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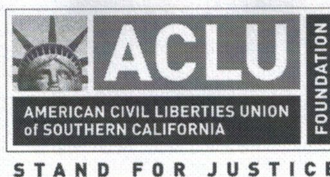

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March 17, 2015

Dr. Jeffrey L. Baarstad, Superintendent
Betsy Connolly, Board President
Patricia H. Phelps, Board Vice President
Mike Dunn, Board Clerk
Peggy Buckles, Board Member
John Andersen, Board Member
Conejo Valley Unified School District
1400 E. Janss Rd.
Thousand Oaks, CA 91362
VIA EMAIL AND FACSIMILE DELIVERY

Re: *Panther Prowler* student newspaper at Newbury Park High School

Dear Superintendent Baarstad and Board Members:

We write on behalf of the Student Press Law Center ("SPLC"), a national nonprofit organization dedicated to educating high school and college students about the First Amendment and supporting students in opposing censorship, and the American Civil Liberties Union Southern California Chapter ("ACLU-SC"), in response to reports that the Board is being asked to consider punitive action motivated by editorial content in the February 27, 2015, edition of the *Panther Prowler* newsmagazine published by students at Newbury Park High School.

Any adverse action taken against the *Panther Prowler* newsmagazine, its student staff, its faculty adviser or the journalism program itself in retaliation for the legally protected decision to publish the material contained in the Feb. 27 edition of the newspaper would violate the First Amendment to the Constitution, Article 1 of the California Constitution, and California Education Code Section 48907. Any advice you are receiving to the contrary is incorrect with respect to the facts, the law, or both.

You received accurate advice from the District's legal counsel prior to publication of the *Prowler* indicating that students in California public schools have the right to publish, in consultation with their journalism adviser, the lawful editorial content of their choice, subject to a few statutory exclusions inapplicable to this situation. The law is as clear as it was a month ago, and there is no justification for retreating from the District's commendable support for the student staff of the *Prowler*, whose work has been repeatedly recognized for its excellence by the National Scholastic Press Association. It was disappointing to read Superintendent Baarstad and Principal Eby's quotes in the *Thousand Oaks Acorn* to the effect that they regret having honored their legal obligations and failed to "protect" audience members from the content of the *Prowler*. We hope that the District has not lost sight of the bigger picture that constitutional rights, and statutory rights designed by the California Legislature, exist not to protect individuals from reading speech they find offensive, but to protect those voicing controversial views on important social and political issues from being intimidated into silence by their government.

We have reviewed the March 3 letter sent by a group identifying themselves as "concerned parents" that appears to be provoking the District into interjecting itself into a matter of student editorial judgment. That letter makes numerous mistaken claims about the First Amendment, the state law protecting student newspapers from censorship, and state law governing the sex education curriculum. We were also disappointed that the authors of the letter made baseless personal attacks leveled by not-at-all-clever insinuation, posing fictitious "hypotheticals" such as: "Did some journalism students who promoted and wrote the article intimidate other journalism students?"

While much of the purported legal analysis in the letter is clearly wrong, we will not engage in a point-by-point rebuttal. However, we note briefly some of the most obvious mistakes in the letter.

(1) The letter misapplies the Supreme Court's *Hazelwood School District v. Kuhlmeier* case – a case that is in any event a dead letter in California as a result of the existence of California Education Code Section 48907 – to suggest that a student news publication can be confused with, and subjected to the same legal requirements as, an official school text. A student news publication is "curricular" only in the sense that it is a part of the journalism curriculum for those participating as a graded class exercise, and certainly not in the sense that the students' editorial product is "curricular" for those reading it. It would be exceedingly strange for a school to assign "curriculum" that is produced and distributed on a schedule determined by students, that recipients are free to ignore without academic consequence or even to discard. Since schools have plenary authority over the content of *actual* curriculum – authority that students are powerless to override – categorizing a student-produced magazine as "curriculum" would read the First Amendment and Section 48907 entirely out of existence. By the standards set forth in the March 3 letter, student journalists could not discuss smoking, drinking, drugs, violence, bullying, or any other activity that, while illegal, is widespread among young people. The Ninth Circuit U.S. Court of Appeals, which makes legal precedent for the state of California, has stated in no uncertain terms that viewpoint discrimination is illegal in public schools in <u>any</u> setting, even a "curricular" one. *See Nurre v. Whitehead*, 580 F.3d 1087, 1095 n.6 (9th Cir. 2009) (stating, in case involving religious music to be played at graduation ceremony, that "viewpoint discrimination … would be impermissible no matter the forum") (*citing Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819 (1995)).

(2) The letter also mistakenly asserts that the paper could be considered part of the school's sex education curriculum and thus its distribution violated the statutory notice and opt provisions of state law. School districts do have an obligation to notify parents, typically at the beginning of the school year, that students will be receiving comprehensive sexual health and HIV/AIDS prevention education. Cal. Ed. Code § 51938(a). The notice must advise parents that the educational materials are available for review, whether the instruction will be provided by school district personnel or by outside consultants, and that parents can make a written request to opt their child out of this instruction. Cal. Ed. Code § 51938(a)(1)-(4).

However, publication of the article did not violate these requirements. The parental notification and opt-out requirements are limited to traditional curricular instruction, provided by trained

teachers or outside consultants. See, e.g., Cal. Ed. Code § 51933(a) (school districts may provide comprehensive sexual health education "using instructors trained in the appropriate courses."); Cal. Ed. Code § 51933(b) (listing criteria sexual health education must meet "whether taught by school district personnel or outside consultants"); Cal. Ed. Code § 51938(a)-(b) (districts must provide notice "about instruction" in comprehensive sexual health education and "whether [it] will be taught by school district personnel or by outside consultants"); see also California Dept. of Education, Parental Notification and Consent, at http://www.cde.ca.gov/ls/he/se/parentnotice.asp (describing the notice required before schools provide "instruction" in sexual health education or HIV/AIDS prevention). The statute in no way contemplates that a student-initiated and student-written newspaper article is part of the districts sexual health education instruction at all, let alone subject to the statue's parental notice and opt-out requirements.

(3) The letter grossly distorts the Supreme Court's *Miller* obscenity test, failing to acknowledge that the courts have never held that the journalistic discussion of issues of public concern can be deemed "obscene" simply because it involves descriptions and imagery of sex. To be obscene under *Miller*, a work must – as a whole, and not deconstructed into its component parts – appeal to a "prurient" interest in sex and lack any redeeming merit, a standard that inarguably excludes news or opinion coverage of social issues. Moreover, condoms are displayed in sex-education books routinely distributed in classrooms throughout the nation, including in California, and are advertised during prime-time network television programming, on a federally regulated medium where content can be sanctioned for mere *indecency*, a standard more rigorous than obscenity. Under the understanding of "obscenity" that you are urged to adopt, a student showing the *Sports Illustrated* swimsuit edition to his Newbury Park classmates would be subject to arrest and prosecution. Fortunately, we do not have to speculate whether the *Prowler* was lawful to distribute, because binding legal precedent in the Ninth Circuit U.S. Court of Appeals tells us so. In *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010), the court struck down a law prohibiting the distribution to minors of "sexually explicit material" or material containing a "visual representation or explicit verbal description or narrative account of sexual conduct" with a minor. The court correctly found that such a standard would criminalize much sex-education curriculum and the use of widely taught literary works such as Margaret Atwood's novel, *The Handmaid's Tale*. The court expressly held that it violated the First Amendment to outlaw distribution of a work because a portion of it contained depictions of sex intended solely to titillate, where that was not the nature and purpose of the work as a whole. *Id.* at 1211. In light of this recent and legally binding authority, there is no room whatsoever to argue that the *Panther Prowler* was proscribable as "obscene."

(4) The letter relies on the antiquated and discredited legal doctrine of *in loco parentis* as a justification for "protecting" young people against exposure to the ideas of their peers, a rationale conclusively rejected by Justice Alito in his controlling opinion in *Morse v. Frederick*, 551 U.S. 393 (2007):

> When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority--

> including their authority to determine what their children may say and hear--to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.

Id. at 424 (Alito, J., concurring).

(5) The letter sloppily leaps from *authority* to censor (authority that did not, by your attorney's accurate assessment, exist here) to a *duty* to censor – for instance, citing a 1992 ruling from a federal district court in Virginia, *Broussard v. School Board of the City of Norfolk*, 801 F.Supp. 1526 (E.D. Va. 1992), that found no actionable federal constitutional violation in the banning of a T-shirt containing vulgar language. Nothing in the *Broussard* case, or in any comparable case, can be read as imposing a *duty* to stop students from discussing sex, nor could schools function under such a fanciful standard.

We have thoroughly reviewed the content of the Feb. 27 edition, and have spoken personally with the student editors about how they made their judgments. These students were motivated by concern that their peers were already – unprovoked by exposure to bananas – engaging in unsafe sexual practices of which the adult community was in denial, as dramatically evidenced by the March 3 letter itself.

That minors have sex, and that there are many gay and lesbian students in every public school, are undisputed facts documented not merely in the pages of the *Prowler* but in works of classic literature literally dating back to *Romeo and Juliet*. The officially recommended reading list for students at Newbury Park High School includes acclaimed works by young-adult authors, such as Jessie Ann Foley and Jenny Han, whose books include profanity, discussion of underage drinking and drug use, suicide, shoplifting and youthful experimentation with sex – themes that have been part of mainstream literature for decades. Student news publications cannot uniquely exist in a hermetically sealed bubble. They reflect the real-world experiences and pressures that young people are encountering and grappling with, not of an idealized "Ozzie and Harriet" world that frankly never existed outside of 1950's television comedy. While some in your community might prefer that it be the position of the Board of Education that gay and lesbian students live a shameful existence worthy of official condemnation, the legal term for that position is "bullying" – an act that, unlike what the staff of the *Prowler* published, actually *is* against the law.

We would encourage you to take a show of hands at your Board meeting – or perhaps in your own living rooms – to ascertain the number of young people who first learned of the existence of teen sex or contraception by reading about it in the pages of a student newsmagazine. To the extent that the *Prowler* expanded anyone's sexual vocabulary, it helped make students more aware of the importance of avoiding unsafe and unhealthy sexual practices, exactly the discussion that the editors hoped to provoke.

We urge you to review the "open letter" disseminated by student editors of the *Prowler* on March 5 in response to public criticism of their work, and to afford those editors the opportunity to explain their decision process at tonight's meeting. What you will see in their writing and hear in their voices is concern for the well-being of young people who are crying out for more complete, reliable information about issues of sex and sexuality than they currently receive in school. When young people use student media to draw attention to difficult social issues such as premarital sex, they invariably are doing so not to "promote" or "encourage" antisocial behavior, but rather are importuning adult authority figures to recognize the enormity of the problem confronting even "good families" with "good homes." Undoubtedly, it is uncomfortable for many of us to acknowledge that the young people we think of as our "babies" are having sexual thoughts and even engaging in sexual behavior, but government-enforced silence will not reduce sexually transmitted disease, unwed pregnancy or other societal ills.

Those calling for the District to exert censorship authority over the views expressed by students should take caution that, while today that authority may be used to suppress or to punish speech distasteful to them, tomorrow the serpent may turn on those who have unleashed it – a point made by Chief Justice Roberts in rejecting a school district's insistence that schools possess the authority to proscribe "plainly offensive" speech: "After all, much political and religious speech might be perceived as offensive to some." *Morse v. Frederick*, 551 U.S. 393, 409 (2007). Justice Alito, the Court's most eloquent advocate for the freedom of religious speech in schools, perhaps said it best of all:

> [W]hen a public school purports to allow students to express themselves, it must respect the students' free speech rights. School administrators may not behave like puppet masters who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.

Nurre v. Whitehead, 130 S.Ct. 1937, 1939 (2010) (Alito, J., dissenting from denial of certiorari).

We appreciate and respect Board Member Dunn's attempt at resolving the ongoing disagreement with a resolution concerning rebuttal time for those offended by what they read in the *Prowler*. We feel confident that the editors were already planning, given the high-profile nature of the disagreement, to afford critics substantial and prominent space in their next edition, as a matter of professional editorial judgment. Nevertheless, that decision *should* be a matter of editorial judgment by the students in consultation with the journalism adviser and not one of coercion. Even if the resolution is framed as a "request," imagine yourself summoned before a powerful government agency with control over the future of your life and presented with an officially enacted "request," and imagine how "voluntary" your compliance would feel. (You should note that even strongly worded acts of official denunciation can, if motivated by an intent to chill legally protected expression, constitute a violation of students' rights. Thus, in *Smith v. Novato Unified School District,* 150 Cal. App. 4th 1439 (2007), the appellate court held that even though a school district did not formally discipline a student over a "disrespectful and unsophisticated" editorial on immigration published in the school newspaper, it nonetheless violated state law by simply announcing that the editorial should not have been published and ordering the remaining issues of the newspaper to be retracted. *See id.* at 1458, 1462.)

If the District insists that some response is necessary to acknowledge the concerns of readers offended by what they read in the *Prowler*, the response should be an educationally based one and not a punitive one. A reasoned discussion of the role of student media and the legal and constitutional boundaries that properly constrain government agencies in substituting their editorial tastes for those of their students would be a salutary first step. As you face demands to "protect" the young people of the Conejo Valley Unified School District today, we hope you will keep in mind those most in need of protection – the journalists who have been publicly vilified and falsely accused of committing crimes.

Frank LoMonte, Esq., Executive Director
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ACLU Foundation of Southern California