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January 11, 2011

The Honorable Charlie Rose
General Counsel
United States Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202

Dear Charlie:

I am writing this letter to express my concern over the National School Boards Association's ("NSBA") Response Letter of December 7, 2010 addressed to you and the Department of Education ("DOE") regarding the Department's "Dear Colleague" Letter ("DCL") of October 26, 2010. The purpose of NSBA's letter is limited to their concern for school boards' exposure to liability and does not regard the safety concerns of students who are the victims of bullying and harassment.

Bullying and student-on-student harassment is a pervasive problem in the U.S. and has reached schoolchildren of all ages, genders, and races. According to an Associated Press report in *Education Week*, a study was conducted by the Josephson Institute of Ethics of 43,000 high school students, in which 43% of students reported being bullied in the past year and 50% reported bullying someone else.[1] In that same article's Editor's Note, another survey conducted by the Olweus Bullying Prevention Program reported that 17% of boy and girl students report being bullied two to three times a month or more within a school semester.[2] Schools are in a unique position to protect the lives of these young victims. School officials have a "comprehensive authority…, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[3] The Supreme Court has in the past recognized "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[4]

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1 Associated Press (AP). *Education Week*. "New study reports 50% of high school students admit to bullying in the past year." (October 27, 2010).

2 *Id.*

3 *Davis v. Monroe County Board of Education*, 526 U.S. 629, 646 (1999) (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969)).

4 *Veronia School District 47J v. Acton*, 515 U.S. 646, 655 (1995). *See also New Jersey v. T.L.O.*, 469 U.S. 325, 342, n. 9 (1985) ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities.").

The DCL aims to inform schools that some student misconduct, regarded as bullying, which goes unaddressed may put schools in violation of federal anti-discrimination laws.[5] In NSBA's Response Letter, Mr. Francisco Negron, Jr., General Counsel for NSBA, relies heavily on the *Davis v. Monroe County Board of Education*, a U.S. Supreme Court case that primarily regards the issue of private damages actions and school liability.[6] In addition, Mr. Negron repeatedly states that disciplinary actions and procedures to deal with harassment and bullying in schools should be left to the deference of educators; this has not always served as a successful methodology.

The Supreme Court in *Davis* addressed the issue of whether private damages action could lie against a school board in instances of student-on-student harassment.[7] The Supreme Court concluded that private damages actions may be brought against a school board, i.e. "funding recipient", when it acts with "deliberate indifference" to known acts of harassment in its programs or activities, and only for harassment that is so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[8] While these standards are still considered good law, the *Davis* case defined standards by which it would be determined whether a school board will be held liable for private damages in instances of student-on-student harassment and <u>not</u> standards by which a school and its administrators should address bullying and harassment.[9] Greater emphasis must be placed on the needs and safety of those bullied. In the face of widespread bullying and student-on-student harassment, Mr. Negron's reliance solely on *Davis* to define the method by which schools should address the victimization of students is limited.

While Mr. Negron claims that the DCL broadens school district's obligations to recognize and respond to harassment and states that that the DCL deviates from *Davis* regarding the "actual knowledge" standard, the DCL correctly stated a recognized standard for notice in instances of student-on-student harassment in schools.[10] In January 2001, after both the *Davis* and *Gebser v. Lago Vista Independent School District* cases had been decided, the Office of Civil Rights ("OCR") published a Guidance that specifically stated

> [I]f a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school <u>*knows or reasonably should*</u>

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5 Letter from Russlynn Ali, U.S. Dep't of Educ. Assistant Secretary for Civil Rights to Colleagues: Harassment and Bullying at 2 (Oct. 26, 2010) (hereafter "DCL").

6 Letter from Francisco M. Negron, Jr., National School Board's Association General Counsel to Mr. Charlie Rose at 2 (December 7, 2010) (hereinafter "Response Letter").

7 *Supra* note 3, at 633. *See also Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998).

8 *Id.*

9 *See supra* note 3, at 644 (stating that "Deliberate indifference makes sense as a <u>*theory of direct liability under Title IX*</u> only where the funding recipient has some control over the alleged harassment.") (Emphasis added.)

10 *Supra* note 5, at 2.

> *know* about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.[11]

In addition, the Court in *Davis* draws on a publication by the National School Boards Association Council of School Attorneys, entitled "Sexual Harassment in the Schools: Preventing and Defending Against Clams", and cites that in that publication, NSBA informed districts that "if [a] school district has *constructive notice* of severe and repeated acts of sexual harassment by fellow students, that may form the basis of a [T]itle IX claim."[12]

Furthermore, in an August 2006 NSBA publication, *Leadership Insider*, Kim Croyle, a member of NSBA's Council of School Attorneys, like Mr. Negron, writes an article that seems to take a much more proactive stance to harassment and bullying in schools, and one not so focused on school liability. In her article, Ms. Croyle states that conduct that gives rise to damages "must be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."[13] She also lists ways that school leaders, "board members and administrators alike", can prevent harassment in their schools, including by holding school administrators accountable.[14] Quoting from the 10th Circuit in *Bryant v. ISD No. I-38* (2003), Ms. Croyle writes

> School administrators are not simply bystanders in the school. They are leaders of the educational environment. They set the standards for behavior. They mete out discipline and consequences. They provide the system and rules by which students are expected to follow… [W]hen school administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable.

Ms. Croyle goes on to share how bullying and harassment complaints should be addressed by schools, urging that "*[e]very complaint* must be investigated – never allow one to be ignored simply because it does not 'seem' credible," and that schools employees should be required "to report all alleged incidents of harassment or violence

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11 Office of Civil Rights' article: *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 12 (January 19, 2001) ("Sexual Harassment Guidance), available at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html. (Emphasis added.)

12 *Supra* note 3, at 647.

13 Kim Croyle. *Leadership Insider*. "Maintaining Respectful Schools; What your school board needs to know about preventing and responding to harassment and bullying," at 2 (August 2006). Article may be found at www.nsba.org/na.

14 *Id.*

that they observe *within 24 hours*."[15] Similarly, the CDL states that "When responding to harassment, a school must take *immediate and appropriate action* to investigate or otherwise determine what occurred."[16] However, Mr. Negron argues in the Response Letter that a school must only address "peer-harassment in a manner that is not clearly unreasonable," pursuant to *Davis*. This is a much more lax attitude towards bullying, and is only the case where a school is solely concerned about liability and not the safety of students. The "not clearly unreasonable" standard is an extremely low standard for a school to meet, and while a school that reacts to harassment or bullying in a "not clearly unreasonable" way may keep itself from paying private damages, it is unlikely that this standard will assist in the prevention of bullying and student-on-student harassment.

In the end, Mr. Negron requests a clarifying document that would "provide accurate legal standards regarding school official's responsibilities with respect to harassment, noting that courts have recognized the *Davis* deliberate indifference standard."[17] While it is true that the "deliberate indifference" standard exists as a standard to determine whether a school might be held liable for private damages, it does not mean that this is the sole standard by which schools should address bullying and harassment. Mr. Negron seems to want to send the message that as long as a school is not "deliberately indifferent" to a complaint of bullying or harassment, the school has met its obligation. This is not the case. While a school may not be held liable for private damages if they were not deliberately indifferent to claims of bullying and harassment, the safety of the student-victims needs to be of greater concern to schools boards, administrators, and leaders.

I know that Mr. Negron was representing his membership in the National School Boards Association when he concentrated exclusively on Davis. If you were still at Franczek and Sullivan, of course you would do the same. However, you are now at the U.S. Department of Education. You and Arnie Duncan represent students, including the victims of the ever increasing acts of bullying and harassment that have been well documented across the nation. Your office did exactly the right thing in issuing the Dear Colleague letter: advise school districts that they have to do more than what they are doing now. What school districts are doing now generally has not been working. The Dear Colleague letter is an important first step and must remain in place. We are talking about more than liability here; we are talking about the lives of children permanently scarred as a result of the clearly accelerating problem of harassment and bullying in our nation.

Sincerely,

Brooke R. Whitted

15 *Id.* at 3.
16 *Supra* note 5, at 2.
17 *Supra* note 6, at 10.