

**A SAFE PLACE TO LEARN:**  
Protecting Students from Anti-gay Abuse

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## **ABSTRACT**

Approximately 2.9 million primary and secondary school students in America are gay. In 2003, 84% of gay students reported that they had been verbally harassed, and 39.1% reported being physically harassed.

As the number of out gay youth increases, society will be confronted with an increasing need to adequately protect these students. This paper will examine legal remedies available to students who have been harassed because of their sexual orientation. The paper will also discuss First Amendment issues which arise in connection with anti-gay harassment. Finally, an innovative response to the issue, the Harvey Milk School, will be examined.

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## I. INTRODUCTION

In the fall of 1995 Dereck Henkle, a gifted student at Galena High School in Reno, Nevada, appeared on a public access television show to discuss his experience as a gay student in high school. It was after this appearance that the harassment by his fellow students began. He suffered constant verbal harassment, and repeatedly reported the incidents to the school administration. On one occasion shortly after his television appearance, in the fall of 1995, he was approached by several students who started calling him “fag,” “butt pirate,” “fairy” and “homo.” One student suggested they tie him to the back of a truck and drag him down a nearby road. While on school property the students pursued Dereck and eventually succeeded in lassoing him around the neck. Dereck was able to escape to a nearby classroom, where he locked the door and called Assistant Vice Principal Denise Hausauer. For two hours Dereck hid in fear in the classroom, and when Hausauer finally arrived, she responded with laughter. Despite knowing the identity of some of Dereck’s attackers, the school failed to investigate and the students were only punished months later after Dereck was forced to leave the school.<sup>1</sup>

Dereck’s tormentors continued to harass him<sup>2</sup>, and the school made no effort to stop the harassment. Instead of punishing the harassers, Dereck’s English teacher admonished him that sexuality was a private matter and that he should not discuss it with other students. By the end of the Fall Semester in 1995, the harassment had become so severe, Dereck asked to transfer to a different school. The School District agreed to transfer Dereck to Washoe High School, an alternative high school, on the condition that he keep his sexuality private. Dereck began at

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<sup>1</sup> Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001)

<sup>2</sup> On one occasion, while Dereck was in the school office reporting another incident of harassment, several students ran by, shouted gay epithets, and threw a metal object at Dereck. The object missed Dereck, but lodged in the wall behind him. Vice Principal Hausauer was aware of the incident and refused to investigate or discipline the students. This attack caused Dereck to experience an emotional breakdown in Hausauer’s office.

Washoe in the Spring of 1996. While there, he was repeatedly warned by the Principal to keep his sexual orientation private, and once was told by the Principal to “stop acting like a fag.”<sup>3</sup>

Frustrated by the lack of educational opportunities at Washoe, Dereck requested a transfer to a traditional high school, and subsequently began his junior year in the Fall of 1996 at Wooster High School.<sup>4</sup> Dereck’s classmates soon learned of his sexual orientation from a student who had transferred to Wooster from Galena, and the harassment began anew. The administration at Wooster failed to respond to Dereck’s complaints. The harassment continued to escalate, culminating in a physical attack on Dereck on school grounds. A group of students approached Dereck shouting gay epithets. With the encouragement of the group, one student began punching Dereck in the face, calling him “bitch.”<sup>5</sup> Two school police officers witnessed the attack and failed to stop it. The officers also refused to arrest the attacker and discouraged Dereck from reporting the attack to the Reno Police Department.

After the attack, school administrators determined that Dereck should be transferred back to Washoe High School for the Spring Semester of 1997. Shortly after the decision was made, however, the Principal of Washoe decided not to accept Dereck. Instead, Dereck, at the age of 16, was placed in an adult education program at a local community college, where he was ineligible to receive a high school diploma.<sup>6</sup>

Unfortunately, Dereck’s experience is not a unique one. Approximately five to six percent<sup>7</sup> of more than 47.7<sup>8</sup> million primary and secondary school students in America are lesbian, gay, bisexual, or transgendered (LGBT) – between 2.4 and 2.9 million students. In 2003, 77.9% of LGBT students reported that they heard anti-gay epithets frequently or often at school; 18.8% reported some of the comments were coming from faculty or school staff. Eighty-four

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<sup>3</sup> *Id.* at 1070

<sup>4</sup> This transfer, like the previous, was conditioned on Dereck’s promise not to reveal his sexual orientation to his classmates.

<sup>5</sup> *Id.* at 1070

<sup>6</sup> *Id.* at 1071

<sup>7</sup> See University of North Carolina, Carolina Population Center, *National Longitudinal Study of Adolescent Health* (2001), <http://www.cpc.unc.edu/addhealth> (last visited November 22, 2006)

<sup>8</sup> Gay, Lesbian, and Straight Educational Network, *State of the States 2004, A Policy Analysis of Lesbian, Gay, Bisexual and Transgender (LGBT) Safer School Issues*, 2 (2004).

percent of LGBT students reported that they had been verbally harassed, and 39.1% reported being physically harassed.<sup>9</sup> LGBT students are three times more likely than their heterosexual peers to be threatened or injured with a weapon at school.<sup>10</sup>

The effects of this harassment on LGBT students are devastating. Nearly one-third of LGBT students drop out of high school to escape the violence and harassment – a dropout rate nearly three times the national average. Gay youth are four times more likely to have attempted suicide.<sup>11</sup> Additionally, gay students are three times more likely to report missing school because they feel unsafe, twice as likely to suffer depression, use methamphetamines or inhalants, and are more likely to report low grades, smoke cigarettes, drink alcohol, use other illicit drugs, or be victims of violence.<sup>12</sup>

Consequences of anti-gay harassment can be even more severe. In 1997 15-year old Michael Carneal brought a gun to his Western Kentucky high school. Carneal fired into a crowd of students, killing three of them and injuring five others. During a mental evaluation after the shooting, Carneal admitted that his attack was motivated by a desire to stop the constant anti-gay harassment he had endured.<sup>13</sup>

As the number of out gay youth increases, schools, legislatures, and courts will be confronted with an increasing demand and need to adequately protect these students. This paper will examine and assess current legal remedies available to students like Derick Henkle who have been harassed because of their actual or perceived sexual orientation. Section II will provide a brief background of legal remedies for anti-gay harassment in schools. In Section III,

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<sup>9</sup> Office of Public Policy of the Gay, Lesbian, and Straight Education Network (“GLSEN”), *National School Climate Survey* (2003). This study surveyed a sample of 887 LGBT students from 48 states and the District of Columbia.

<sup>10</sup> Massachusetts Department of Education, *Massachusetts High School Students and Sexual Orientation Results of the 1999 Youth Risk Behavior Survey* (1999), available at [http://www.doe.mass.edu/cnp/hprograms/yrbs/99/glb\\_rslts.html](http://www.doe.mass.edu/cnp/hprograms/yrbs/99/glb_rslts.html) (last visited October 28, 2006)

<sup>11</sup> See GLSEN National School Climate Survey, *supra* note 9.

<sup>12</sup> California Safe Schools Coalition and 4-H Center for Youth Development, University of California, Davis, *Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer* (2004)

<sup>13</sup> Ryan Lee, ‘Boy-Code’ a factor in fatal school shootings?, THE WASHINGTON BLADE, April 15, 2005

claims under the Equal Protection and Due Process clauses, First Amendment, and Title IX will be examined. Also a brief discussion of claims under state civil rights protections and state tort law will be included in Section III. In Section IV, an innovative response to the issue by the New York City Public School system, the Harvey Milk School, and an Equal Protection challenge to that school, will be examined. Finally, the paper will conclude, in Section V, with recommendations for schools, legislatures, and courts addressing this issue.

## II. BACKGROUND

Although harassment and bullying of students who or either perceived as, or actually are gay, is not a new phenomenon, litigation concerning anti-gay abuse of students in public schools is a relatively new movement. A few factors likely contributed to the appearance and increasing number of anti-gay abuse claims in the court system. First, in 1996, the U.S. Supreme Court, in their first opinion ever to rule in favor of a gay, lesbian, or bisexual plaintiff seeking equal rights under the federal Constitution, declared that dislike for gay people is an illegitimate basis for a law or for any exercise of governmental power.<sup>14</sup> This ruling was a seismic shift for the judiciary and marked a reduction in the judiciary's hostility to claims based on sexual orientation.

Secondly, gay youth are coming out at younger ages. Data from recent studies on gay and lesbian youth suggest that the age of first awareness of their sexual orientation may range from 8 to 11 years on the average, and the average age of identifying as gay or lesbian may

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<sup>14</sup> *Romer v. Evans*, 517 U.S. 620 (1996) *Romer* involved an amendment to Colorado's constitution which prohibited the state and its subdivisions from enacting, adopting, or enforcing any statute, regulation, ordinance, or policy "whereby homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships would constitute or otherwise be the basis for of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination." Writing for a 6-member majority, Justice Kennedy eloquently declared that "a state cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

range from 15 to 17 years old<sup>15</sup> – down from earlier studies showing that the average age of identification between 19 and 23 years old.<sup>16</sup>

One such youth, in the late 1980s and early 1990s, was Jamie Nabozny of Ashland, Wisconsin. After admitting to a friend that he was gay, Jamie suffered years of harassment by his fellow students. The continual harassment eventually led Jamie to unsuccessfully attempt suicide. At the age of 16, Jamie was finally forced to withdraw from the school system after he was hospitalized for internal bleeding from a severe beating by a fellow student. Jamie filed suit against the Ashland School District, and in 1996 the Seventh Circuit Court of Appeals held that Jamie was entitled to a trial.<sup>17</sup> Jamie's was the very first case to proceed to trial in which a student was claiming that a school's failure to stop anti-gay abuse was unlawful. A jury found in favor of Jamie and the school district settled for almost \$1 million.<sup>18</sup>

Jamie's victory at trial was a wake up call to school districts throughout the country and a call to action for LGBT students and activists. The tragic murder of gay college student Matthew Shepard in October 1998<sup>19</sup> further awakened America to the violence endured by LGBT Americans. Despite the pervasiveness of the problem, no federal law explicitly addresses harassment of students based on sexual orientation. Accordingly, attorneys have developed, and courts have accepted to varying degrees, a number of legal theories aimed at challenging antigay harassment in schools.

## II. LEGAL REMEDIES

### A. EQUAL PROTECTION

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<sup>15</sup> R.C. Savin-Williams and L.M. Diamond, *Sexual Identity Trajectories Among Sexual-minority Youths: Gender Comparisons*, ARCHIVES OF SEXUAL BEHAVIOR, 29, 607-627 (2000).

<sup>16</sup> Catlin Ryan & Donna Futterman, *Lesbian & Gay Youth: Care and Counseling* ADOLESCENT MEDICINE: STATE OF THE ART REVIEWS, vol. 8, no 2, p. 207-374 (1997)

<sup>17</sup> Nabozny v. Podlesny, 92 F.3d 446 (1996)

<sup>18</sup> David Buckel, *Stopping Anti-gay Abuse of Students in Public Schools: A legal perspective* 12 (Peg Byron & Deidre M. Reznik eds., 1998)

<sup>19</sup> Bob Hohler, *Anti-Gay Bias Confronted in Wyoming*, THE BOSTON GLOBE, October 12, 1998, at A1.

In the *Nabozny* case, the principal legal theory used was the Equal Protection Clause of the U.S. Constitution. Nabozny alleged that by failing to protect him from the harassment, the school and individual school officials violated his right to equal protection of the law guaranteed by the Fourteenth Amendment. Nabozny's lawyers argued that the school district made some students safe, but treated Nabozny differently because of his gender and because of his sexual orientation.<sup>20</sup> The Seventh Circuit Court of Appeals agreed; the court stated "the Equal Protection Clause does, however, require the state to treat each person with equal regard, as having equal worth, regardless of his or her status."<sup>21</sup>

The *Nabozny* Court made another important and groundbreaking decision: individual administrators who had ignored the abuse of Nabozny were not immune from suit.<sup>22</sup> Teachers, administrators and other "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>23</sup> If the law in question was not "clearly established," the government official cannot be held liable for violating it. In the *Nabozny* case, the Court found that the law was clearly established and that a rational person in the defendants' positions would have known that the U.S. Constitution "prohibits discrimination between similarly situated persons based on membership in a delineable class."<sup>24</sup> The ability to hold individual administrators and teachers liable when they turn a blind eye to harassment is an important tool in preventing this type of harassment.

In order to establish liability for violation of Equal Protection, a plaintiff must first show that the defendants acted with a discriminatory purpose. The Supreme Court has declared that discriminatory purpose requires that "the decision maker... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an

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<sup>20</sup> *Supra* note 17 at 446

<sup>21</sup> *Id.* at 456

<sup>22</sup> *Id.* at 458

<sup>23</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)

<sup>24</sup> *Supra* note 17 at 458

identifiable group.”<sup>25</sup> It is not enough for a plaintiff to prove negligence; rather, a defendant must have acted with intent or deliberate indifference.<sup>26</sup>

Next, a plaintiff must show that the defendant discriminated against him based on his membership in a definable class.<sup>27</sup> The Seventh Circuit Court of Appeals in *Nabozny* recognized that “homosexuals<sup>28</sup> are an identifiable minority subjected to discrimination in our society.”<sup>29</sup> Shortly after *Nabozny* was decided the U.S. Supreme Court implicitly confirmed that homosexuals are a definable class for equal protection purposes.<sup>30</sup>

A defendant can avoid liability by proving that he did not discriminate, or that his discriminatory conduct satisfied one of several well-established standards of review. The Equal Protection Clause does not require that all individuals be treated equally; rather, it requires only that similarly-situated individuals be treated alike.<sup>31</sup> With that understanding, the courts have developed different standards of review depending on whether the disparate treatment is based on an individual’s membership in a suspect class. Classifications based on race,<sup>32</sup> alienage,<sup>33</sup> and national origin<sup>34</sup> are considered suspect. Suspect classifications receive strict scrutiny by the court and must be narrowly tailored to serve a compelling state interest.<sup>35</sup> Virtually all state actions subjected to strict scrutiny fail. Classifications based on gender<sup>36</sup> or illegitimacy<sup>37</sup> are

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<sup>25</sup> *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>26</sup> *Supra* note 17 at 454

<sup>27</sup> *Albright v. Oliver*, 975 F.2d 343 (7<sup>th</sup> Cir. 1992), *aff’d*, 510 U.S. 266. The 7<sup>th</sup> Circuit noted, “the state’s act of singling out an individual for differential treatment” does not “itself create the class.” *Id* at 348

<sup>28</sup> At the time, not all Circuits agreed. The Sixth Circuit in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, had ruled that “those persons having a homosexual orientation simply do not, as such, comprise an identifiable class...because homosexuals generally are not identifiable on sight ... they cannot constitute a suspect class or a quasi-suspect class...” 54 F.3d 261, 267 (6<sup>th</sup> Cir. 199) [internal quotations omitted] However, the 6<sup>th</sup> Circuit’s decision was reversed and remanded by the Supreme Court in light of its decision in *Romer*. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 518 U.S. 1001(1996).

<sup>29</sup> *See supra* note 17 at 457

<sup>30</sup> *Romer v. Evans*, 517 U.S. 620 (1996)

<sup>31</sup> *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)

<sup>32</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967)

<sup>33</sup> *Graham v. Richardson*, 403 U.S. 36, 372 (1971)

<sup>34</sup> *Korematsu v. United State*, 323 U.S. 214, 216 (1944)

<sup>35</sup> *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)

<sup>36</sup> *Craig v. Boren*, 429 U.S. 190 (1976)

considered quasi-suspect and are subjected to heightened, or intermediate scrutiny. A quasi-suspect classification fails if it is not substantially related to a sufficiently important governmental interest.<sup>38</sup> Finally, a non-suspect classification fails under rational basis review only if it is not rationally related to a legitimate governmental interest<sup>39</sup> Governmental actions subjected to rational basis review are almost always upheld.

In determining whether or not a class of persons is suspect, three factors have emerged as dispositive. First, the court will consider whether or not the group's defining characteristic is immutable.<sup>40</sup> Second, the court will look to history to determine if the group has been subjected to purposeful unequal treatment.<sup>41</sup> Finally the group's political power as a method to protect itself from the majority is relevant.<sup>42</sup>

The U.S. Supreme Court has never directly considered whether homosexuals constitute a suspect class. All of the Federal Courts of Appeals that have addressed the issue, however, have found that homosexuals do not constitute a protected class.<sup>43</sup> For example, the Ninth Circuit Court of Appeals addressed the issue in *High Tech Gays*, and admitted that "homosexuals have suffered a history of discrimination..."<sup>44</sup> The Court, however, found that homosexuality was behavioral, unlike gender, race, or alienage, and thus was not an immutable characteristic. Finally, the court determined that homosexuals "are not without political power" by pointing to examples of state and local legislation prohibiting discrimination against LGBT individuals.<sup>45</sup>

The Ninth Circuit's analysis was fundamentally flawed in at least two respects. First, the majority's assertion that homosexuality is not an immutable characteristic, is not shared by all

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<sup>37</sup> *Matthews v. Lucas*, 427 U.S. 495, 505 (1976)

<sup>38</sup> *See supra* note 34 at 197

<sup>39</sup> *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)

<sup>40</sup> *Frontiero v. Richardson*, 411 U.S. 677(1973)

<sup>41</sup> *Id.* at 684-85

<sup>42</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)

<sup>43</sup> *See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563; *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied.*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied.*, 495 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985).

<sup>44</sup> *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9<sup>th</sup> Cir. 1990)

<sup>45</sup> *Id.* at 574

scientists. In fact, a number of recent studies have identified a “gay gene” which scientists believe is inherited from the mother.<sup>46</sup> The studies are not conclusive, however, and the scientific community remains divided on the question. A finding that homosexuality is not genetic, however, is not dispositive of the issue of whether or not homosexuality is immutable. The Merriam-Webster Online Dictionary defines immutable as “not capable or susceptible to change.”<sup>47</sup> Anecdotal evidence, as well as the sheer number of individuals who identify as gay, lesbian, or bisexual, and the discrimination they suffer because of their sexual orientation, seem to indicate that sexual orientation – heterosexual or homosexual – is not a choice, similar to race or gender, and thus not something that is “susceptible to change.”

Second, the Court’s contention that the LGBT community wields sufficient political power to protect themselves from the majoritarian political process is questionable. The court identifies a number of state and local laws aimed at protecting LGBT individuals, and it is true that more and more of these types of laws are being passed. But at most, these examples highlight the group’s power in certain communities. Repeated attempts at the Federal level to amend Title VII to prohibit employment discrimination on the basis of sexual orientation have failed. Nineteen states have amended their constitutions to prohibit LGBT individuals from marrying their partners; another 26 states have laws with the same prohibition.<sup>48</sup> In fact, the state constitutional amendment at issue in *Romer v. Evans* was adopted by a majority of Colorado voters.<sup>49</sup> Additionally, only three members of Congress are openly gay, constituting just .19% of all 535 members of Congress.<sup>50</sup> While it is true that LGBT citizens do wield relatively more political power in some communities, these examples suggest that the LGBT community occupies such a position of political powerlessness in many communities across the Nation, as well as on a

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<sup>46</sup> See, e.g., Thanks Mum, the Evidence for a “gay” gene in men is increasing, THE ECONOMIST, November 4, 1995, at 87;

<sup>47</sup> Merriam-Webster Online, <http://www.webster.com/> (last visited October 29, 2006)

<sup>48</sup> Human Rights Campaign, *State Prohibitions on Marriage for Same-Sex Couple* (2006), <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

<sup>49</sup> See *supra* note 30

<sup>50</sup> Those members as of 10/30/06 are Reps. Tammy Baldwin (D-Wis), Barney Frank (D-Mass), and Jim Kolbe (R-Ariz)

national level, that they deserve the extraordinary protection that suspect, or at least quasi-suspect class status provides.

At least one court has found that homosexuals are a quasi-suspect class.<sup>51</sup> After finding as a matter of law that homosexuals have suffered historical discrimination, the court goes on to discuss whether sexual orientation is immutable. The court distinguishes between sexual conduct, which it finds to be a matter of volition, and sexual orientation. Relying on expert testimony, the court concluded that “sexual orientation is a characteristic not only beyond the control of the individual, but also one existing independently of any conduct that the individual, hetero-, homo- or bisexual, may choose to engage in. Furthermore, relevant and credible evidence revealed that sexual orientation is unamenable to techniques designed to change it, and that such techniques are considered unethical.” Turning its attention to the issue of political power, the court found that the LGBT community “while not a wholly politically powerless group, do suffer significant political impediments.”<sup>52</sup> More interestingly, the court questioned how much weight should be given to the political power issue. The court points out that males as a group enjoy significant political power, but classifications based on gender which discriminates against males are subjected to intermediate scrutiny.<sup>53</sup> Further, racial classifications which discriminate against whites are subjected to strict scrutiny. And while this court’s decision stands in contrast to the majority of courts, its reasoned analysis suggests that classifications based on sexual orientation should, in fact, be subjected to intermediate scrutiny.

## B. DUE PROCESS

In combating anti-gay harassment, another available but much less effective tool is the Due Process Clause of the Fourteenth Amendment. The Supreme Court has held that absent a special relationship, a state’s failure to protect an individual from harm caused by third parties

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<sup>51</sup> Equality Found v. City of Cincinnati, 860 F. Supp 417 (D. Ohio 1994)

<sup>52</sup> *Id.* at 437

<sup>53</sup> *Id.* at 438

does not violate that individual's due process rights.<sup>54</sup> Several Circuits have found that no such special relationship exists between the school and the students, and accordingly schools are under no affirmative duty to protect their students.<sup>55</sup> Thus it is not enough for a plaintiff to show that a school failed to protect him from anti-gay harassment. Instead, a plaintiff must show that the school "created a risk of harm, or exacerbated an existing one."<sup>56</sup> Alternatively, the plaintiff could argue that the school's deliberate indifference encouraged a harmful environment, but something more than a school's failure to act must be shown.<sup>57</sup> These onerous burdens make recovery under the Due Process clause difficult and limit the effectiveness of the Due Process clause in addressing anti-gay harassment.

### C. TITLE IX

In certain circumstances, Title IX of the 1972 Education Amendments (amended 1990) (Title IX), a federal statute prohibiting discrimination in schools "on the basis of sex,"<sup>58</sup> may be useful in addressing claims of anti-gay harassment.<sup>59</sup> In enacting Title IX Congress sought "to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens effective protection against those practices."<sup>60</sup> As originally enacted, Title IX sought to remedy such problems as pay disparities between male and female professors and sex discrimination in admissions and scholarships. However, the Supreme Court has declared that

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<sup>54</sup> *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989)

<sup>55</sup> See e.g., *D.R. by L.R. v. Middle Bucks Area Vocational and Technical Sch.*, 972 F.2d 1364, 1375 (3d Cir. 1992); *Maldonado v. Josey*, 975 F.2d 727, 733 (10<sup>th</sup> Cir. 1992); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272-273 (7<sup>th</sup> Cir. 1990)

<sup>56</sup> See *supra* note 17 at 460

<sup>57</sup> *Id.* at 460

<sup>58</sup> The agency charged with interpreting Title IX, the Department of Education, Office of Civil Rights, has defined discrimination on the basis of sex, as discrimination "[1] the student would not have been subjected to ... had he or she been a member of the opposite sex;..[2] the student would not have been affected by ... in the same way or to the same extent had he or she been a member of the opposite sex;...or [3] the student's sex was a factor in or affected the nature of the harasser's conduct or both." See 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 (1997)

<sup>59</sup> 20 U.S.C.A. § 1681(a)

<sup>60</sup> *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)

“there is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language”<sup>61</sup> [internal quotes omitted] and has expanded the reach of Title IX to prohibit other discriminatory practices, such as the sexual harassment of students by teachers<sup>62</sup> and by other students.<sup>63</sup>

In interpreting Title IX, the courts have turned to Title VII of the Civil Rights Act of 1964<sup>64</sup>, a federal statute which prohibits discrimination in employment and which was enacted eight years prior to Title IX, for guidance. Although the courts which have addressed the issue have found that Title VII does not prohibit discrimination on the basis of sexual orientation,<sup>65</sup> the Supreme Court has recognized discrimination for failure to conform with gender and sex stereotypes<sup>66</sup> and same-sex sexual harassment<sup>67</sup> as prohibited sex discrimination under Title VII. In determining that same-sex sexual harassment constitutes sex discrimination, the Supreme Court avoided the sexual orientation question and instead concluded that the sexes of the victim and the perpetrator are not important, as long as the harassment is “because of...sex.”<sup>68</sup>

Thus, relying on Title VII jurisprudence as a guide, a student harassed because of his actual or perceived sexual orientation might have a cognizable claim under Title IX if he can prove that the harassment was sexual in nature or that the harassment was a result of his failure to conform to sex stereotypes. In *Montgomery v. Independent School District No. 709*<sup>69</sup>, the court rejected the plaintiff’s sexual orientation claim as not cognizable under Title IX, but went on to

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<sup>61</sup> North Haven Bd. Of Educ. V. Bell, 456 U.S. 512, 521 (1982)

<sup>62</sup> Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)

<sup>63</sup> *E.g.*, Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). But note that the Supreme Court limited liability to situations in which the school failed to remedy a sexually hostile environment when they had actual or constructive knowledge of the hostile environment. So, Title IX does not hold a school liable for student-on-student sexual harassment; rather, it imposes liability for discrimination by the school in failing to remedy the situation.

<sup>64</sup> 42 U.S.C. 2000e-(2a)(2000).

<sup>65</sup> See *e.g.*, Desantis v. Pacific Telephone Co., 608 F.2d 327 (9th Cir. 1979), concluding that “Title VII’s prohibition of “sex” discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.” *Id* at 329-330

<sup>66</sup> Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

<sup>67</sup> Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998)

<sup>68</sup> *Id.* at 81

<sup>69</sup> 109 F. Supp. 2d 1081 (D. Minn. 2000)

state that a plaintiff can state a cognizable claim “by pleading facts from which a reasonable fact-finder could infer that [the plaintiff] suffered harassment due to failure to meet masculine stereotypes....”<sup>70</sup>

This interpretation of Title IX protects some victims of anti-gay harassment, but leaves many victims without recourse. A male student who appears too effeminate, or a female student perceived by her classmates as too masculine, are afforded some protection from their tormentors by Title IX if the school is aware of the harassment. But the gay student who appears to conform to gender stereotypes but nonetheless suffers harassment will likely not be protected. In fact, a defendant can seek to avoid liability by claiming that she was harassing the student not because of his failure to conform to gender stereotypes, but because of his sexual orientation, as did the defendant in *Montgomery*.<sup>71</sup> This bizarre result – the creation of a virtual ‘sexual orientation discrimination’ affirmative defense – is incongruous with Congress’s purported goal of protecting individuals from discriminatory treatment<sup>72</sup> and the Supreme Court’s self-described “broad” interpretation of the statutory language.<sup>73</sup>

A better interpretation of Title IX, one that would equally protect both male, female, straight and gay, students from anti-gay harassment, would recognize harassment based on an individual’s sexual orientation as sex discrimination. At least one court has used this more inclusive interpretation. In *Schroeder v. Maumee Board of Education*<sup>74</sup> a federal district court allowed a plaintiff’s Title IX claim of harassment based on sexual orientation to go to a jury. In this case, the plaintiff, 15-year old Matthew Schroeder, after learning that his older brother was gay, became an outspoken advocate for gay rights. Matthew alleged that his advocacy led his classmates to believe that he was gay, and that the harassment complained of was based upon that belief.<sup>75</sup> In concluding that Matthew’s claim was cognizable under Title IX, the court cited

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<sup>70</sup> *Id.* at 1092

<sup>71</sup> *Id.* at 1089

<sup>72</sup> See *supra* note 60

<sup>73</sup> See *supra* note 61

<sup>74</sup> 296 F.Supp. 2d 869 (N.D. Ohio 2003)

<sup>75</sup> *Id.* at 871

such a broad array of cases that the ultimate reasoning is unclear.<sup>76</sup> Even though Matthew had not argued it, by citing *Montgomery*<sup>77</sup> the court seems to rely partially on the sex-stereotyping theory.<sup>78</sup> The court also seems to rely on the proposition that anti-gay harassment may be based on sex because “the comments focused on the sexual conduct of plaintiff as a man.”<sup>79</sup> Whatever the reason, the court’s decision in *Schroeder* symbolized a recognition of the seriousness of anti-gay harassment and desire to remedy that harassment.

#### D. STATE AND LOCAL CIVIL RIGHTS LAWS

Another potential tool available for students suffering anti-gay harassment is state or local antidiscrimination laws which are sexual orientation inclusive. Eight states and the District of Columbia have passed laws which prohibit discrimination on the basis of sexual orientation and gender identity<sup>80</sup>; another nine states have passed nondiscrimination laws which include only sexual orientation.<sup>81</sup> Unfortunately, only eight of those states’ nondiscrimination laws extend to protect students.<sup>82</sup> In addition, in the 33 states without nondiscrimination laws<sup>83</sup>, about 100 municipalities have local ordinances banning discrimination on the basis of sexual orientation.<sup>84</sup>

Although these state and local protections provide an important additional tool in a harassed student’s arsenal, it is estimated that only about 25% of all students enjoy state

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<sup>76</sup> *Id.* at 880.

<sup>77</sup> See *supra* note 74

<sup>78</sup> See *supra* note 74 at 880

<sup>79</sup> *Id.* at 880

<sup>80</sup> See National Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.*, (June 2006), <http://www.thetaskforce.org/downloads/nondiscriminationmap.pdf>. These states include Minnesota, Rhode Island, New Mexico, California, Hawaii, Illinois, Washington, and Maine.

<sup>81</sup> *Id.* These states include Wisconsin, Massachusetts, Connecticut, New Jersey, Vermont, New Hampshire, Nevada, Maryland, and New York.

<sup>82</sup> Gay, Lesbian, and Straight Educational Network, *State of the States 2004, A Policy Analysis of Lesbian, Gay, Bisexual and Transgender (LGBT) Safer School Issues*, 2 (2004). These states are California, Minnesota, and New Jersey (sexual orientation and gender identity) and Connecticut, Massachusetts, Vermont, Washington, and Wisconsin (sexual orientation only).

<sup>83</sup> At least seven states have laws which prohibit the positive portrayal of homosexuality in schools. These states are Alabama, Arizona, Mississippi, Oklahoma, South Carolina, Texas, and Utah. *Id.* at 3.

<sup>84</sup> See *supra* note 80

protections based on orientation, and only 18% enjoy state protections which include gender identity. Another approximately 11% are protected in some form (sexual orientation and/or gender identity) by local ordinances. Ultimately, it is estimated that approximately 36%, or 17.1 million students in the United States enjoy some form of explicit protection.<sup>85</sup> Unfortunately, this leaves over 30 million students without explicit protections.

## E. OTHER REMEDIES

Depending on the circumstances of the anti-gay abuse, state tort laws might provide a harassed student with alternative remedies. For example, a teacher or principal who failed to protect a student from harm might be negligent under state law. A student being harassed could have a claim of intentional infliction of emotional distress against his tormentor.

Criminal law can also be applicable. All too often verbal taunts escalate into physical attacks. A student who assaults or batters another student is breaking the law and can be prosecuted accordingly. In Maine, the state attorney general has the power to prosecute students who commit antigay violence at school.<sup>86</sup>

State tort and criminal laws have, no doubt, been used, and will continue to be used, to address anti-gay harassment. The effectiveness of these remedies, however, is often limited to the individual incident of harassment. These laws do little to discourage anti-harassment generally, and alone are insufficient to effectively address the anti-gay harassment pandemic.

## F. FIRST AMENDMENT ISSUES

### 1. The Right to 'be' Gay in School

Often First Amendment Freedom of Speech claims arise as tangential issues in the context of anti-gay harassment. Many times anti-gay harassment is a result of a student's outspoken acknowledgement of their own homosexuality, or support for gay rights. An

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<sup>85</sup> See *supra* note 82

<sup>86</sup> 5 M.R.S.A. § 4681

administrator's demand that a student silence his speech can constitute a violation of that student's First Amendment right.<sup>87</sup> A school wishing to prevent anti-gay harassment by adopting an overly broad anti-harassment policy, can violate a student's First Amendment freedom to express his disapproval of homosexuality.<sup>88</sup> Thus, schools are required to walk a careful line between the rights of the LGBT students to be open about their sexuality, and the rights of a possible perpetrator to express his anti-gay views.

The First Amendment's protection of the speech of school children first arose in *Tinker v. Des Moines Independent School District*, where the Supreme Court famously declared that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>89</sup> The *Tinker* Court ruled that a school could limit a student's speech only when "necessary to avoid material and substantial interference with schoolwork or discipline."<sup>90</sup> Subsequent courts have attempted to narrow this broad protection for school speech. In *Bethel School District v. Fraser* the Court upheld sanctions against a student for an "offensively lewd and indecent speech" even though the disruption caused by the speech did not rise to the *Tinker* "material and substantial interference" standard.<sup>91</sup> In upholding the speech restrictions, the court noted the difference between the political speech in *Tinker* and the "vulgar speech and lewd conduct" in *Fraser*<sup>92</sup>. The Court in *Hazelwood School District v. Kuhlmeier* found that as opposed to private student speech, school-sponsored student speech can be restricted so long as the restrictions are "reasonably related to legitimate pedagogical concerns."<sup>93</sup>

The interaction of these three standards has proven to be less than straightforward. The Circuits seem to agree that the Supreme Court has established that student speech deserves

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<sup>87</sup> See e.g., *McLaughlin v. Bd. Of Educ. Of the Pulaski County Sch. Dist.*, 296 F.Supp. 2d 960 (E.D. Ark. W. Div., 2003); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001)

<sup>88</sup> See e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001)

<sup>89</sup> 393 U.S. 503, 506 (1969)

<sup>90</sup> *Id.* at 511

<sup>91</sup> 478 U.S. 675, 685 (1986)

<sup>92</sup> *Id.* at 683

<sup>93</sup> 484 U.S. 260, 272-273 (1988)

some special consideration, but they disagree on the nature of that consideration. For example many circuits, including the Sixth, Seventh, Eighth, and Eleventh, use an ad-hoc approach in applying the *Tinker-Fraser-Hazelwood* standards.<sup>94</sup> Other Circuits use a more rigid framework, classifying student speech into specific categories.<sup>95</sup> Even the Circuits adopting this approach disagree, however, on the categories. The Tenth Circuit, for example, defines the three categories into which school speech may fall as (1) student speech, (2) government speech, and (3) school-sponsored speech.<sup>96</sup> On the other hand, the Third and Ninth Circuits categorize student speech as either (1) lewd, vulgar, obscene, and plainly offensive speech, (2) school-sponsored speech, or (3) speech that falls into neither of these categories.<sup>97</sup>

Consider a situation in which a student is being harassed because of his perceived or actual sexual orientation and that harassment is based upon the student's self-identification as gay as well as his vocal support for gay rights. A request by the school that the student silence his views on sexual orientation would likely violate his First Amendment freedom of speech rights. First, the speech could not be considered lewd or offensive and is not school-sponsored, and thus could not be restricted under *Fraser* or *Hazelwood*. Rather, this is the very type of "political" speech at issue in *Tinker* and accordingly the *Tinker* "substantial interference" standard would apply. Whether or not the student's expression substantially interfered with school functions is of course an individualized question whose answer is dependent upon the nature of the expression and probably the community in which the school is located. It seems likely, however, that if the student feels comfortable enough to express these views, the views themselves would not cause any substantial interference.

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<sup>94</sup> See Lynn Mostoller, *Freedom of Speech and Freedom from student-on-student sexual harassment in Public schools: The nexus between Tinker v. DeMoines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N.M.L. Rev. 533, 541 (2003)

<sup>95</sup> *Id.* at 539 - 540

<sup>96</sup> See *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923-929 (10th Cir. 2002) (cited in *Freedom of Speech and Freedom from student-on-student sexual harassment in public schools*, supra note 94 at 540

<sup>97</sup> See e.g., *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1992); *Saxe v. State. Coll. Area Sch. Dist.*, 240 F. 3d 200 (3d Cir. 2001)

Thus, First Amendment claims, while not addressing the specific problem of harassment, can often be used to target an even more egregious action: the school's failure to protect the harassed students. Many times school administrators blame not the student's tormentors, but the student himself. An administrator who attempts to deflect his moral (though not legal) duty to protect a student, by warning that student against expressing his sexual orientation, might have violated that student's rights. Further, it might be argued that the administrator's subsequent failure to act in light of the harassment is retaliation for the student's exercise of his constitutional rights. At least some courts have been willing to accept similar retaliation claims as a violation of the First Amendment.<sup>98</sup>

## 2. The Right to Express Opposition to Homosexuality in Schools

Schools wishing to expressly prohibit anti-gay harassment are confronted with a especially difficult problem. Just as gay students have a constitutionally protected right to express their sexual orientation, students who, for moral or religious reasons, disapprove of homosexuality have a right to express their views. Thus, schools wishing to adopt sexual orientation inclusive anti-harassment policies must carefully balance their legitimate interest in protecting LGBT students from harassment with other students' First Amendment freedom of speech rights. Recently, these two interests clashed in *Saxe v. State College Area School District*.<sup>99</sup>

In August 1999 the board of education for the State College Area School District (SCASD) unanimously adopted an anti-harassment policy, which in pertinent part prohibited students and employees of the school district from engaging in "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics ... which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or

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<sup>98</sup> See, e.g., *Henkle v. Gegory*, 150 F. Supp. 2d 1067, 1075-1076 (D. Nev. 2001)

<sup>99</sup> 240 F.3d 200 (3d Cir. 2001)

offensive environment.”<sup>100</sup> David Saxe, a member of the Pennsylvania State Board of Education and the legal guardian of two SCASD students, filed suit alleging that the policy violated the students’ freedom to express their beliefs regarding the “sinful nature and harmful effects of homosexuality.”<sup>101</sup>

The trial court found the policy constitutional, finding that “harassment has never been considered protected activity under the First Amendment.”<sup>102</sup> The Third Circuit Court of Appeals, in an opinion written by now Supreme Court Justice Samuel Alito, reversed the trial court’s decision, responding that “such a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between antiharassment laws and the Constitution’s guarantee of freedom of speech.”<sup>103</sup>

In finding that the policy was overly broad, and thus unconstitutional, Justice Alito compared the policy to existing anti-harassment laws, noting that the SCASD policy prohibited harassment based on sexual orientation and “other personal characteristics,” not covered by the relevant federal anti-harassment statutes.<sup>104</sup> And although, Justice Alito noted that schools are free to adopt regulations that are more restrictive than existing law, the regulations must comply with the Constitution. Because the policy was not limited to vulgar and lewd speech, or school sponsored speech, the court applied the *Tinker* standard.<sup>105</sup> The court found that SCASD could not prove that the policy only regulated speech that would “substantially disrupt school operations or interfere with the rights of others.”<sup>106</sup> Accordingly the court struck the policy down.

### 3. Gay-Straight Alliances and Freedom of Speech

The extent to which a school may limit speech is also dependent on the nature of the forum the school has developed. For first amendment purposes, there are three different types of

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<sup>100</sup> *Id.* at 200

<sup>101</sup> *Id.* at 203

<sup>102</sup> *Saxe v. State College Area School District*, 77 F. Sup. 2d 621 (D. Pa. 1999)

<sup>103</sup> *Supra* note 99 at 209

<sup>104</sup> *Id.* at 220

<sup>105</sup> *Id.* at 216

<sup>106</sup> *Id.* at 214

public forums: traditional public forums, limited public forums, and non-public forums. Traditional public forums are areas such as streets and parks that “time out of mind, have been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions.”<sup>107</sup> In such a traditional public forum, the Government’s ability to limit speech is at its weakest. The Supreme Court, however, has distinguished public schools noting that school facilities may be public forums only if school authorities have “by policy or by practice” opened the school “for indiscriminate use by the general public” or by some segment of the public, such as student organizations.<sup>108</sup> Once the school has opened such a limited public forum, speech may only be limited by reasonable time, place and manner restrictions and content-based restrictions that withstand strict scrutiny.<sup>109</sup>

The issue of whether or not a school has created a limited public forum has become particularly important with respect to student-created gay and lesbian support groups in schools. In recent years, over 700 of these groups, often known as Gay-Straight Alliances (GSAs), have formed across the nation.<sup>110</sup> The formation of GSAs have sparked considerable controversy and present schools with a difficult problem.

Critics of GSAs oppose them for a variety of reasons, but generally fear that they are a “vehicle for recruitment into homosexuality” and an “advancement of the homosexual cause.”<sup>111</sup> In reality, opposition to GSAs are likely fueled by misinformation and homophobia. According to the Gay, Lesbian, and Straight Education Network, an GSA “aims to create a safe, welcoming and accepting school environment for all youth” by allowing “youth to build coalitions and community that can work towards making safer school environments for all people” and by

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<sup>107</sup> *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 516 (1939)

<sup>108</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (citing *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 47 (1983))

<sup>109</sup> *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37 (1983)

<sup>110</sup> Leslie Bulion, *Gay-Straight Alliances: Ground Zero for School Tolerance*, EDUCATION WORLD, December 19, 2000 (updated August 4, 2005), available at [http://www.educationworld.com/a\\_issues/issues/issues149.shtml](http://www.educationworld.com/a_issues/issues/issues149.shtml) (last visited November 26, 2006)

<sup>111</sup> *Id.*

providing support for “lesbian, gay, bisexual, transgender, or questioning identified students.”<sup>112</sup> GSAs are more than mere social clubs. A GSA can help to reduce anti-gay harassment by addressing homophobia in the school environment. Moreover, GSAs provide an open and welcome environment for students that are being harassed, and in doing so reduce the negative consequences of anti-gay harassment.

Confronted with loud and vehement opposition from the community, many school officials have attempted to prevent the formation of GSAs in their schools. If the school has allowed other non-curricular student groups to meet at the school, however, the school has created a limited public forum. Where a school has created such a limited public forum the Federal Equal Access Act of 1984 (EEA)<sup>113</sup> requires the school to provide the same access to any non-curricular club, regardless of content.

Many schools have sought alternative ways to prohibit GSAs from meeting in their schools while not violating the EEA. In 2005, Kerry Pacer, a 16 year-old high school senior in White County, Georgia decided to form a GSA after being booed by the student body for receiving a rose from another female student during a valentine’s day program.<sup>114</sup> Rather than allowing Kerry to form the GSA, the school purported to shut down all non-curricular clubs. Kerry sued, and in July 2006, a federal district court found that the school had violated the EEA and enjoined the school from prohibiting Kerry’s GSA to meet on the school premises.<sup>115</sup>

Kerry’s legal victory was bittersweet. In response to the GSA controversy in White County, the state Board of Education considered a proposal to require parental permission for students to participate in extracurricular activities, such as the GSA. Critics of the proposal argued that it was an attempt to prevent students from joining GSAs. The proposal was rejected

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<sup>112</sup> Gay, Lesbian and Straight Education Network, *Gay-Straight Alliance Handbook* (2000), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/32-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/32-1.pdf) (last visited November 26, 2006)

<sup>113</sup> [20 U.S.C. § 4071](#) et seq. (2000)

<sup>114</sup> Dahleen Glanton, *High school gays get a harsh lesson; Kerry Pacer's failing struggle to encourage acceptance of homosexuals in her rural Georgia hometown is echoed across the U.S.*, CHICAGO TRIBUNE, March 13, 2005, at 6.

<sup>115</sup> P.R.I.D.E. v. White Co. Sch. Dist., No. 2:06-CV-29-WCO (July 14, 2006)

by the Board of Education, but a version of the proposal was eventually passed by the Georgia Legislature.<sup>116</sup>

### III. THE HARVEY MILK SCHOOL

#### A. A NEW APPROACH TO AN OLD PROBLEM

While attorneys and advocates have sought to improve the learning environment for LGBT youth by targeting the anti-gay behavior of the *perpetrators*, the city of New York has developed an innovative alternative: remove the *victims*. The Harvey Milk High School (HMHS)<sup>117</sup> was opened in 1985 by the Hetrick-Martin Institute, a gay youth advocacy organization. The school was envisioned as a safe haven for LGBT youth and focuses on educating children who are “at a risk of physical violence and/or emotional harm in a traditional educational environment” because of their actual or perceived sexual orientation.<sup>118</sup>

In 2003 the New York City Department of Education allocated \$3.2 million to HMHS, making it the first and only school of its type in the nation.<sup>119</sup> Currently 170 students, grades nine through twelve, attend the school. HMHS graduates 95%<sup>120</sup> of its students, compared with 58% of all other New York City schools.<sup>121</sup> Sixty percent of HMHS graduates attend college or other additional educational programs.<sup>122</sup>

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<sup>116</sup> Sonji Jacobs, *Legislature 2006: Senate passes school club bill*, THE ATLANTA JOURNAL-CONSTITUTION, March 1, 2006, at 4B.

<sup>117</sup> Named after the nation’s first openly gay elected official, Harvey Milk. In 1977 Milk was elected to the San Francisco Board of Supervisors. After his election, he famously declared, “If a bullet should enter my brain, let that bullet destroy every closet door.” On November 27, 1978, Milk was assassinated, along with Mayor George Moscone, by a conservative, anti-gay former member of the Board of Supervisors. See John Cloud, *The Pioneer; HARVEY MILK People told him no openly gay man could win political office. Fortunately, he ignored them*, TIME MAGAZINE, June 14, 1999 at 183.

<sup>118</sup> Hetrick-Martin Institute: Home of the Harvey Milk High School, F.A.Q.’s, [http://www.hmi.org/HOME/FOR\\_THE\\_PUBLIC/Article/Params/articles/1315/pathlist/s1050\\_o1222/default.aspx#item1315](http://www.hmi.org/HOME/FOR_THE_PUBLIC/Article/Params/articles/1315/pathlist/s1050_o1222/default.aspx#item1315) (last visited November 4, 2006)

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Attrition of Students from New York Schools: Hearing Before the N.Y.S. Standing Comm. On Educ., 226<sup>th</sup> Legis. Sess. (2003 (statement of Walter M. Haney, Center for the Study of Testing, Evaluation and Educational Policy, Boston College), available at

Rebecca Bethard points to these success rates in arguing that the Harvey Milk School may be a viable alternative for educating LGBT youth.<sup>123</sup> Although the school can only accommodate a small fraction of at-risk LGBT students in the New York City area, Bethard argues that protecting some students is better than protecting none. She acknowledges that “separating [LGBT] youth from their peers is not a permanent solution, only a means to an educational end for a few dozen children in an immediately desperate situation.” However, Bethard believes that by providing public funding to the Harvey Milk School, the New York City Department of Education has taken an important first step: acknowledging the severity of the problem anti-gay harassment poses.<sup>124</sup>

Richard Ford disagrees.<sup>125</sup> Professor Ford recognizes the need to protect LGBT students from anti-gay harassment, but argues that the Harvey Milk School “thwart[s] integration, dilute[s] its practical benefits, and undermine[s] its legitimacy;” effectively preventing the “achieve[ment] [of] meaningful integration and fulfill[ment] [of] *Brown’s [v. Board of Education]*”<sup>126</sup> mandate.”<sup>127</sup> He also believes that the school distracts from the important questions that ought to be asked: “Were all other responses to anti-gay harassment exhausted before the city resorted to a segregated school? Did the New York City Department of Education choose to endorse a segregated gay high school because it could not secure the safety of its gay students in any other way, or did it do so because it was politically expedient?”<sup>128</sup>

Professor Ford raises interesting questions about the legality of the Harvey Milk School in light of *Brown v. Board of Education*. The comparison of pre-*Brown* racial segregation in public schools to the segregation at work in the Harvey Milk School, however, is inappropriate. A

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[http://timeoutfromtesting.org/testimonies/923\\_Testimony\\_Haney.pdf](http://timeoutfromtesting.org/testimonies/923_Testimony_Haney.pdf) (reporting New York City high school graduation rates in 2001-2002).

<sup>122</sup> See *supra* note 118

<sup>123</sup> Rebecca Bethard, *New York’s Harvey Milk School: A Viable Alternative*, 33 J.L. & EDUC. 417, 422 (2004)

<sup>124</sup> *Id.* at 422 - 423

<sup>125</sup> Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305 (2004)

<sup>126</sup> 347 U.S. 483 (1954)

<sup>127</sup> See *supra* note 125 at 1307

<sup>128</sup> *Id.* at 1326

number of factors distinguish the Harvey Milk school from the 'separate but equal' segregation prohibited by *Brown*. First, the intent behind the two forms of segregation is significantly different. The intent behind 'separate but equal' racial segregation, although perhaps not articulated, was essentially to insulate the white students from non-white students; essentially 'protecting' the majority from the segregated students. The intent behind the Harvey Milk School is to actually protect the students being segregated from the majority. Another important difference between pre-*Brown* racial segregation and the Harvey Milk School is that the voluntariness of the segregation. 'Separate but equal' racial segregation was forced segregation. Alternatively, the Harvey Milk School is a voluntary program that students may choose to enter.

Regardless of whether or not the comparison between racial segregation and segregation based on sexual orientation is an apt one, the debate over whether segregation is a solution at all continues. By removing the harassed students from regular schools, are the bullies essentially winning? Does segregation of the harassed student allow the schools to avoid addressing the underlying issues? Andy Milk, the nephew of the school's namesake stated: "If you want to honor the man – fine. But make it equal for everyone. Segregation is not what he stood for. He was for equal rights for everyone. Harvey stood for, 'We're out of the closet and we want to exist among everyone else.' A separate school is putting things back to where you started...."<sup>129</sup>

## B. CONSTITUTIONAL DILEMMA

Another critic of the Harvey Milk School is New York State Senator Ruben Diaz, Sr. In 2003 Senator Diaz and a group of parents filed suit challenging the use of public funds for the Harvey Milk School. The suit alleges that the school violates the New York City Department of Education's antidiscrimination policies, as well as the Equal Protection Clause of the Fourteenth

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<sup>129</sup> Beth Shapiro, *Harvey Milk would have rejected gay school nephew says*, 365GAY.COM NEWSCENTER, Aug. 11, 2003 available at <http://www.365gay.com/NewsContent/o81103milkSchool.htm>

Amendment by discriminating against heterosexual students.<sup>130</sup> Apparently the Harvey Milk School is a victim of its own success: Diaz argues that the heightened quality of education provided by the Harvey Milk School discriminates against black and Latino youth attending low-performing public schools.<sup>131</sup> Senator Diaz ignores the fact that approximately eighty percent of Harvey Milk School students are black or Latino.<sup>132</sup> Diaz contends that “the money should be better used to protect all children – black, Jewish, Hispanic, Asian, Arabs – all children. The ones that we have to segregate really are the bullies. Those are the ones with the problems. The homosexual kids, they are not the ones with the problems.”<sup>133</sup>

Professor William Rubenstein, a professor at U.C.L.A. Law School, believes that the suit will likely fail. Because these students are more susceptible to anti-gay harassment, they are not similarly situated to other New York City public school students.<sup>134</sup> The lawsuit has promoted some change already though; the Harvey Milk School’s website has removed references to lesbian, gay, bisexual, or transgender students, and administrators emphasize that the school is open to “any interested individual.”<sup>135</sup>

One commentator, Erik Ludwig, has used the Harvey Milk School as an example to argue that it is more desirable for the gay community for courts to consider homosexuality as a non-suspect class.<sup>136</sup> Ludwig contends that “benign” programs intended to address anti-gay discrimination, like the Harvey Milk School, are more likely to be invalidated by the court if they are subjected to intermediate or strict scrutiny. He further contends that after the Supreme Court found “private prejudice and moral disapproval” to be illegitimate state interests in *Romer v. Evans*, laws which discriminate against LGBT individuals will be struck down under rational basis

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<sup>130</sup> David M. Herszenhorn, *Lawsuit Opposes Expansion of School for Gay Students*, THE NEW YORK TIMES, August 16, 2003, 12.

<sup>131</sup> *Id.*

<sup>132</sup> John Colapinto, *The Harvey Milk School Has No Right to Exist*, NEW YORK MAGAZINE, Feb. 7, 2005, at 38,

<sup>133</sup> *See supra* note 130

<sup>134</sup> *Id.*

<sup>135</sup> *See supra* note 132

<sup>136</sup> Erik K. Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513 (2006)

review. Thus, any heightened standard of review, Ludwig argues, would not provide any additional protection to LGBT individuals, but would instead invalidate any attempts to address the discriminatory treatment suffered by the LGBT community.<sup>137</sup>

#### IV. RECOMMENDATIONS AND CONCLUSION

Derek Henkle suffered years of taunts, threats, intimidation, discrimination and violence at the hands of his classmates and indifference, inaction and even contempt by school administrators. Finally, at the age of 16, Derek was forced to withdraw from the Washoe County School District and enroll in an adult education program where he was ineligible to receive his high school diploma. Subsequently, Derek sued the Washoe County School District and those individual administrators and school personnel that had turned blind eyes to his suffering.<sup>138</sup> In his complaint, Derek asserted that the defendants had violated his Equal Protection and First Amendment freedom of speech rights and that their actions constituted violations of Title IX and state tort laws including negligence, negligent training and supervision, and intentional and negligent infliction of emotional distress.<sup>139</sup> Derek sought compensatory and punitive relief, as well as an injunction to require the Washoe County School District to issue him a high school diploma.

In March of 2001, a federal district court judge, in denying many of the School District's motions for summary judgment, allowed a number of Derek's claims to go forward, including First Amendment, Title IX, and state tort law claims against the School District and the individual defendants, and Equal Protection claims against the individual defendants<sup>140</sup>. The judge also

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<sup>137</sup> *Id.* at 518

<sup>138</sup> *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001)

<sup>139</sup> *Id.* at 1071

<sup>140</sup> *Id.* at 1067. See also Lambda Legal, *Henkle v. Gregory Litigation Timeline*, available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/159.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/159.pdf) (last viewed November 25, 2006)

refused to dismiss Derek's claims for punitive damages.<sup>141</sup> Five months later, the Washoe County School District settled with Derek for over \$450,000.<sup>142</sup>

The results of Derek's lawsuit were even broader and more important. As a condition of the settlement, the Washoe County School District agreed to enact 18 policy changes whose purpose were to ensure that no other student would have to live through Derek's nightmare. Important changes included a recognition that "student's freedom of expression includes the rights to disclose their sexual orientation at school and to discuss issues related to sexual orientation in school settings," as well as fifteen changes to the School Districts discrimination, harassment, and sexual harassment policies.<sup>143</sup> These changes will hopefully ensure that Derek's experience will not be relived by another student in the Washoe County School District.

Derek went on to study public communications at New York University and American University, even interning with ABC's Good Morning America Weekend Edition.<sup>144</sup> Other victims of anti-gay harassment are not as fortunate. No student, gay or straight, should have to go through the torture Derek and many others like him have to endure on a daily basis. Derek himself noted, "School Officials didn't care about me at all. They were more concerned about sweeping the abuse under the rug. Gay and Lesbian kids should be able to be who they are, and free to get an education and live with hope instead of fear."<sup>145</sup>

Derek's case is illustrative of many of the tools attorneys can use in the courtroom to combat anti-gay harassment in the school halls: Equal Protection, Title IX, First Amendment, and state tort laws. Noticeably absent from that list of tools is a federal statute explicitly targeting anti-gay abuse in the school setting. Despite the availability of these other tools, and their

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<sup>141</sup> Henkle v. Gregory *Litigation Timeline* supra note 140

<sup>142</sup> Lambda Legal, *One Gay Student Fights Back* (2002), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1152> (last visited November 25, 2006)

<sup>143</sup> Lambda Legal, *Summary of Policy Changes Adopted as a Result of the Settlement in Henkle v. Gregory*, available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/160.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/160.pdf) (last visited November 25, 2006)

<sup>144</sup> Derek Henkle, [www.derekhenkle.com](http://www.derekhenkle.com) (last visited November 25, 2006)

<sup>145</sup> Joneil Adriano, *A New Battle to Protect Gay Students* (2000), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=676> (last visited November 25, 2006)

effectiveness as demonstrated in *Henkle v. Gregory*, Congressional action should be taken to address this serious problem. The application of these other tools – Equal Protection, Title IX, First Amendment and state tort laws – is all dependent on specific factual scenarios. This requires that actual instances of harassment be ‘fit into,’ or framed, in a certain way that often feels artificial, and occasionally is simply impossible. The result is that some victims of anti-gay harassment are left without any legal remedies; further, students, teachers, and administrators alike are left unsure of what exactly is required by law. Clarification, whether in the form of a new federal law, or an expansion of Title IX to include sexual orientation and gender identity as “sex,” is needed. Unfortunately, any federal action is unlikely in the near future in light of a lack of political will on the part of politicians and a lack of attention by the gay community who are busy struggling for marriage and employment equality.

The ultimate solution, however, does not lie in the halls of Congress or in the court room, but at the schoolhouse itself. By the time the lawyers get involved, a student has likely already suffered from severe and pervasive harassment. The effects of that harassment, on the particular student and on other gay students who might have observed it, are irreversible. Accordingly, a solution which seeks to *prevent* the harassment from ever occurring is needed. It is true that the legal tools described above do more than punish past behavior – by punishment of past behavior, similar future conduct is deterred.<sup>146</sup> But more importantly, policies, as well as a culture, at the local level – in each classroom across the nation – which do not tolerate harassment of any student based on his actual or perceived sexual orientation or gender identity, are necessary for real change. School policies that prohibit all types of harassment, and teachers and administrators that fully enforce such policies, would significantly reduce the incidents of harassments, and the need for legal remedies.

The adoption of policies expressly addressing anti-gay harassment in every school system across America is an ambitious, if not impossible, goal. In some school systems

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<sup>146</sup> It is for this reason that a federal statute expressly addressing anti-gay harassment is needed. In order to deter future conduct, it must be clear what conduct is actually prohibited.

administrators will recognize the need for such policies. In others, school officials will refuse to see the urgent need for such policies, even in light of actual harassment in their schools, and instead blame the victim. In such cases, the legal tools once again play an important role. Unfortunately, the strongest messages are often felt in the pocketbook. Courts' willingness to hold school districts, as well as individuals, liable sends a strong message to these individuals that they should not tolerate such abuse. An even stronger message is the courts' willingness to impose not only compensatory, but punitive damages as well.

Training to educate and sensitize teachers to the issues facing LGBT students is another important aspect of the solution to this problem. Even when a policy expressly addressing anti gay harassment has been adopted, the struggle is not over. In order to be effective, administrators and teachers must be willing to aggressively enforce the policy. Teachers who understand the truths about homosexuality – and not the anti-gay rhetoric articulated by right-wing America – are more likely to protect gay students and enforce such policies. Training and education for teachers and administrators would help to dispel homophobic myths that discourage the enforcement of anti-harassment policies.

Gay-Straight Alliances also play an important role in reducing anti-gay harassment and mitigating the damaging effects of such harassment. First, GSAs help to educate students in their schools about LGBT students. Students who are better informed about their LGBT classmates are less likely to harass them. GSAs also provide a supportive environment for those students who are being harassed, mitigating the damaging effects of the harassment. A student is less likely to drop out of school or commit suicide if there is a group of students and teachers at the school supporting the student.

Finally, although this paper did not discuss discrimination and harassment of LGBT teachers, local policies that expressly prohibit discrimination and harassment of school personnel based on sexual orientation and gender identity, are essential to addressing anti-gay harassment of students. Often LGBT teachers are very secretive about their sexual orientation, fearing that the truth could jeopardize their jobs. Frequently, these teachers avoid getting involved in

situations involving anti-gay harassment, fearing that their involvement could “out” them.<sup>147</sup> Policies protecting LGBT teachers and administrators help to foster an environment in which anti-gay harassment is unacceptable, and LGBT teachers will be free to address anti-gay harassment of students without fear of reprisal by the administration.

Ultimately, more than a mere change in laws and policies is needed to protect students from anti-gay harassment; a change of heart is needed. Heather Sawyer, senior counsel for Lambda Legal Defense and Education Fund, correctly noted:

When young people hear the message that we as a country want to deny gay families civil protections we provide other families under law, it has a negative boomerang effect on how young people may treat other students they know or perceive to be gay. . . . It sends a message that gay people are not entitled to [the] same equality and rights as non-gay people.<sup>148</sup>

Although the gay rights movement has made significant improvements in the lives of LGBT Americans, and many Americans embrace their Gay and Lesbian neighbors, friends, and family, many in America still cling to antiquated beliefs that homosexuality is a sinful choice or mental disease that can be overcome. It is contingent upon the LGBT community and their allies to reach out to these individuals, educate them, and hopefully in doing so change their perceptions. In a world free of homophobia, students would have no reason to harass gay students, and teachers would not hesitate to prevent any such harassment that did occur. But, until that day comes a variety of tools must be employed by both lawyers and teachers to ensure that lesbian, gay, bisexual, and transgender students are provided with a safe place to learn.

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<sup>147</sup> These assumptions about LGBT teachers and school personnel are derived from the author's experience with a local organization seeking to have sexual orientation and gender identity added to the Clarke County School District's anti-harassment and anti-discrimination policies.

<sup>148</sup> Dahleen Glanton, *High school gays get a harsh lesson; Kerry Pacer's failing struggle to encourage acceptance of homosexuals in her rural Georgia hometown is echoed across the U.S.*, CHICAGO TRIBUNE, March 13, 2005, at 6.