ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTHERN CALIFORNIA
FOUNDATION

August 16, 2011

By United States mail and facsimile

Winfred B. Roberson, Jr., Superintendent
Davis Joint Unified School District
526 B Street
Davis, CA 95616
FAX: 530 757 5323

Dear Superintendent Roberson:

We write on behalf of two students who were enrolled in the Davis Joint Unified School District during the 2010-11 academic year, Alana de Hinojosa and [redacted], and their families, regarding the District's policies and practices relating to police interrogations of students on District property. We have grave concerns about recent incidents in which these students were removed from class and subjected to prolonged, coercive interrogations, without parental consent or prior notification. Each student was taken to a private office where they were confronted by a uniformed police officer from the Davis Police Department and high level school officials, who used threats and intimidation to pressure the students to provide information about suspected off-campus conduct by *other* students. Neither student was suspected of any wrongdoing. On the contrary, they were questioned because of their participation in activities protected by the First Amendment and California Constitution, and yet made to feel like criminals for attempting to exercise their constitutional right to remain silent. Indeed, they were not even afforded the rights owed to actual criminal suspects. This egregious conduct violated the federal constitution, the California constitution, and state law. It also underscores the need for parental consent *before* a student is questioned by police officers, including school resource officers, at school.

These coercive interrogations during the school day served no legitimate educational interest on the part of the District. On the contrary, they interfered with the District's mission by interrupting the students' instruction. The mission of the District is to provide students with education, not to provide law enforcement seeking to investigate off-campus activity with captive witnesses. We urge the District to take the necessary steps to prevent such incidents from recurring, to ensure a safe learning environment for all students, and to avoid unnecessary criminalization of students. In particular, we urge the District to revise its existing policies on police interrogations by training school personnel about students' rights with respect to law enforcement officers, by advising students of their rights prior to any such interrogation, and by prohibiting law enforcement personnel from interrogating students on District property without first obtaining parental consent. We request the opportunity to meet with you and discuss these issues further.

I. Factual Background

During the 2010-11 academic year, Ms. de Hinojosa was the Editor-in-Chief of the Davis High School student newspaper, The HUB. She wrote an article that appeared in the April 29, 2011 edition of The HUB about graffiti. In the article, Ms. de Hinojosa explored the question whether graffiti is artistic expression or a crime, and interviewed individuals with a wide-range of perspectives on the topic, including two self-described graffiti artists who were identified in the article only by their tag names.

On the morning of May 12, 2011, Ms. de Hinojosa was pulled out of her class at Davis High in front of her teacher and all her classmates, and escorted by a school staff member to the office of the head campus supervisor. There, Ms. de Hinojosa was questioned by a sworn officer of the Davis Police Department, Officer Ellsworth, the High School's vice-principal, and another school staff member about her newspaper article. Officer Ellsworth and the school staff proceeded to threaten and intimidate Ms. de Hinojosa, in an effort to pressure her into revealing the identities of the two graffiti artists discussed in her article. The interrogation lasted for approximately one hour. At no point was Ms. de Hinojosa informed of her right not to answer questions, or advised that she was free to leave the room. At no point was she afforded an opportunity to call her parents or an attorney, and indeed, she was actively prevented from doing so when a school official subsequently confiscated her cellphone.

On May 25, 2011, Ms. de Hinojosa was again pulled out of class, taken to a private office, and interrogated by Officer Ellsworth.

In both these interrogations, Ms. de Hinojosa courageously asserted her rights, and refused to reveal the identity of her confidential journalistic sources. She did acknowledge, however that she came into contact with the anonymous graffiti artists through a student at Da Vinci High School, [redacted].

[redacted], a former police cadet, had come into contact with the graffiti artists through his work on a documentary about graffiti, which won an award at the Davis High Student Film Festival. On May 12, 2011, [redacted] was pulled out of his A.P. Calculus class while taking an exam, so that he, too, could be interrogated about alleged off-campus graffiti. He was escorted to the school's main office, and led into a closed-door private office, where he was questioned by Officer Ellsworth, who had on his person a taser and a stick or baton. Also present were DaVinci's Acting Principal, and another school official to question [redacted] about Ms. de Hinojosa's article. The interrogation lasted between 45 minutes to one hour, and, as with Ms. de Hinojosa, the police officer and school staff attempted to intimidate [redacted]. Officer Ellsworth, for example, threatened [redacted] that the situation would "snowball" unless he revealed the identity of the graffiti artists. As with Ms. de Hinojosa, he was not informed of his right not to answer questions, advised that he was free to leave the room, or afforded an opportunity to call his parents or an attorney. His phone was also confiscated.

II. Legal Analysis

The prolonged detentions and coercive interrogations about off-campus graffiti, carried out by a police officer in conjunction with school staff on school property during the school day,

violated Ms. de Hinojosa's and [redacted]'s rights under the federal constitution, the California constitution, and state laws.

As the Supreme Court long ago explained in *Davis v. Mississippi*, "the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis v. Mississippi*, 394 U.S. 721 (1969). The Supreme Court concluded that "detention for custodial interrogations . . . trigger[s] the traditional safeguards against illegal arrest." *Dunaway v. New York*, 442 U.S. 200, 216 (1979). The prolonged detentions and interrogations at issue here violated Ms. de Hinojosa's and [redacted]'s right to be free from unreasonable seizures under the Fourth Amendment of the United States Constitution and Article I, Sections 1 and 13 of the California Constitution. There can be no doubt that each student was "seized" and that the seizures were unreasonable.

Ms. de Hinojosa and [redacted] were each seized when they were involuntarily taken out of their classrooms for for prolonged interrogations and were not informed that they were free to leave. See *Dunaway*, 442 U.S. 200. Age is an important factor that may be taken into account when assessing how a reasonable person would have perceived his or her freedom to leave when subject to police questioning. *J.D.B. v. North Carolina*, No. 09-11121, slip op. (U.S. Jun. 16, 2010). Any reasonable high school student taken into a private office to be questioned by authority figures, including a uniformed police officer and high level school staff such as a vice-principal, would not have believed that he or she was free to leave. *See United States v. Mendenhall*, 446 U.S. 544 (1980); *White v. City of Markham*, 310 F.3d 989 (7th Cir. 2002); *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003).

It bears emphasis that Ms. de Hinojosa and [redacted] were not themselves suspected of violating any school rule, endangering school safety, or indeed having engaged in wrongdoing of any kind. On the contrary, they were detained for the sole purpose of facilitating the police officer's investigation of alleged off-campus graffiti by other individuals. Moreover, the alleged off-campus graffiti posed absolutely no imminent threat to life or safety, raising serious questions as to why school staff believed it appropriate to remove the students from class. The only reason to do so was to facilitate Officer Ellsworth's criminal investigation of non-school related activity, not to further the school's educational mission. Under these circumstances, the seizures were utterly unreasonable. They were conducted without a warrant, probable cause, or parental consent, and there were simply no exigent circumstances.[1]

The detentions and interrogations also violated a panoply of other federal and state constitutional and statutory provisions.

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[1] Because the seizure in this case did not further the school's interest "in establishing and maintaining a safe educational environment," the "arbitrary, capricious, or harassing" standard announced by the California in Supreme Court in *Randy G.*, 26 Cal.4th 556, 559, 568 (2001), for detentions of students by school officials is inapplicable here. On the contrary, the seizures of the two students here were "conducted by school officials in conjunction with or at the behest of law enforcement agencies," a situation *Randy G.* expressly declined to address. *Id.* at 569 n.3. In any event, the prolonged detentions and coercive interrogations were unconstitutional even under the *Randy G.* standard because the students were not themselves suspected of violating any school or other rule.

During the course of the interrogations, Officer Ellsworth and school staff threatened and intimidated both students, in an effort to compel them to identify the anonymous graffiti artists. This interfered with the students' right to remain silent, guaranteed by the Fifth and Fourteenth Amendments. *See Chavez v. Martinez*, 538 U.S. 760 (2003); *Miranda v. Arizona*, 384 U.S. 436 (1966).[2] State and federal constitutional free speech guarantees also include a right not to speak. Efforts to compel speech thus violate the First Amendment, Article I, section 2 of the California Constitution, and California Education Code section 48907 and 48950. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Moreover, the detentions and interrogations were prompted by Ms. de Hinojosa's exercise of her constitutionally protected right to report on newsworthy issues. [redacted] only became involved because he assisted Ms. de Hinojosa in this endeavor and because he too had engaged in the constitutionally protected activity of making a documentary film. Under these circumstances, the detentions and interrogations constituted retaliation against the students for their exercise of constitutional rights. Official reprisal for protected speech "offends the Constitution." *Crawford-El v. Britton*, 523 U.S. 574 (1998).

Relatedly, the use of threats and intimidation during the interrogations interfered with both students' exercise of their rights – to write newspaper articles, to assist others in doing so, to make documentary films, and to decline to answer questions by law enforcement or other government officials. In this regard, Officer Ellsworth and District personnel violated the Bane Act, which prohibits interference or attempts to interfere "with the exercise or enjoyment" of federal or state rights "by threats, intimidation, or coercion." *See* Cal. Civ. Code §52.1(a); *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 841 (2004).

Further, the unjustified detentions and interrogations caused Ms. de Hinojosa and [redacted] to miss valuable class time, thus interfering with the students' fundamental right to education, guaranteed by the California Constitution. *See Serrano v. Priest*, 5 Cal.3d 584 (1971).

The conduct also gives rise to tort liability for false imprisonment because the students were confined, without their consent and without any justification, for far more than a fleeting encounter. *See Easton v. Sutter Coast Hosp.*, 80 Cal.App.4th 485, 496 (2000) (elements of false imprisonment are "(1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief").

In addition, the seizures of their cell phones were also unlawful. A seizure of property occurs when "there is some meaningful interference with an individual's possessory interest in

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[2] Officer Ellsworth has since threatened [redacted] father that [redacted] could be prosecuted as an "accessory" if he refuses to identify the graffiti artists. *See* Penal Code §32 (criminal accessory liability for concealing or aiding another in a felony, "with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment"). "Obviously the exercise of the constitutional right to remain silent cannot be the basis for conviction as an accessory." *People v. Nguyen*, 21 Cal.App.4th 518, 539 (1993). In any event, if any statements by Ms. De Hinojosa or [redacted] during the interrogations could be construed to establish liability for criminal prosecution, any such statements were procured in violation of the Fifth Amendment and California Welfare and Institutions Code §625, as neither student was informed of their constitutional rights to remain silent and to have counsel present. *Miranda v. Arizona*, 384 U.S. 436 (1966); Cal. Welf. & Instit. Code § 625.

that property." *Soldal v. Cook County Ill.*, 506 U.S. 56, 63 (1992). Ms. de Hinojosa and [redacted] each had their respective cell phones confiscated by school officials the day that they were interrogated, even though there is no school rule against having cell phones on campus or in the classroom. A meaningful interference with their possessory right occurred. As the Ninth Circuit explained, "a seizure becomes unlawful when it is 'more intrusive than necessary.'" *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005). This seizure was indeed more intrusive than necessary, as the cell phones themselves were not evidence of any crime or contraband. As such, there was no special need or substantial interest that would justify lessened Fourth Amendment protections and the seizure was unreasonable. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Significantly, there was no reason to confiscate the students' cell phones other than to prevent them from speaking with their parents or counsel, or perhaps to search their cell phones without their consent. The seizures of the cell phones were not only independently unlawful, but compounded the impropriety of the seizures of the students, by cutting off their ability to reach out to their parents or an attorney for assistance.

III. Conclusion

We are deeply troubled by the egregious violations of state and federal law. The incidents on May 12 and May 25, 2011 underscore the need for strong safeguards to protect students' rights when they are questioned by law enforcement personnel, including school resource officers, on school property. Such violations can easily be avoided by training school personnel about students' rights vis-à-vis law enforcement officers and adoption of a Board policy that requires parental consent and advising students of their rights prior to any such interrogations. We request the opportunity to meet with you and discuss this issue further.

Sincerely,

Linda Lye
Staff Attorney