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May 23, 2011

Kim Tolhurst, Esq.
Acting General Counsel
U.S. Commission on Civil Rights
624 Ninth Street, NW
Sixth Floor
Washington, DC 20425

Re: U.S. Commission on Civil Rights public comments on *Peer-to-Peer Violence and Bullying: Examining the Federal Response*

Dear Ms. Tolhurst:

The endorsement of legal remedies and voluntary actions to eliminate or prevent discrimination based on race, origin or gender is a current legislative priority for the American Bar Association (ABA). To this end, we are pleased that the U.S. Commission on Civil Rights held a briefing in connection with its 2011 statutory enforcement report, *Federal Enforcement of Civil Rights Laws to Protect Students Against Bullying, Violence and Harassment*. The ABA commends the Commission for its attention to bullying and other types of peer-to-peer violence where students are targeted due to their actual or perceived sexual orientation or gender identity or expression.

Of most direct relevance to the Commission's recent briefing, in February 2011, the ABA adopted a policy resolution urging the prevention of bullying, including cyberbullying and youth-to-youth sexual and physical harassment on a variety of bases including, among others, sexual orientation and gender identity. As was explained in the accompanying report, LGBT youth are particularly vulnerable to bullying and harassment: "Ninety percent of lesbian, gay, bisexual, and transgender youth report having been verbally or physically harassed or assaulted."¹

The ABA has a long and proud tradition of actively opposing discrimination on the basis of sexual orientation, and the Association recently extended that opposition to discrimination on the basis of gender identity. The ABA also has opposed discrimination on the basis of sexual orientation in many areas of family law.² Pursuant to this

¹ 2/11 Resolution, Accompanying Report (citing Gay, Lesbian, and Straight Education Network, From Teasing to Torment: School Climate in America – A Survey of Students and Teachers (2005)) (footnote omitted).

² See, e.g., resolutions adopted 8/95 (opposing discrimination on the basis of a parent's sexual orientation in child custody or visitation determinations); 2/99 (opposing discrimination on the basis of sexual orientation in adoption proceedings); 8/03 (supporting second and co-parent adoptions by same-sex and other unmarried couples); 2/06 (opposing discrimination on the basis of sexual orientation in adoption and foster care determinations); 8/02 (supporting the availability of victim compensation and victim assistance funds for the surviving partners of victims of terrorism or other crime to the same extent as they are available to spouses); 2/04 (opposing any federal enactment that would restrict the ability of a state to

commitment and these various policies, the ABA has actively advocated for effective federal anti-discrimination legislation and has filed numerous Supreme Court amicus briefs urging the adoption of strong anti-discrimination positions with respect to sexual orientation.³

Through numerous related recommendations, the ABA has recognized that lesbian, gay, bisexual, and transgender people face pervasive discrimination in all aspects of their lives. In 1987, the ABA adopted a resolution explicitly condemning crimes of violence based on prejudice, including prejudice on the basis of sexual orientation. Two years later, the ABA adopted a policy urging federal, state, and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations.⁴ In 2006, the ABA expanded this policy position to include support of laws and policies that prohibit discrimination on the basis of actual or perceived gender identity or expression.⁵ More recently, in 2007, the ABA adopted a resolution urging the enactment of laws and policies that “promote the safety, well-being, and permanent placement of lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth who are homeless or involved with the foster care system.”⁶

In recognition of the pervasiveness of discrimination on the basis of sexual orientation and its effects on access and opportunity for LGBT people, the ABA adopted policy in 1991 supporting the study of prejudice in the federal judicial system based on sexual orientation, among other grounds. In addition, the ABA’s law school accreditation standards have been amended to require that law schools provide equal educational and employment opportunities without regard to, among other things, sexual orientation.⁷ And, more recently, in 2007, the ABA adopted policy amending its own aspirational Goal IX (now Goal III) to include a commitment to promote the full and equal participation of LGBT people in the legal profession. In the accompanying report, the ABA explained that harassment and discrimination impedes the full participation and advancement of lesbian, gay, bisexual, and transgender people.

As noted above, the ABA has been involved in various advocacy efforts to implement these various policy positions. Of note, the ABA recently submitted an amicus brief in *Christian Legal Society v. Martinez*, No 08-1371 acknowledging the delicate balance between First Amendment rights and combating discrimination. Here, the ABA sided

prescribe the qualifications for civil marriage or to determine when effect should be given to a civil marriage validly contracted in another jurisdiction); 2/09 (urging repeal of Section 3 of DOMA, which denies federal marital rights and protections to validly married same-sex spouses); 8/10 (supporting the elimination of legal barriers to civil marriage for same-sex couples who are otherwise qualified to marry).³ For example, in 2003, the ABA filed an amicus brief in *Lawrence v. Texas*, urging the Court to overturn its 1986 decision in *Bowers v. Hardwick*. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas statute that prohibited consensual sexual conduct between two persons of the same sex); ABA Amicus Brief, 2003 WL 164108. In 1996, the ABA also filed an amicus brief in *Romer v. Evans*, in which the United States Supreme Court struck down an amendment to the Colorado Constitution that prohibited the state and local jurisdictions from enacting provisions which prohibited discrimination on the basis of sexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996); ABA Amicus Brief, 1995 WL 17008433.

⁴ See, e.g., Resolution adopted 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation).

In addition to the 1989 policy, in 1990, the House adopted Canon 3B(5) of the Canons of Judicial Conduct, which prohibits bias by judges on the basis of, among other things, sexual orientation.

⁵ Resolution adopted 8/06 (urging prohibition of discrimination on the basis of actual or perceived gender identity or expression, in employment, housing and public accommodations).

⁶ Resolution adopted 8/07.

⁷ Resolution adopted 8/94 (requiring equal educational and employment opportunities regardless of, among others, sexual orientation).

with the principle that a public University could implement its policy prohibiting, among other things, nondiscrimination on the basis of sexual orientation without trampling First Amendment rights by not funding the discriminatory group's activities, but leaving alternatives for the group's activities.

The ABA has consistently recognized and reiterated that discrimination on the basis of sexual orientation and gender identity is pervasive, and that its persistence limits the full participation of and opportunities available to lesbian, gay, bisexual, and transgender people. The ABA thus urges the Commission to do everything within its power to address this very serious problem.

For the convenience of the Commission, copies of the related ABA policies and a link to their accompanying reports are included as an appendix to this letter.

Thank you for your concern and attention regarding this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman