

**The Current Status of Protection Afforded to Homosexual Students who Fall  
Victim to Peer Sexual Orientation Discrimination: Are Our Schools  
Condoning Harassment by Their Inaction?**

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## **The Current Status of Protection Afforded to Homosexual Students who Fall Victim to Peer Sexual Orientation Discrimination: Are Our Schools Condoning Harassment by Their Inaction?**

*It is Friday night. Many students are crammed in the school gymnasium to watch the high school's wrestling team compete against their main rival. The first match involves the lowest weight class and the rival's competitor is a girl. The principal of the high school, considering the reaction and humiliation directed at the high school's competitor, refuses to let the student compete. The girl is forced to forfeit. Considering that the male student will now appear too afraid to fight a girl, the feared result of the humiliation will likely become very real for him. It is also doubtful that the principal even considered the humiliation that the girl likely faces each and every day that she pursues her love of wrestling. And these are supposed to be the popular, athletic students. Imagine the dorks, geeks, and gay students...<sup>1</sup>*

### **Introduction**

There is no doubt, as the facts in the case law exhibit, that students endure sometimes relentless harassment. The question is whether adequate protection is provided to prevent the harassment, and if not, what additional measures should be taken. This paper argues that students who are harassed based on their actual or perceived sexual orientation are not adequately protected, and in turn, that the educational system of this country is suffering.<sup>2</sup>

Although federal court decisions have held that public school officials do have a legal obligation under the Equal Protection Clause to protect students from such harassment, there have been no

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<sup>1</sup> This is the fact pattern of a case that I came across as a legal extern at the ACLU of Georgia and the reason I became interested in this topic.

<sup>2</sup> Disclaimer: Please note that this paper is limited to a discussion of public schools' liability for failing to stop anti-gay harassment, and that the term "school" used throughout this paper should not be read to extend to private schools. However, that is not to imply that private schools are adequately handling this problem.

U.S. Supreme Court cases on point.<sup>3</sup> Moreover, Federal statutes do not expressly prohibit peer anti-gay harassment.

Part I of this paper will discuss the remedies available to gay student victims of discrimination, outlining three primary avenues: (A) what a homosexual student must prove in order for a public school official, acting as a state actor, to be liable under 42 U.S.C. § 1983 of the Equal Protection Clause for failing to stop peer sexual orientation harassment; (B) Title IX jurisprudence and the problems posed for gay student plaintiffs since peer harassment based on sexual orientation is not expressly prohibited by the statute as sex discrimination; and (C) the protections that homosexual students are afforded under state law in the few states that have such statutes on their books. In Part II, this paper will argue that schools are not properly dealing with the problem of sexual orientation harassment and discuss the negative impact that this is having on our educational system. Part III will suggest extending Title IX to expressly include sexual orientation harassment, as well as to encourage schools to aggressively enact and enforce clear policies against sexual orientation discrimination and harassment. Such a drastic measure is necessary to ensure the safety of our students and to guarantee that all students are able to benefit from the education opportunities to which they all are entitled.

## **I. An Overview of the Remedies Available to Gay Student Victims of Discrimination**

Student victims of discrimination have limited legal remedy. First, a student may bring a lawsuit against school districts and school officials for the violation of the Equal Protection Clause of the Fourteenth Amendment under § 1983.<sup>4</sup> In general, the typical federal constitutional claim brought in any public school harassment context would allege that the

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<sup>3</sup> See discussion of Nabozny v. Podlesny, 92 F. 3d 446 (7<sup>th</sup> Cir. 1996) and Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9<sup>th</sup> Cir., 2003) in Part I.

<sup>4</sup> 42 U.S.C.A. § 1983 (2003). The Fourteenth Amendment of the Constitution provides that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” In short, this statute mandates that all persons similarly situated be treated alike by the state.

victim's Fourteenth Amendment right to due process (i.e. that a student's complaints be properly addressed) was violated by the school's conduct.<sup>5</sup> Specifically, in the context of anti-homosexual harassment in schools, if a school official intentionally ignores the complaints of a gay student, the official and the school board may be liable to the student. Section 1983 provides:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...”<sup>6</sup>

However, a barrier to relief under § 1983 is the qualified immunity doctrine, where individual teachers, administrators, and board members acting within the scope of their employment for the school enjoy a “cloak of immunity” for such actions.<sup>7</sup>

Second, federal law does not specifically prohibit peer harassment in schools on the basis of sexual orientation. Title IX of the Education Amendments of 1972 (Title IX) is the most significant federal statute that broadly covers discrimination in the public schools of the United States.<sup>8</sup> In relevant part, Title IX provides: “[n]o person in the United States shall, on the basis of *sex*, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial

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<sup>5</sup> Jeff Horner and Wade Norman, *Student Violence & Harassment*, 182 Ed. Law Rep. 371 (2004).

<sup>6</sup> 42 U.S.C.A. § 1983 (2003).

<sup>7</sup> Horner and Norman at 374. Moreover, in many states school employees are granted statutory immunity from tort suits.

<sup>8</sup> 20 U.S.C. §§ 1681-1688 (2000).

assistance...”<sup>9</sup> However, what the courts have defined as prohibited sex discrimination does not include discrimination based on sexual orientation.

Third, only 8 states and the District of Columbia currently have statewide legal protections for students based on sexual orientation, but only California, Minnesota and New Jersey include protections based on gender identity or expression.<sup>10</sup> That means that more than 75% of students in grades K-12 go to schools that do not include sexual orientation and gender identity/expression as statewide protected classes.<sup>11</sup>

## **A. Liability Under 42 U.S.C. § 1983**

### **1. Background**

The Supreme Court ruled in Hafer v. Melo that a state official may be sued under § 1983 in both an official and an individual capacity.<sup>12</sup> If a gay student feels that his complaints of harassment are being ignored by a school teacher or a principal, then the student must show that the school official is not following formal school procedures for addressing claims of harassment in general, unless the suit is against the official individually.<sup>13</sup> Then, the student must be able to show that the teacher or principle has “selected or reaffirmed a particular course of action at least in part because of” that student’s sexual orientation.<sup>14</sup> Moreover, a gay student seeking to establish an Equal Protection violation by a school official or district must first establish a discriminatory intent in dealing with (or not) the harassment claim. However, in general, a

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<sup>9</sup> Id. at §1681(a), emphasis added.

<sup>10</sup> GLSEN’s 2004 State of the States Report, available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/1687.html>.

<sup>11</sup> Id.

<sup>12</sup> 502 U.S. 21, 31 (1991). This is an important distinction because to prove liability in a suit against a state officer acting in his official capacity requires that the official’s conduct be tied to a “policy or custom” of the governmental entity that was a part of the violation. See Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978).

<sup>13</sup> See Hafer, 502 U.S. 21, 25 (1991). (All that need be established to impose personal liability is that actions were taking “under color of state law” that deprived a person of federal rights).

<sup>14</sup> See Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

government official and/or municipality (both qualify as a “person” for purposes of § 1983) are shielded if they were in the performance of their discretionary functions.<sup>15</sup>

The Equal Protection Clause of the Fourteenth Amendment does not demand absolute equality in the treatment of groups of people on the government’s part. In general, classifications made by the government on the basis of race and national origin are subjected to “strict scrutiny,” which is the highest level of scrutiny, and the government must show a “compelling state interest” in order to justify it.<sup>16</sup> Classifications based on gender, for example, are reviewed under intermediate scrutiny, and all other classifications are reviewed under the lowest level, or rational basis scrutiny.<sup>17</sup> The Supreme Court in Romer v. Evans indicated that the proper standard of review for sexual orientation cases, under equal protection, is merely rational basis.<sup>18</sup> This means that if the school official can state a reason for his or her action that is rationally related to a government policy, then it can be justified under rational basis analysis.

## **2. A School Official who Does not end Known Harassment is in Violation of the Student’s Right to Equal Protection**

The 7<sup>th</sup> Circuit Court of Appeals was the first court to hold a public school district as well as individual employees monetarily liable for discriminating against a gay student by failing to address his complaints of harassment.<sup>19</sup> Jamie Nabozny was an openly homosexual student who fell victim to severe harassment throughout middle school, and although he asked school officials repeatedly to protect him and to punish his assailants, the officials allegedly ignored his

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<sup>15</sup> See Mitchell v. Forsyth, 427 U.S. 511, 526 (1985). (Qualified immunity provides immunity from suit; it is not just a defense to liability.) and Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). (But, they are only protected insofar as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

<sup>16</sup> Erwin Chemerinsky, *Constitutional Law: Principals and Policies*, § 9.1.2, at 527 (1<sup>st</sup> ed. 1997).

<sup>17</sup> Id.

<sup>18</sup> 517 U.S. 620, 632-633 (1996).

<sup>19</sup> Nabozny v. Podlesny, 92 F. 3d 446 (7<sup>th</sup> Cir. 1996).

requests.<sup>20</sup> After experiencing a mock rape by two other boys in front of 20 laughing students, the boy ran to Principal Podlesny's office and she responded that this type of behavior was to be expected if he was going to be openly gay.<sup>21</sup> Nabozny claimed an Equal Protection violation under the Fourteenth Amendment as well as an exacerbation of his risk of harm.<sup>22</sup> In this case the court allowed Nabozny's gender claim because had such a mock rape happened to a female student, the court believed the school would likely have ensured that the harassment ceased and punished the offending students.<sup>23</sup>

Using the rational basis test, which is satisfied if there is any reasonable factual basis for the classification, the Court found the school officials' discriminatory treatment of Nabozny to be motivated by their disapproval of his sexual orientation. The court concluded: "[w]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one."<sup>24</sup> In denying immunity to the school officials, the court stated, A[u]nder the doctrine of qualified immunity...[t]he question is whether a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful. We believe that reasonable persons standing in the defendants' shoes at the time would have reached just such a conclusion.<sup>25</sup> In November 1996, a jury unanimously awarded Nabozny nearly \$1 million in damages.<sup>26</sup>

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<sup>20</sup> *Id.* at 451-452. The harassment included physical beatings, a mock rape, and an instance where another student urinated on him, throughout his middle and high school years in the Ashland Public School District.

<sup>21</sup> *Id.* at 451.

<sup>22</sup> *Id.* at 446. (Nabozny claimed he was more likely than other students to be harmed because the school allowed a hostile school environment to persist).

<sup>23</sup> *Id.* at 455. (Although the differential treatment of groups is allowed, state actors "are required to give male and female students equivalent levels of protection...absent an important governmental objective@).

<sup>24</sup> *Id.* at 456. (Even under this low level of scrutiny, this conduct was found to be unconstitutional).

<sup>25</sup> *Id.* This case sends a clear message that school districts and school officials who don't intervene when gay students complaint of harassment could face liability under the Equal Protection Clause of the Fourteenth Amendment. However, the facts of this case are so egregious that it is unclear how the courts will handle less violent behavior that is directed towards gay students.

<sup>26</sup> See Alycia N. Broz, *Nabozny v. Podlesny: A Teenager's Struggle to End Anti-Gay Violence in Public Schools*, 92 Nw.U.L.Rev. 750 (Winter, 1998).

### 3. Proof of Intent to Discriminate is Necessary to Establish an Equal Protection Violation

In the wake of Nabozny, gay students across the country filed suits against their school officials for being harassed by fellow students. Six years after Nabozny, another significant decision was reached in Flores v. Morgan Hill Unified School District. The student plaintiffs sued school administrators under § 1983 alleging that administrators' response, or lack of response, to complaints of student-to-student anti-homosexual harassment denied them equal protection.<sup>27</sup> These plaintiffs alleged that teachers and administrators failed to stop and properly discipline name-calling, anti-gay remarks, and instances of physical violence for a period of 7 years.<sup>28</sup>

The Court of Appeals for the Ninth Circuit followed the Seventh Circuit's decision in Nabozny by denying the school officials' motion for summary judgment on qualified immunity grounds, and finding that there was enough evidence for a jury to prove that school officials' failure to act was a violation of the students' constitutional right to equal protection.<sup>29</sup> In both cases, the courts found that the failure to properly discipline the offending students and the failure to train students and teachers regarding anti-homosexual harassment presented sufficient evidence of an intent to discriminate against the plaintiffs. In Flores, several times plaintiff Alana Flores found pornography and notes to the effect of "Die, dyke bitch" inside and outside of her locker. However, when she showed this to assistant principal Delia Schizzano and asked to be reassigned to a new locker, Schizzano allegedly asked Flores, "Are you gay?" When Flores answered, "No, no. I'm not gay," she was asked, "Why are you crying, then?"<sup>30</sup> This evidence

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<sup>27</sup> 324 F. 3d 1130 (9<sup>th</sup> Cir., 2003). These plaintiffs were a group of former students who were, or were perceived to be gay, lesbian, or bisexual.

<sup>28</sup> Id. at 1132.

<sup>29</sup> Id. at 1138.

<sup>30</sup> Flores at 1133. (In Nabozny, when the student reported that he was subjected to a mock rape, Principal Mary Podlesny allegedly responded by saying, "boys will be boys"). See Nabozny at 454.

was enough to prove discriminatory intent, and at that time the right to be free from intentional discrimination on the basis of sexual orientation was clearly established.<sup>31</sup>

On January 6, 2004, the school district agreed to settle the Flores lawsuit by paying the six student plaintiffs \$1.1 million.<sup>32</sup> The school district also agreed to provide teachers, school administrators, and school staff with training in the recognition and prevention of student discrimination and harassment based on sexual orientation.

#### **4. Difficulty in Finding School Board Liable for Equal Protection Violation**

In a 2003 case from the Northern District of Ohio, Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., the court ruled that there was no equal protection liability of the school board when a student who often spoke out about gay rights brought a § 1983 claim for anti-homosexual harassment.<sup>33</sup> Like the plaintiffs in the previous cases, Matthew Schroeder claimed that both he and his mother told the school principal about the harassment, but the school administrators failed to take any action to stop its occurrence.<sup>34</sup> In particular, when Matthew told principal Conroy about the harassment, he allegedly said, "You can learn to like girls, go out for the football team, and that if he shut his mouth about gay rights, he would stop getting into so many fights."<sup>35</sup>

This case underscores the distinction between the equal protection liability of the school principal and that of the school board, as well as the difficulty in holding the school board liable

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<sup>31</sup> Id. (This must be met to hold a government official liable because "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful"). See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

<sup>32</sup> Kevin P. Brady, *Local School Officials' Legal Duty to Prevent Anti-Gay Student Harassment: The Impact of Nabozny and Flores*, 187 Ed. Law Rep. 383, 386 (2004).

<sup>33</sup> 296 F. Supp. 2d 869 (N.D. Ohio, 2003). In this case, plaintiff Matthew Schroeder alleges that during fifth through seventh grades, while he attended Fort Miami Elementary School and Gateway Middle School in Maumee, Ohio, he was the victim of repeated, pervasive physical and verbal harassment because he was perceived to be gay.

<sup>34</sup> Id. at 871.

<sup>35</sup> Id. Schroeder also alleges that in other situations involving racial and gender discrimination, the school did enforce its policies and protect its students.

for an equal protection violation. As this case shows, the difficulty arises from the fact that a plaintiff must prove an official policy or custom on the part of the school board itself. “As a result, it is very difficult to hold a school board liable under § 1983 as it frequently has no awareness and little or no involvement with individual cases of harassment brought to the attention of school officials.”<sup>36</sup> This court stated: “if the decision to ignore harassment and abuse of plaintiff ‘was made by the government's authorized decision makers, the [Board] is responsible,’” but that was not found to be the case here.<sup>37</sup>

## 5. Conclusions

In summary, a student seeking to establish a violation of the Equal Protection Clause by a school official or the school district can file under ' 1983, which establishes civil liability for a deprivation of constitutional rights. First, the student plaintiff must assert a dual deprivation of Constitutional equality: the first stemming from his gender, and the second stemming from his sexuality. To win under the gender or sexual orientation claims, the plaintiff "must show that the defendants acted either intentionally or with deliberate indifference" in dealing with the student's harassment claims.<sup>38</sup> The school officials are not liable if they negligently overlooked the harassment.<sup>39</sup> To win under the gender claim the plaintiff must show that the school officials did not "give male and female students equivalent levels of protection ....@<sup>40</sup> The school will likely face liability if the harassment of the student was severe and it cannot show that an important government interest was furthered by its inaction. For the sexual orientation claim, the student

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<sup>36</sup> Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. Ill. L. Rev. 829, 853. Moreover, Bedell also points out that as a policy matter, the school board is not necessarily in the best position to stop peer harassment, so its punishment is not the best deterrent.

<sup>37</sup> Schroeder at 876, citing Meyers v. City of Cincinnati, 14 F.3d 1115, 1118 (6<sup>th</sup> Cir. 1994). While the school principals were responsible for implementing policies, their alleged deliberate indifference to plaintiff's complaints of harassment and physical violence did not represent the policy or custom of the Board of Education in this case.

<sup>38</sup> Nabozny at 454.

<sup>39</sup> Id.

<sup>40</sup> Id. at 456.

must prove that he is a member of a "definable minority" and that the school's intentional discrimination stemmed from this membership.<sup>41</sup> If the school cannot show a rational basis for its differential treatment, the school will likely face liability. Thus, Alocal school officials across the country who fail to take proactive steps to prevent student discrimination, harassment, and abuse based on sexual orientation place their schools and themselves personally at an increased risk of not only violating students' equal protection rights but having to pay costly monetary damages.<sup>42</sup>

## **B. Liability Under Title IX**

### **1. Background**

Title IX is a conditional offer of federal funding in exchange for a promise by the recipient not to discriminate on the basis of sex.<sup>43</sup> Congress' objective in enacting Title IX was to avoid the use of federal resources to support discriminatory practices, as well as to provide individual citizens with an effective protection against discrimination.<sup>44</sup> Since school officials in their individual capacity do not have control over the federally funded educational programs in the school, they can not be defendants in sexual discrimination suits brought under Title IX; only the school board and the school district may be subject to suit under Title IX.<sup>45</sup>

Although outside the scope of this paper, Title VII jurisprudence is relevant to judicial interpretation of Title IX.<sup>46</sup> Title VII of the 1964 Civil Rights Act was enacted seven years prior to Title IX and contains language similar to Title IX.<sup>47</sup> The law is relatively well-settled that a

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<sup>41</sup> Id. at 457.

<sup>42</sup> Brady, supra note 31 at 384.

<sup>43</sup> 15 Am. Jur. 2d Civil Rights § 329.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> See, e.g. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

<sup>47</sup> Title VII prohibits an employer from discriminating against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. See 42 U.S.C.S. §§ 2000e-2(a)(1) (emphasis added).

homosexual's sexual orientation alone does not qualify him or her as a member of a Title VII protected class, "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation..."<sup>48</sup> Moreover, "[t]he cases interpreting Title VII sex discrimination provisions agree that they were intended to place women on an equal footing with men,"<sup>49</sup> not to prohibit workplace discrimination based on sexual preference. Since courts have used Title VII in their determination of what constitutes sexual harassment under Title IX, student victims of sexual orientation harassment are not adequately protected by law or by the judicial interpretation of that law.<sup>50</sup>

## 2. The Prohibition of Peer Sexual Harassment Under Title IX

In 1999, in Davis v. Monroe County Board of Education, the Supreme Court recognized a private right of action under Title IX for *heterosexual* student-on-student sexual harassment.<sup>51</sup> In this case, a fifth grade girl was repeatedly subjected to verbal harassment and offensive sexual touching by a male classmate, and although she reported the incidents to various teachers and her principal, no action was taken.<sup>52</sup> In a five-to-four split, the Court held that public schools, as recipients of federal funds, may be liable for damages under certain circumstances if they acted with "deliberate indifference to known acts of harassment in its programs of activities."<sup>53</sup> The court limited liability to situations where school officials had actual notice of the sexual

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<sup>48</sup> Simonton v. Runyon, 232 F.3d 33, 35-36 (2d Cir. 2000) (Holding Title VII does not prohibit discrimination based on sexual orientation.); see also, Martin v. New York State Dept. of Correctional Services, 224 F. Supp. 2d 434 (2002). (Where plaintiff did not dispute that he could not proceed on the theory that he was harassed solely on the basis of his sexual orientation).

<sup>49</sup> Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9<sup>th</sup> Cir. 1977). (The court, in exercising judicial restraint, argued that giving the language of Title VII its plain meaning meant Congress only had the traditional notions of sex in mind when drafting the statute).

<sup>50</sup> For a more in-dept discussion, see Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 Berkeley Women's L.J. 125 (2000).

<sup>51</sup> 526 U.S. 629 (1999).

<sup>52</sup> Id. at 634-635.

<sup>53</sup> Id. at 633. See also Vanessa H. Eisemann, supra note 49 at 132. ("Although the facts of Davis involved a female victim of harassment perpetrated by males, the Supreme Court did not specifically limit its holding to situations where a male student has harassed a female student. The Court simply defined actionable "peer sexual harassment"....).

harassment and that it was “so severe, pervasive, and objectively offensive that it effectively bar[red] the victim’s access to an educational opportunity or benefit.”<sup>54</sup>

“This high burden of proof demonstrates how reluctant the Court was to hold public schools liable for the acts of third-party students.”<sup>55</sup> In that case the burden was met; the victim’s grades dropped substantially, which was enough to show a negative effect on her ability to receive an education.<sup>56</sup> The Supreme Court also limited the types of behavior that would be covered. If male students repeatedly physically threatened female students in a way that prevented them from accessing school facilities, the standard would be met, but one incident of sexual harassment would not be likely to trigger damages.<sup>57</sup>

### **3. A Gender Nonconformity Claim is the Only Avenue to Relief Under Title IX**

Based on Davis, it is clear that there is statutory protection provided for students from sexual harassment by other students. Although several district courts have found that Title IX also applies to cases involving anti-homosexual student-on-student harassment, the courts agree that a claim for discrimination on the basis of sexual orientation is not tenable under Title IX.<sup>58</sup> The only remaining argument is that harassment based on sexual orientation does amount to sex discrimination, but this will only succeed if there is evidence that the harassment is due to gender nonconformity.

In Montgomery v. Independent School District, the U.S. District Court of Minnesota found that a student who was harassed because of his sexual orientation could state a claim for

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<sup>54</sup> Id.; Id. at 645.

<sup>55</sup> Mostoller, Lynn, *Freedom of Speech and Freedom from Student-on-Student Sexual Harassment in Public Schools: The Nexus Between Tinker v. Des Moines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N. M. L. Rev. 533, 545 (2003).

<sup>56</sup> Davis at 654.

<sup>57</sup> Id. at 650-651; Id. at 652-653.

<sup>58</sup> Bedell, supra note 35 at 844. (“Harassment motivated by animus to the victim’s sexual orientation is not prohibited, so long as it is ‘non-sexual’”).

sex discrimination under Title IX.<sup>59</sup> In this case, Jesse Montgomery brought an action against the school board for failing to prevent harassment by other students due to his gender and his perceived sexual orientation.<sup>60</sup> For a period of eleven years, the students engaged in verbal abuse of Jesse because they believed he was gay and because he did not meet their stereotyped expectations of masculinity.<sup>61</sup>

By using Title VII jurisprudence, the Montgomery court held that a student could state a claim under Title IX by pleading facts indicating that harassment was due to an inability to conform to gender stereotypes.<sup>62</sup> Although originally developed in a Supreme Court case involving a female whose sexual orientation was not at issue, the concept of gender nonconformity has been used by homosexual plaintiffs to bring their claims within Title VII's prohibition against sex discrimination.<sup>63</sup> In Price Waterhouse v. Hopkins, Ann Hopkins' employer refused to promote her to partner in an accounting firm allegedly because she was overly aggressive and disliked by staff, but she was able to convince the Court that these reasons were masking sex discrimination.<sup>64</sup> In this landmark case, the Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has [impermissibly] acted on the basis of gender."<sup>65</sup> The discrimination against Jesse Montgomery was not distinguishable from the harassment "based on sex" that was found to be actionable in

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<sup>59</sup> 109 F. Supp. 2d 1081 at 1089-1092 (N. Minn., 2000).

<sup>60</sup> Id. at 1083.

<sup>61</sup> Id. at 1084. Specifically, he was taunted with names like "princess," "fairy," "bitch," and "queen," which indicated that he was being singled out for his feminine characteristics and because his harassers believed that he did not behave like boys should.

<sup>62</sup> Id. at 1090.

<sup>63</sup> Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

<sup>64</sup> Hopkins, 490 U.S. at 235 (1989). Hopkins pointed to partners advising her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

<sup>65</sup> Id. at 250.

Price Waterhouse; however, the court found that Montgomery’s claim for sexual orientation harassment must be dismissed.<sup>66</sup>

The same year as the Montgomery decision, the Northern District of California in Ray v. Antioch Unified School District held that harassment due to a student’s *perceived* sexual orientation can constitute sexual harassment under Title IX and lead to liability for the school district.<sup>67</sup> Like the student in Montgomery, this plaintiff was also repeatedly victim to same sex student-on-student harassment, and although he reported it to school officials, they did not take action to stop the harassment.<sup>68</sup> The victim was eventually severely physically assaulted, which led to such fright that it allegedly “effectively barred his access to an educational opportunity or benefit.”<sup>69</sup> Although the defendants moved for a judgment as a matter of law that Title IX does not prohibit discrimination on the basis of homosexuality or transsexualism, the court denied the motion.<sup>70</sup> In its application of Title VII jurisprudence and its analysis of the Davis factors, the court found that even though the offending conduct was not necessarily sexual in nature, “it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff’s sexuality, i.e. that Plaintiff was harassed *on the basis of sex*.”<sup>71</sup>

#### 4. Conclusions

These cases indicate a willingness by the lower courts to extend Title VII jurisprudence to Title IX claims to allow an argument that gender nonconformity amounts to sex

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<sup>66</sup> Montgomery at 1091, 1093 quoting Schmedding v. Tnemec Co. Inc., 187 F. 3d 862 at 865. (“We do not think that, simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation.”)

<sup>67</sup> 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

<sup>68</sup> Id. at 1167. The allegation stated: “such harassment was based on the students’ perception that [he] was a homosexual, and due to the status and physical appearance of [his] mother, a transgendered female.”

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id. at 1168-1170. The factors enumerated by the Davis court “indicate the liability of funding recipients where they are: (1) deliberately indifferent, (2) to sexual harassment, (3) of which they have actual knowledge, (4) that is so severe, pervasive, and objectively offensive, (5) that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”

discrimination.<sup>72</sup> This is crucial to the success of a gay student's Title IX claim because it appears that only in cases where the student is successful in specifying discrimination based on gender and failure to meet expected gender stereotypes will the court address the claim.<sup>73</sup>

Unfortunately, this interpretation leaves many potential plaintiffs without remedy. "The assumption that every lesbian plaintiff walks, talks, and appears masculine, while every gay male plaintiff walks, talks, and acts feminine, leaves out feminine lesbians and masculine gay men...because a gender nonconformity argument would be much more difficult to make."<sup>74</sup>

Bolstering the interpretation of Title IX given by the courts are administrative regulations issued by the U.S. Department of Education. The Department of Education's Office of Civil Rights states plainly: "Title IX does not prohibit discrimination on the basis of sexual orientation."<sup>75</sup>

While gay students seem to be protected from sexual harassment when it is sex discrimination (i.e. the gender nonconformity cases), gay students face a substantial amount of harassment that is not prohibited by Title IX.

### **C. Liability Under State Law**

Homosexual students are protected from harassment by other students under state law in only a few states.<sup>76</sup> California, Connecticut, the District of Columbia, Massachusetts, Minnesota, New Jersey, Vermont, Washington, and Wisconsin have laws that protect students from anti-gay harassment.<sup>77</sup> Vermont requires local school boards to develop and adopt

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<sup>72</sup> Baird, Julie A., *Playing It Straight: An Analysis Of Current Legal Protections To Combat Homophobia And Sexual Orientation Discrimination In Intercollegiate Athletics*, 17 Berkeley Women's L.J. 31, 60 (2002).

<sup>73</sup> *Id.* at 60-61.

<sup>74</sup> *Id.*

<sup>75</sup> Department of Education, Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, at 12,039 (1997).

<sup>76</sup> Gay, Lesbian, and Straight Education Network, *The 2003 Annual Report*, available at [http://www.glsen.org/GLSEN\\_AR\\_2003.pdf](http://www.glsen.org/GLSEN_AR_2003.pdf).

<sup>77</sup> GLSEN's 2004 State of the States Report, available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/1687.html>.

harassment prevention policies.<sup>78</sup> Minnesota and New Jersey protect gays and lesbians broadly, with laws that prohibit discrimination on the basis of sexual orientation in employment, housing, and education.<sup>79</sup> New Jersey states that it prohibits discrimination in public schools, while Minnesota prohibits “educational institutions” from “discriminat[ing] in any manner in the full utilization of or benefit from...or the services rendered thereby to a student based on sexual orientation.”<sup>80</sup>

Under the California Student Safety and Violence Prevention act of 2000, all public schools are given the duty to protect students from harassment and discrimination on the basis of sexual orientation or gender identity.<sup>81</sup> This Assembly Bill protects students as well as school employees against discrimination and harassment which is defined as “conduct based on protected status that is severe or pervasive, which unreasonably disrupts an individual’s educational or work environment or that creates a hostile educational or work environment.”<sup>82</sup> This protection covers any program or activity in a school, including extracurricular activities and student clubs.<sup>83</sup> These state statutes definitely make a difference by setting the tone and describing in no uncertain terms which conduct is prohibited. However, the remedy for violation of these statutes varies from state-to-state, and there is likely inconsistent enforcement within a state from district to district.<sup>84</sup>

In the other states that do not extend protection by statute, two states, Pennsylvania and Rhode Island, protect homosexual students from sexual orientation harassment by regulations.<sup>85</sup>

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<sup>78</sup> *Id.* at 840. See also Vt. Stat. Ann. tit. 16, § 565 (2001).

<sup>79</sup> *Id.* See also Minn. Stat. Ann. § 363.03, subd. 5 (West Supp. 2002); NJ Stat. Ann. §§ 10:5-4 to -5, 5-12 (f)(1) (West Supp. 2001).

<sup>80</sup> *Id.*

<sup>81</sup> Assembly Bill 537. See <http://www.cde.ca.gov/re/lr/sv/>

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Bedell, *supra* note 35 at 840.

<sup>85</sup> *Id.* at 841.

The Board of Education in Pennsylvania has a regulation that guarantees that “access to educational programs shall be provided without discrimination on the basis of...sexual orientation...”<sup>86</sup> Rhode Island’s Department of Education has a non-binding “Policy Statement” that states: “no students shall be excluded from, discriminated against, or harassed in any education program, activity or facility in a public school on account of sexual orientation or perception of same.”<sup>87</sup>

Unfortunately, in the other states, there is no existing legal remedy under state law for peer harassment on the basis of sexual orientation. In those states, students are left to rely on tort law if they wish to pursue a legal remedy. In that case, the argument would be that school officials are in a custodial relationship with students, and, as such, have a duty to address foreseeable harm in the school setting.<sup>88</sup> This, however, is a more difficult option.<sup>89</sup>

## **II. The Negative Impact of Peer Sexual Orientation Harassment on Education**

### **A. Statistical Evidence**

As these cases have shown, the problem of peer harassment based on perceived, or actual, sexual orientation is an every day occurrence for many K-12 students in America’s schools. The case law alone indicates that schools are not properly handling this issue. A survey of 887 gay, lesbian, bisexual, or transgendered (LGBT) youths revealed that more than 90% of the students reported hearing the words “faggot” or “dyke” used in a derogatory manner.<sup>90</sup> Over one-third of students reported physical harassment, and nearly 20% reported being physically

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<sup>86</sup> Id. See also 22 Pa. Code § 4.4(c) (2002).

<sup>87</sup> Id. See also R.I. Dep’t of Educ., A Policy Statement of the State Board of Regents Prohibiting Discrimination Based on Sexual Orientation.

<sup>88</sup> Bedell, *supra* note 35 at 841. See also RST (Second) of Torts § 320 cmt. A (1965).

<sup>89</sup> Id.

<sup>90</sup> Gay, Lesbian, and Straight Education Network, The 2003 National School Climate Survey, available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/300-3.PDF](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF).

assaulted because of their sexual orientation.<sup>91</sup> 81% of trans-gendered students, 73% of female students, and 52.7% of male students reported being sexually harassed in the form of sexual comments and inappropriate touching.<sup>92</sup> Students are harassed on the basis their sexual orientation with increasing frequency, and this abuse, apart from being an impediment to the students' ability to receive an education, has terrible negative consequences on their psychological and physical health.<sup>93</sup> These cases have also shown that all too often public school officials do nothing to stop the problem. The GLSEN Survey reports: "Harassment continues at unacceptable levels and is too often ignored: 84% of LGBT students report being verbally harassed because of their sexual orientation, and 82.9% of students report that faculty never or rarely intervene when present."<sup>94</sup>

**B. Gay student Victims are "Effectively Barred from Educational Benefits"<sup>95</sup>**

It is not shocking to hear that students who get harassed at school often suffer severe psychological, behavioral, and academic problems. A gay student who is being victimized on a regular basis may become so worried about getting through the day without abuse that her attention may be completely diverted from the learning process. Most disturbing is the fact that gay, lesbian, and bisexual teens are more likely to consider and attempt suicide than are heterosexual teens, which suggests that the discrimination they face has important mental health consequences.<sup>96</sup> Furthermore, many students who are harassed for their perceived or actual

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<sup>91</sup> *Id.* Physical harassment was defined as "being shoved, pushed, etc.," while "being punched, kicked, or injured with a weapon" qualified as physical assault.

<sup>92</sup> *Id.*

<sup>93</sup> Bedell, *supra* note 35, 831.

<sup>94</sup> Gay, Lesbian, and Straight Education Network, The 2003 National School Climate Survey, available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/300-3.PDF](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF).

<sup>95</sup> Davis, *supra* note 50 at 645.

<sup>96</sup> Russell, S.T. & Joyner, K. (2001). Adolescent sexual orientation and suicide risk: Evidence from a national study. *American Journal of Public Health*, 91(8), 1276-81.

sexual orientation lash out against others, rather than themselves, in a violent manner. Both of the Columbine High School students responsible for murdering 15 of their classmates were regularly called “fags” and harassed by the more popular students.<sup>97</sup> This negative impact on homosexual youths has become a severe impediment to the educational system of this country.

### **III. Recommendations for Creating Better Policies and Resolutions to Peer Harassment Aimed at Sexual Orientation.**

#### **A. Title IX Should be Extended to Include Sexual Orientation Discrimination**

The case law and the statistical evidence suggests that more often than not, a gay student victim’s case would be a slam dunk if the victim were heterosexual and if the harassers were of the opposite sex. Unfortunately, what appears to be the best theory for a gay student victim to proceed on, the gender non-conformity theory, is far from a home run for homosexual student victims. Although that may work for some plaintiffs, it does not afford protection to those whose allegations solely involve discrimination based on sexual orientation, rather than discrimination based on the homosexual’s failure to conform to gender stereotypes.

A primary objective for extending Title IX to cover sexual orientation discrimination is to place more responsibility on the school district and the school board. As seen in the Equal Protection cases, the school board is often not liable for instances of sexual orientation harassment because the school board and school district is never aware of the complaints or the disregarding of any policy by a school official. By including sexual orientation discrimination in Title IX, the school board would necessarily have to create better policies to prevent this type of peer harassment, or potentially lose their funding. In turn, the better policies would then lead to more successful claims under §1983 or state law because the school officials’ conduct would

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<sup>97</sup>Bedell, supra note 35, 838-839.

either be tied to a clearly established policy or custom, or directly conflict the policy or custom. In addition, courts may be more reluctant to find a rational basis for violating the policy or custom. The obvious question now is: what would represent an appropriate school policy.

**B. Schools Should Create a Policy of Deterring Any Conduct Aimed at Sexual Orientation.**

First, schools should be obligated to have policies in place that protect based on race, color, religion, ancestry, national origin, gender, sexual orientation, physical appearance, socio-economic status, and mental or physical disability. Sexual harassment and sexual orientation harassment should be adequately defined, perhaps even including examples of inappropriate behavior. Harassment should include written, verbal, or physical conduct. Second, formal procedures need to be put in place so that students know who to report to and officials know how to handle the complaints. Teachers and staff should be obligated to immediately report any harassment, but the procedures should also include a minimal investigative mandate that requires a written response within 15 days or less of the complaint. Third, school students need to be clear the consequences they will face if found to be in violation of the school's anti-harassment policy. Fourth, school teachers should be obligated to follow-up with the student victim as well as the perpetrator, and to ensure that the offending conduct has stopped. Fifth, schools should provide training to teachers and staff on how to actively combat the problem of harassment and how to deal with the sensitive issue of sexual orientation harassment. Lastly, these policies should be shared with all school employees, students, and parents.<sup>98</sup>

**Conclusion**

The schools of this country need to ensure that they have clearly drafted policies that adequately define sexual harassment to include sexual orientation harassment. A large part of this problem stems from the fact that a school officials' mandate to maintain an educational

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<sup>98</sup> See Brady *supra* note 32 at 386-387 for his helpful discussion, "Guidelines for Local School Officials."

environment free from sexual harassment does not include any directive towards protecting the homosexual students in the school. For example, the University of Georgia's Non-Discrimination and Anti-Harassment Policy includes a prohibition against discrimination aimed at Vietnam veterans but does not include harassment or discrimination on the basis of sexual orientation!<sup>99</sup> If a top public university in this country does not define sexual orientation harassment as prohibited conduct, how can we expect our lower schools to? If there were properly defined policies in place it would be more difficult for school officials to dismiss a gay student's complaints of harassment as normal adolescent teasing.

Finally, schools can no longer afford to deny that homosexual students exist. Although sexuality and sexual orientation are both sensitive subjects, school teachers need to be properly trained in how to handle both topics. If our nation's teachers are homophobic and are even afraid to talk about sex, what can we expect for our nation's public school students? An especially challenging issue for homosexual students is the desire on the part of many to remain closeted to their friends and family. School teachers need to be people that a student can feel comfortable going to with all of her problems, but she should at least feel comfortable reporting that she is being harassed by other students.<sup>100</sup> The bottom line is that a uniform policy, covering all forms of discrimination and imposing uniform liability for failure to follow them, should be in place in

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<sup>99</sup> I was shocked to read The University of Georgia's Non-Discrimination and Anti-Harassment Policy's Definition of Sexual and Discriminatory Harassment: "The University of Georgia ("the University") is committed to maintaining a fair and respectful environment for living, work and study. To that end, and in accordance with federal and state law and Board of Regents' policy, the University prohibits any member of the faculty, staff, administration, student body, or visitors to campus, whether they be guests, patrons, independent contractors, or clients, from harassing and/or discriminating against any other member of the University community because of that person's race, *sex (including sexual harassment)*, ethnic or national origin, religion, age, disabled status, or status as a disabled veteran or veteran of the Vietnam era. Incidents of harassment and discrimination will be met with appropriate disciplinary action, up to and including dismissal from the University." Available at <http://www.uga.edu/legal/NDAH.htm>.

<sup>100</sup> See Eisemann *supra* note 49 at 149 for a more in-depth discussion of the unique issues facing a gay student victim of harassment. ("Internalized homophobia and shame are also likely to keep some children from letting anyone in authority know about the harassment and violence they endure. This reluctance is legally significant because of the requirement that schools have actual knowledge of harassment before they can be found liable under Title IX).

every public school. If our schools do not actively confront peer sexual orientation harassment and other forms of discrimination, then our school systems run the risk of condoning violent behavior at a time when our children are most easily influenced. If a discriminatory environment is allowed to persist, the educational experience of all students suffers.

## **BIBLIOGRAPHY**

### **Sources Consulted:**

1. David S. Doty, *Finding a Third Way: The Use of Public Engagement and ADR to Bring School Communities Together for the Safety of Gay Students*, 12 Hastings Women's L.J. 39 (2001).
1. Ann-Yu Wang, *Flores v. Morgan Hill Unified School District: Behind the Specter of Qualified Immunity – Applying the Appropriate Standard for Summary Judgment Under Equal Protection*, 13 Law & Sexuality 753 (2004).

### **Sources Cited:**

1. Baird, Julie A., *Playing It Straight: An Analysis Of Current Legal Protections To Combat Homophobia And Sexual Orientation Discrimination In Intercollegiate Athletics*, 17 Berkeley Women's L.J. 31, 60 (2002).
2. Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. Ill. L. Rev. 829 (2003).
3. Kevin P. Brady, *Local School Officials' Legal Duty to Prevent Anti-Gay Student Harassment: The Impact of Nabozny and Flores*, 187 Ed. Law Rep. 383 (2004).
4. Alycia N. Broz, *Nabozny v. Podlesny: A Teenager's Struggle to End Anti-Gay Violence in Public Schools*, 92 Nw.U.L.Rev. 750 (Winter, 1998).
5. Erwin Chemerinsky, *Constitutional Law: Principals and Policies*, § 9.1.2, at 527 (1<sup>st</sup> ed. 1997).
6. Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 Berkeley Women's L.J. 125 (2000).
7. Jeff Horner and Wade Norman, *Student Violence & Harassment*, 182 Ed. Law Rep. 371 (2004).
8. Mostoller, Lynn, *Freedom of Speech and Freedom from Student-on-Student Sexual Harassment in Public Schools: The Nexus Between Tinker v. Des Moines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N. M. L. Rev. 533 (2003).
9. Russell, S.T. & Joyner, K. (2001). Adolescent sexual orientation and suicide risk: Evidence from a national study. American Journal of Public Health, 91(8), 1276-81.
10. GLSEN's 2004 State of the States Report, available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/1687.html>.
11. Gay, Lesbian, and Straight Education Network, The 2003 Annual Report, available at [http://www.glsen.org/GLSEN\\_AR\\_2003.pdf](http://www.glsen.org/GLSEN_AR_2003.pdf).

### **Cases Cited** (in order of citation in paper):

1. Nabozny v. Podlesny, 92 F. 3d 446 (7<sup>th</sup> Cir. 1996).
2. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9<sup>th</sup> Cir., 2003).
3. Hafer v. Melo, 502 U.S. 21 (1991).
4. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).
5. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).
6. Mitchell v. Forsyth, 427 U.S. 511 (1985).

7. Harlow v. Fitzgerald, 457 U.S. 800 (1982).
8. Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869 (N.D. Ohio, 2003).
9. Meyers v. City of Cincinnati, 14 F.3d 1115 (6<sup>th</sup> Cir. 1994).
10. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).
11. Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000).
12. Martin v. New York State Dept. of Correctional Services, 224 F. Supp. 2d 434 (2002).
13. Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9<sup>th</sup> Cir. 1977).
14. Montgomery v. Indep. Sch. Dist., 109 F. Supp. 2d 1081 at 1089-1092 (N. Minn., 2000).
15. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
16. Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

**Statutes and Policies Cited:**

1. 42 U.S.C.A. § 1983 (2003).
2. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000).
3. Vt. Stat. Ann. tit. 16, § 565 (2001).
4. Minn. Stat. Ann. § 363.03, subd. 5 (West Supp. 2002)
5. NJ Stat. Ann. §§ 10:5-4 to -5, 5-12 (f)(1) (West Supp. 2001).
6. California Student Safety and Violence Prevention Act of 2000, Assembly Bill 537.
7. 22 Pa. Code § 4.4(c) (2002).
8. Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, at 12,039 (1997).
9. R.I. Dep't of Educ., A Policy Statement of the State Board of Regents Prohibiting Discrimination Based on Sexual Orientation.
10. The University of Georgia's Non-Discrimination and Anti-Harassment Policy, Available at <http://www.uga.edu/legal/NDAH.htm>.