988, but denied fees under CCP § 1021.5, noting that "[t]his Court is convinced that, although the Complaint had theories of liability or prayers concerning the general treatment of gay and lesbian students, the primary focus of the evidence, verdict and judgment was personal to the plaintiffs such that the Court finds that the analysis of *Flannery v. California Highway Patrol* (Cal.App. 1st Dist.1998) 61 Cal.App.4th 629 [71 Cal.Rptr.2d 632], ought to control in this particular case, and the Court declines to assess this matter as one having implication to CCP section 1021.5." (RT 3897.) Respondents/Cross-Appellants timely filed a Notice of Cross Appeal seeking review of the trial court's denial of fees under CCP § 1021.5. (RT 1122-23.)

The decision whether or not to grant attorneys' fees under CCP §1021.5 is reviewed under an abuse of discretion standard; however "reversal is required where there is no reasonable basis for the ruling or when the trial court applied the wrong test to determine if statutory requirements were satisfied." (*Flannery, supra,* 61 Cal.App.4th at 635.) In this case the trial court applied the wrong legal test by emphasizing that plaintiffs had received a monetary award and no injunctive relief, rather than weighing the magnitude of the public benefit conferred against the private impact of the monetary award. This legal error constitutes an abuse of discretion warranting reversal.

California Code of Civil Procedure § 1021.5 is commonly referred to as the "Private Attorney General Statute." The law's purpose is to encourage private lawsuits that have a broad positive impact on the public at large, particularly where those cases would not or could not be brought without the availability of an attorneys' fee award. "Underlying the private attorney general doctrine is the recognition that privately initiated lawsuits often are essential to effectuate fundamental public policies embodied in constitutional or statutory provisions, and

that without some mechanism authorizing a fee award, such private actions often will as a practical matter be infeasible." (*Flannery, supra,* 61 Cal.App.4th at 635.)

In 1977, the legislature enacted Assembly Bill 1310. (Sen. Com. of Judiciary, Analysis of Assem. Bill No. 1310 (1977-1978 Reg. Sess.) as amended May 18, 1977.) The State Bar of California sponsored the bill "to provide statutory authority for an award of Attorneys' fees in public interest litigation." (*Id.*) The bill's supporters highlighted the need to attract quality legal representation for public interest cases. The director of the Center for Law in the Public Interest, for example, testified that if "attorneys and law firms felt that there was a possibility of getting fees on those successfully litigated cases which confer a substantial benefit on a broad segment of the public, we would be far more successful in getting attorneys to engage in public interest litigation." (Testimony of John R. Phillips to the Sen. Com. of Judiciary on August 16, 1977 in Support of Assem. Bill 1310 (1977-1978 Reg. Sees.), at pp. 7-8; Assem. Final Hist. (1977-1978 Reg. Sess.) p. 833.)

As codified, this rule has three elements: (1) whether the litigation concerns an issue affecting the public interest; (2) whether the litigation has conferred a benefit on the public; and (3) whether the costs and burdens of conducting the litigation deter private enforcement absent the possibility of a fee award. (CCP § 1021.5.) This case manifestly satisfies each of these elements. The trial court denied a fee award, however, based on its mistaken understanding that an award of injunctive relief should accompany any damages award for counsel to be eligible for a fee award. That legal error warrants reversal and remand for reconsideration of counsel's fee request.

A. Respondents/Cross-Appellants Meet Every Element Required For An Award Of Fees Under The California Private Attorney General Statute.

An award of attorneys' fees is appropriate under CCP § 1021.5 if: "(1) plaintiffs' action has resulted in the enforcement of an important right affecting the

public interest; (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate." (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318 [193 Cal.Rptr. 900] [quoting *Woodland Hills*, *supra*, 23 Cal.3d at 935].)

As explained in detail below, Respondents/Cross-Appellants' successful litigation and jury verdict in the trial court meets all three elements of this test. The lawsuit resulted in the enforcement of an important right affecting students throughout California. The suit clarified and illustrated the right of students to have their school administrators protect them from on-campus bias-based harassment, which conferred a significant benefit on a large class of persons. Finally, as the six-week trial evidences all too clearly, the financial burden of private enforcement is large, and certainly heavy enough to warrant fees under the Private Attorney General Statute. Accordingly, the decision of the trial court should be reversed.

1. Respondents/Cross-Appellants' Suit Has Enforced An Important Right Affecting The Public Interest.

Six years after passage of AB 537, there still are no published California decisions clarifying and enforcing the rights of gay and lesbian students under the California Education Code. Joey Ramelli and Megan Donovan brought a factually complex claim requiring nearly six weeks of trial testimony and ultimately resulting in a finding that school administrators failed to act appropriately upon learning that gay and lesbian students at Poway High School were subject to ongoing harassment and discrimination. Successful prosecution of this lawsuit required extensive briefing of novel legal questions, as well as presentation of testimony by numerous percipient witnesses, as well as expert witnesses. It was groundbreaking legally and resulted in the enforcement of an important right affecting the public interest. Accordingly, Respondents/Cross-Appellants are entitled to an award of attorneys' fees under the Private Attorney General Statute.

Courts have stressed the role of the Private Attorney General Statute to facilitate useful litigation to clarify and enforce existing statutes and constitutional provisions. In *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078 [240 Cal.Rptr. 569], the court determined an award of attorneys' fees under the private attorney general statute was appropriate in a case "conferring a 'significant benefit' on the general public in clarifying the extent of the Governor's veto power" under the California Constitution. (*Id.* at 1103.) In *Wilkerson v. City of Placentia* (1981) 118 Cal.App.3d 435 [173 Cal.Rptr. 294], the court approved upholding an award of attorneys' fees under the statute when "clarification and expansion of the law ... is what is at the heart of [the] case." (*Id.* at pp. 444-445.)

The case at hand appears to have involved the first successful trial of a discrimination claim of any sort filed under § 200 *et seq.* of the California Education Code, and it was a lengthy and successful one. It also appears to be the first successful action demonstrating through an extensive trial and jury verdict that peer harassment of gay and lesbian students can result in liability under California law on the part of school officials who fail to take adequate steps to prohibit such harassment. The trial court held, for the first time, that students enjoy protection against bias-motivated bullying and abuse under California law that is superior to the limited protection offered by federal law. The action being reviewed by this Court is groundbreaking in every sense of the word. Because the statutory provisions were untested, determining proper legal standards required sophisticated briefing; and because many people are unaware of the challenges faced by lesbian and gay students, proving plaintiffs' damages required extensive witness testimony and education of the jury. The court's instructions and jury verdict have helped in meaningful ways to clarify the law in California and have resulted in the enforcement of an important right, supporting an award of attorneys' fees.

The private attorney general doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the

fundamental public policies embodied in constitutional or statutory provisions." (*Woodland Hills, supra,* 23 Cal.3d at 933; see also *Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 545 [207 Cal.Rptr. 705].) Furthermore, courts have ruled that attorneys' fees under the statute are appropriate even when *no* judicial relief is granted, under the "catalyst theory," which "authoriz[es] an award of attorneys' fees when a plaintiff's suit is a catalyst to defendants' changed behavior, is an application of the principle 'that courts look to the practical impact of the public interest litigation in order to determine whether the party was successful, and therefore potentially eligible for attorney fees.'" (*Godinez v. Schwarzenegger*, (2005) 132 Cal.App.4th 73, 89 [33 Cal.Rptr.3d 270], citing *Graham, supra*, 34 Cal. 4th at 566.)

This action clearly vindicates an important right shared by a significant number of students in California's schools. As the first decision interpreting and enforcing the anti-harassment protections adopted based on the demonstrated needs of gay and lesbian students in the state's schools, the case breaks new ground and serves as an important catalyst for safer schools throughout California in the future by clarifying school officials' obligations to take immediate and appropriate corrective action when they know or should know about on-campus peer harassment. Consistently with the express purpose of the Education Code's anti-discrimination provisions, this action encourages school administrators across the state to employ proactive measures to prevent harassment in the hallways. The verdict in this action did more than provide some compensation for two harassment victims. In the best tradition of public interest litigation, it sent a clarion message to schools across California about the primacy of student safety and responsible bias-reduction measures. Accordingly, this suit has resulted in the enforcement of an important right affecting the public interest.

2. The Decision Below Has Conferred A Significant Benefit On A Large Class of Persons, And The Court Abused Its Discretion By Ignoring The Scope Of That Benefit In Denying An Award Of Fees Under The Private Attorney General Statute.

As acknowledged in the official journal of the American Academy of Pediatrics, "gay lesbian and bisexual adolescents face tremendous challenges growing up physically and mentally healthy in a culture that is often unaccepting." (Garafolo, et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, Pediatrics, Vol. 101, No. 5 (May 1998) p. 895.) Scientific surveys have determined that forty-five percent of gay men and twenty percent of lesbians were victims of bullying and verbal assaults in secondary schools. (*Id.)* Moreover, a majority of school counselors surveyed agreed that students often degrade other students whom they perceive as gay or lesbian, and over two-thirds of the counselors strongly agreed that gay or lesbian students are more likely to feel isolated and rejected. (*Id.*) One survey ascertained that twenty-eight percent of gay and lesbian students eventually drop out of school due to discomfort and fear. (*Id.* at p. 896.)

Gay and lesbian students face ongoing challenges in California's schools. Indeed, it is no exaggeration to say that the harassment of gay and lesbian students is at epidemic proportions in California. There are just over three million students in grades 7 – 12 in California's schools. (Cal. Dept. of Education, *California Statewide Enrollment Report 2005-2006* (2006) <http://dq.cde.ca.gov/dataq uest/State Enr.asp?cChoic e=StEnrGrd&cYear=2005-06&cLevel=State&c Topic=Enrollment&myTimeFram e=S&submit1=Submit > [as of October 26, 2006].) In the 2001-2002 California Healthy Kids Survey, more than seven percent of the 237,544 students surveyed reported having been harassed or bullied because they are or were perceived to be gay or lesbian. (California Safe Schools Coalition, et al., *Safe Place to Learn Report* (January 2004) p. 6 <http://www.ca safeschools.org/tools.html#training tools> [as of October 30, 2006].) Translating

the results of this large survey to California's total middle school and high school enrollment, well over 200,000 students are the targets of harassment based on actual or perceived sexual orientation every year. (*Id.*)

Harassment of students based on sexual orientation cuts across all demographic groups in California. African-American, White, American Indian/Alaska Native and Native Hawaiian/other Pacific Islander students reported slightly higher rates of harassment than average, while Latino and Asian American students reported slightly lower rates of harassment. (*Id.* at p. 6.) The fact that anti-gay harassment is not confined to any one racial or ethnic subgroup of California's students further underscores the importance of this case to a large group of students across the state.

The harm caused by harassment extends beyond the fear and pain its victims experience. Harassment also has real, measurable negative impact on academic performance and mental health. Throughout California, children suffer due to preventable in-school, bias-motivated peer harassment. Harassed students in California tend to get lower grades. (*Id.* at p. 8.) Harassed students also report serious symptoms of depression twice as frequently as non-harassed students. (*Id.*) California students harassed on the basis of sexual orientation are more than three times as likely as non-harassed students to miss school because they feel unsafe. (*Id.*) Students who are harassed based on their actual or perceived sexual orientation are also three times more likely than other students to consider suicide seriously. (*Id.* at p. 9.) Furthermore, analysis of the California Healthy Kids Survey reveals that youth who are harassed based on their actual or perceived sexual orientation suffer more severe harms than those who are harassed for reasons unrelated to bias. (*Id.* at p. 11.)

The problem of anti-gay harassment in schools is as widespread as it is severe. Gay and lesbian students are significantly less likely to report feeling safe at school than their heterosexual peers. (*Id.* at p. 13.) *Nearly half* of the students surveyed in California report that it was "not at all true" or only "a little true" that

their schools were safe for gay and lesbian students. (*Id.* [46% so responded].) Ninety-one percent of California students surveyed reported hearing other students make negative remarks based on sexual orientation at school. (*Id.* at p. 14.) Finally, two out of three gay, lesbian, bisexual or transgender students reported having been personally harassed or bullied at school. (*Id.* at p. 13.) Both the breadth and the severity of the problem of anti-gay peer harassment in California's schools demonstrate that groundbreaking litigation to enforce the Education Code's requirements that school officials take prompt and appropriate action to stop such harassment does, beyond any reasonable dispute, confer a benefit on a large group of California's children.[8]

As the facts of this case illustrated vividly, school officials sometimes respond anemically and ineffectually to reports of harassment of gay and lesbian students. When students reported anti-gay harassment to school officials, fewer than half of the students said that the actions taken by school authorities in response to the report was effective. (*Id.* at p. 37) Nearly six percent of

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[8] Findings across the United States echo the California findings. Nationwide, nearly eight out of ten students reported hearing anti-gay language at school "often" or "frequently." (GLSEN, *The 2005 National School Climate Survey*, *supra*, at p. 14.) Nearly one-fifth of students heard teachers or staff members making anti-gay remarks. (*Id.* at p. 15.) Nearly two-thirds of gay and lesbian students reported that they felt unsafe at school because of their sexual orientation. (*Id.* at p. 22.) A clear majority of gay and lesbian students reported having been verbally harassed due to their sexual orientation. (*Id.* at p. 24.) Over ten percent of gay and lesbian students report being physically harassed at school "frequently" or "often," while an additional twenty-five percent reported at least some level of physical harassment. (*Id.* at pp. 24, 26.) Nearly one-fifth of these students reported physical harassment so severe that it involved being punched, kicked or injured with a weapon. (*Id.* at p. 24.) As is the case in California, harassment of gay and lesbian students nationally has negative consequences both in terms of academic performance and mental health. Students who had been verbally or physically harassed due to their sexual orientation were almost three times more likely to miss school than other students because of feeling unsafe. (*Id.* at p. 28.) Harassment of gay and lesbian students leads to decreased academic achievement and lower interest in attending college. (*Id.* at pp. 46-47.)

harassment victims reported that school administrators blamed them for the harassment, often arguing that the students had brought the harassment upon themselves because they were gay or lesbian. (*Id.* at p. 38.) Against this chilling backdrop, the important benefit conferred on a large group of people by this case is impossible to ignore. Accordingly, the trial court erred in failing to grant Respondents/Cross-Appellants' an award of fees under the Private Attorney General Statute.

3. The Financial Burden Of Private Enforcement In This Action Makes An Award Of Fees Appropriate.

Because this action is the first to assert the rights of California's students under § 220 *et seq.* of the Education Code, the risks and challenges accompanying the prosecution of this action were unique. Trial counsel brought this action despite the fact that there were no published California decisions clarifying the law governing the anti-discrimination provisions of the Education Code. The Clerk's transcript contains over a thousand pages of pleadings, motions, legal memoranda and orders. The trial lasted nearly six weeks. Counsel for Respondents/Cross-Appellants worked for 1,550.85 hours to bring this matter to a successful resolution. (CT 926.) Even after winning a substantial verdict at trial, counsel for Respondents/Cross-Appellants would receive only $64 per hour for their work if their recovery were limited to a standard contingency fee of thirty-three percent. Sixty-four dollars an hour is not a sufficient financial incentive to make it feasible for attorneys to file difficult, factually intensive cases to protect the rights of gay and lesbian students who have been subjected to harassment in California's schools, particularly when counsel faces the risk of losing and recovering absolutely nothing. If, as is the case here, a successful action generates only a minimal hourly fee, attorneys simply will be unable to afford the financial sacrifices required to bring cases like this one to trial. Because the financial burden of bringing cases similar to this one makes an award of fees under the

Private Attorney General Statute essential and entirely appropriate, the trial court abused its discretion in failing to grant such fees.

B. An Award of Injunctive Relief Is Not A Prerequisite For Attorneys' Fees Under The California Private Attorney General Statute.

The trial court appears to have placed an improper emphasis on the fact that Respondents/Cross-Appellants did not obtain any injunctive relief (RT 3897), contrasting its decision with the ruling in *Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075 [241 Cal.Rptr. 239]), in which the court reversed a trial court decision denying an award of fees under the Private Attorney General Statute for a patient who had succeeded in obtaining a court order mandating removal of a feeding tube. Neither *Bouvia* nor any other California decision has, however, ever held that an award granting injunctive relief is required for an award of fees under the statute.

In determining if injunctive relief is required for a court to grant attorneys' fees under the statute, one first should turn to the statutory criteria. The statute makes no mention of a need for declaratory or injunctive relief, or any other particular type of final judgment, but merely states, "A court may award attorneys' fees to a *successful party* against one or more opposing parties" (emphasis added). Cal. Code Civ. Proc. § 1021.5. The California Supreme Court has taken "a broad, pragmatic view of what constitutes a 'successful party.' Our prior cases uniformly explain that an attorney fee award may be justified even when plaintiff's legal action does not result in a favorable final judgment." (*Graham v. Daimler Chrysler Corp.* (2004) 34 Cal. 4th 553, 565-566 [21 Cal.Rptr.3d 331].) Thus, even a party who fails to obtain a favorable judgment may be awarded attorneys' fees if the court deems it appropriate.

In this action, Respondents/Cross-Appellants plainly were "successful parties" because they obtained an award of damages and a jury finding that Appellants had acted with "deliberate indifference" to reports of harassment and

discrimination against gay and lesbian students. Furthermore, in cases that arrive at a final judgment, such as this one, the Supreme Court has declined to impose a requirement of a specific form of relief in order for the statute to apply: "How the party achieves the goal of enforcing the right in question is not determinative of the right to an award of attorneys' fees under § 1021.5. The impact of the litigation is." (*In re Head* (1986) 42 Cal.3d 223, 228-22 [228 Cal.Rptr. 184].)

Trial court clearly erred in overemphasizing the pecuniary benefit to Respondents/Cross-Appellants, while minimizing the breadth and importance of the public benefit conferred, making the decision to deny fees an abuse of discretion. A failure to reverse the decision of the trial court would have the absurd effect of approving a rule that parties are entitled to fees under § 1021.5 if counsel fails to prove compensable damages and if the issue was of little importance to plaintiff. Under such reasoning, anyone receiving a gratifying benefit from litigation would be precluded from obtaining fees under § 1021.5, no matter how many other people benefited similarly and no matter to what degree others benefit. Such a rule seemingly could preclude attorneys' fees in the range of cases that obtain important public benefits by clarifying applicable law – such as preventing large-scale environmental harms, deterring discrimination, or improving health care options for at-risk populations – whenever the plaintiff receives some form of monetary award. The courts consistently have recognized the public value of litigation that achieves such salutary ends, however, as well as the propriety of compensating attorneys who have assumed the financial burdens of conducting such litigation in the public interest. (See *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 935 [154 Cal.Rptr. 503]; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311 [193 Cal.Rptr. 900]; *Phipps v. Saddleback Valley Unified School District* (1988) 204 Cal.App.3d 1110 [251 Cal.Rptr. 720].)

As set forth above, Respondents/Cross Appellants have vindicated an important right that affects thousands of students across California, and their

successful suit is likely to inspire more robust preventive measures to stop harassment in schools throughout the state. This constitutes a critical public benefit far outweighing any individual pecuniary interest to Respondents/Cross-Appellants. According, the trial court abused its discretion by applying an incorrect legal rule and failing to grant an award of fees under the Private Attorney General Statute.

CONCLUSION

Appellants have failed to demonstrate any error of law or insufficiency of evidence that would justify a reversal of the jury verdict in favor of Respondents. The trial court was correct in interpreting the California Safe Schools Act consistently with California's other anti-discrimination statutes, rather than applying the less protective "deliberate indifference" standard employed under Title IX. Furthermore, even if "deliberate indifference" were the correct standard, the jury found Appellants indeed acted with deliberate indifference to the harassment of Respondents and that finding was supported by substantial evidence in the lengthy trial record. Furthermore, the trial court acted well within its discretion in denying Appellants' request for a new trial based solely upon questionable testimony from a single biased witness and contradicted speculation from one juror. The only actual error below was the trial court's failure to grant Respondents' request for an award of fees under the private attorney general doctrine.

For all the foregoing reasons, Respondents/Cross-Appellants respectfully request this Court affirm the judgment entered by the trial-court, and reverse the order of the trial court denying fees under California Code of Civil Procedure § 1021.5

Dated: November 21, 2006.

Respectfully submitted,

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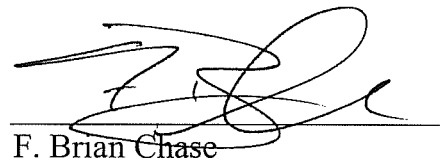
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, I hereby certify that, excluding tables and this certificate, but including footnotes, the foregoing brief contains 31,170 words, based on the computer program used to prepare the brief.

Dated: November 21, 2006

By: 

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

I, Tito Gomez, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On November 21, 2006, I served a copy of the attached document, described as **COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF,** by overnight delivery, on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:

George E. Murphy Suzanne M. Nicholson Farmer, Murphy, Smith & Alliston 3640 American River Drive Suite 150 Sacramento, CA 95864 *Attorneys for Appellants* Clerk of the Court California Supreme Court 350 McAllister Street San Francisco, CA 94102	Daniel R. Shinoff Jeffery A Morris Paul V. Carelli, IV Stutz, Atriano, Shinoff & Holtz 401 West "A" Street 15th Floor San Diego, CA 92101 *Attorneys for Appellants*	Clerk of the Court c/o The Honorable Steven R. Denton San Diego County Superior Court 330 West Broadway San Diego, CA 92101

I am readily familiar with the office's practice of collecting and processing correspondence for mailing and overnight delivery. Under that practice, this correspondence would be deposited with the overnight carrier on that same day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date is more than one day after the date of deposit for mailing stated in this affidavit.

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

Dated: November 21, 2006

Tito Gomez