



School Business Law Update

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A (BAD) DAY IN THE LIFE OF A SCHOOL ADMINISTRATOR

The “sexual orientation harassment” case of *Donovan v. Poway Unified School District* went badly against the school district, a high school principal, and one of the vice principals. An award of \$175,000 was made in favor of student Joseph Ramelli and \$125,000 to student Megan Donovan. In addition, the judgment included an award of attorney’s fees to the students for another \$421,357 and costs in the amount of \$29,040.68.

This case serves as a reminder that school districts and also individual school officials may be held liable for the perpetration of peer sexual orientation harassment - that is the harassment of a homosexual student by heterosexual students - even though neither the school nor school officials were directly engaged in the acts of harassment. Liability in the *Donovan* case followed an insufficient response by school officials to allegations of sexual orientation harassment. It should now be clear that an unacceptable level of exposure to liability will always follow an insufficient response by school officials to any complaints of student-on-student gender, gender identity, sexual orientation, racial, ethnic, religious, nationality or disability-based harassment.

Interestingly, in another important case, *Harper v. Poway Unified School District*, the same school district had to defend the same administrators who acted to protect gay students, including the complaining students in the *Donovan* case, from having to endure the anti-gay sentiment, including a bible passage, worn on a t-shirt by a fellow student named Tyler.

The *Harper* case arose during the same general time frame as the *Donovan* case. In the *Harper* case, Tyler, a devout Christian, had worn a t-shirt containing statements which condemned homosexuality. One of the statements was a passage from the Bible (Romans 1:27). He wore the t-shirt on a day designated to teach tolerance of others, including those with a different sexual orientation. He wore a similar t-shirt on the following day as well. The t-shirts expressed his sincerely held religious belief that homosexuality is immoral, and it also served to protest against a school policy which, as he perceived it, endorsed, encouraged, subsidized and promoted homosexual activity.

When asked to remove the t-shirt, Tyler politely refused and calmly demanded to be suspended from school. Instead, Tyler was required to remain in the school office while wearing the t-shirt and instructed not to leave without an escort. The school declined to suspend him or impose any formal student discipline whatsoever. Nevertheless, the Alliance Defense Fund was quick to sue the school district on

Tyler's behalf. However, as a result of the judicious action by the same school administrators in the *Donovan* case, the Poway Unified School District prevailed in the *Harper* case. If they had suspended Tyler, however, they may not have prevailed.

FACTS OF THE *DONOVAN* CASE

Joseph, Megan and Tyler were all Poway High School (PHS) students during the pertinent time frame, and all three are now PHS graduates. Three thousand other students were attending PHS as well. Also, the school was, unfortunately, struggling with a rash of hateful, and sometimes violent, incidents perpetrated against gay students. Preventative measures included a written policy expressly prohibiting sexual orientation based harassment. Additionally, the faculty was provided training directed at responding to anti-gay language casually being used by students who may not appreciate the hurtfulness of their comments. Also, at the beginning of the school year, the principal and a team of administrators visited each class room and spent 30-45 minutes discussing the student code of conduct, unacceptable behavior and, specifically, the use of derogatory language directed at gays. The school was even sponsoring an official event called the "Day of Silence" which is designed to call attention to violence experienced by the gay population and teach tolerance for those with a different sexual orientation. In reaction, interestingly, a group of heterosexual students organized an unofficial event called "Straight Pride Day" designed to compete with the school's "Day of Silence."

Despite the school's preventative measures, throughout their freshmen and sophomore years, students Joseph Ramelli and Megan Donovan were either the target of, or personally witnessed, multiple anti-gay motivated acts of harassment, threats and assaults perpetrated by students during the school day. At the start of the first semester of their junior year, they each began to maintain a log documenting their observations. According to Joseph, he and others were harassed, threatened or assaulted nearly every day during his junior year. He was tripped, shoved into lockers, threatening notes were placed on his car, his car was vandalized, liquids and food were thrown at him, he was physically threatened by groups of students, and regularly subjected to anti-gay slurs.

At the end of March during the second semester, the students, along with their parents, presented their logs to school officials along with written complaints alleging pervasive and continuing anti-gay harassment. Apparently, however, the information they provided lacked specificity. Nevertheless, school officials promised to follow up with an investigation. Unfortunately, the students and parents were not asked for more detailed information and no effort was otherwise made to investigate the allegations. Instead, they were told to report any future misconduct directly to the discipline office as quickly as possible after the event. Rightly or wrongly, 10 out of 12 jurors were thoroughly unimpressed by this response and an adverse judgment resulted.

GUIDANCE GLEANED FROM THE POWAY UNIFIED SCHOOL DISTRICT CASES

The following guiding principles may be gleaned from the *Donovan* and *Harper* cases:

1. The anti-harassment and anti-discrimination provisions in Division 1, Chapter 2, of the Education Code require school officials to act urgently and to take affirmative and robust steps to stem racism, sexism, and intolerance based on gender, gender identity, sexual orientation, religious beliefs, nationality or disability.
2. As a general rule, in a school setting, a student's right to express his or her sincerely held personal religious or political beliefs is subordinate to preventing individual students from being subjected to an act of intolerance or harassment on the bases of their gender, gender identity, sexual orientation, racial, ethnic, religious, nationality or disability.
3. Each district should have a policy against harassment in place and a process for training administrators and teachers in harassment prevention.
4. Districts should follow district policies, such as the uniform complaint procedure, when addressing complaints of harassment or discrimination. This includes conducting an appropriate investigation of harassment complaints.

If you are presented with a circumstance in which the expression of a bona fide religious or political belief is also the bases for a charge of harassment, please contact me or the other members of our Business Practice Group for guidance.

If you have any concerns regarding the sufficiency of a response to an allegation of discrimination or harassment, please give us a call as well.

— Alan B. Harris

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