



NATIONAL CENTER FOR LESBIAN RIGHTS

HARASSMENT & DISCRIMINATION: A Legal Overview

FEDERAL LAW

Equal Protection Clause of the 14th Amendment (applies to public schools)

All students have a federal constitutional right to equal protection under the law. This means that schools have a duty to protect lesbian, gay, bisexual, and transgender (LGBT) students from harassment on an equal basis with all other students. If school officials failed to take action against anti-LGBT harassment because they believed that the LGBT student should have expected to be harassed, or because they believed that the LGBT student brought the harassment upon him or herself simply by being openly LGBT, or because the school was uneducated about LGBT issues and was uncomfortable addressing the situation, then the school has failed to provide equal protection to the student.¹

Title IX (applies to all schools that receive federal financial assistance)

Title IX² of the Education Amendment Acts of 1972 prohibits discrimination based on sex in education programs and activities receiving federal financial assistance. Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at an LGBT student is prohibited by Title IX if it is sufficiently severe and pervasive.³

Title IX also prohibits gender-based harassment, including harassment on the basis of a student's failure to conform to stereotyped notions of masculinity and femininity.⁴

Standard of Liability

Under Title IX, a school district can be held liable if it knew about sex-based harassment of a student by another student or a teacher and failed to take reasonable steps to stop it.⁵ In other words, in order for a school district to be held liable under Title IX, an individual or body with the authority to take corrective action must have known about the harassment and failed to take reasonable corrective actions.⁶

Enforcement

Title IX permits a student to sue for money damages in state or federal court.⁷ Alternatively, anyone may file a complaint with the Office of Civil Rights (OCR) of the Department of Education. OCR has the power to initiate investigations upon receiving a complaint, and can cut off the school's federal funding if it finds Title IX has been violated. OCR has negotiated settlements on behalf of LGBT students who were harassed because of their sexual orientation and/or gender identity.

Affirmative Requirements

Title IX requires all schools receiving federal financial assistance to adopt a policy prohibiting discrimination on the basis of sex and to notify employees, students, and elementary and secondary school parents of the policy.⁸ Title IX also requires the school to adopt and publish grievance procedures for resolving sex discrimination complaints,⁹ and requires schools to have at least one employee designated to be responsible for coordinating efforts to comply with Title IX.¹⁰

1st Amendment, Equal Protection & Due Process Clauses (apply to public schools)

A transgender student's right to dress in accordance with his or her gender identity may also be protected under the First Amendment and the Equal Protection and Due Process Clauses of the U.S. Constitution. The First Amendment limits the right of school officials to censor a student's speech or expression. Students also have a protected liberty interest (under the Due Process Clause) in their personal appearance. In addition, a transgender student also has a right under the Equal Protection Clause to be treated similarly to other students of the same gender identity. If the school treats the student differently than it would treat other students of the same gender identity (i.e. if it imposes a dress code on a male-to-female transsexual that is different than the dress code that is applied to biological females), then the school is applying rules in a sex discriminatory way (i.e. it is applying the code differently based on the student's biological sex).¹¹

Proposed Legislation: Student Non-Discrimination Act

The Student Non-Discrimination Act (H.R. 998/S. 555) was introduced to ensure that all students have access to public education in a safe environment free from discrimination, including harassment, bullying, intimidation and violence. The Student Non-Discrimination Act would provide nationwide comprehensive prohibition of discrimination in public schools based on actual or perceived sexual orientation or gender identity. The measure would provide victims of such discrimination with meaningful and effective remedies, modeled after Title IX. On March 10, 2011 the bills were introduced in the House of Representatives by Rep. Polis (D-CO) and in the Senate by Sen. Al Franken (D-MN).

Proposed Legislation: Federal Safe Schools Improvement Act

The Safe Schools Improvement Act (H.R. 1648/S. 506) is an amendment to the Elementary and Secondary Education Act (previously known as the No Child Left Behind Act). It would require schools to implement a comprehensive anti-bullying policy that enumerates categories most often targeted by bullies, including race, religion, sexual orientation, gender identity/expression and others. It also would require states to include bullying and harassment data in their state-wide needs assessments reporting. The Safe Schools Improvement Act was introduced into the Senate on March 8, 2011 by Sens. Robert Casey (D-PA) and Mark Kirk (R-IL) and was introduced into the House on April 15, 2011 by Rep. Linda Sanchez (D-CA).

For more information, visit:

http://www.nclrights.org/site/PageServer?pagename=issue_federallegislation_overview

STATE LAW

In addition to these federal protections, numerous states and the District of Columbia have statutes prohibiting discrimination or harassment on the basis of sexual orientation or gender identity in educational facilities: Arkansas, California, Colorado, District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, North Carolina, Oregon, Vermont, and Washington.¹² New York currently prohibits discrimination in schools based on sexual orientation only but has passed a more comprehensive anti-bullying law that includes both sexual orientation and gender identity, which will be effective July 1, 2012.¹³ Additionally, there are four states that offer protections on the basis of sexual orientation only: Connecticut, Massachusetts, Nevada, and Wisconsin.¹⁴ Some states and many school districts have regulations or policies prohibiting discrimination based on sexual orientation or gender identity.¹⁵ Many states also have laws protecting

students from bullying and cyberbullying, that do not explicitly protect students on the basis of their sexual orientation or gender identity.

This publication is intended to provide general information. Because laws and legal procedures are subject to change and differing interpretations, the National Center for Lesbian Rights cannot ensure the information herein is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or conducting your own independent research.

¹¹ See Flores v. Morgan High Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (holding that students could maintain claims alleging discrimination on the basis of sexual orientation under the Equal Protection Clause where school district failed to protect the students to the same extent that other students were protected from harassment and discrimination); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that a student could maintain claims alleging discrimination on the basis of gender and sexual orientation under the Equal Protection Clause where school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation). In Nabozny, after the student and his parents reported the incidents of physical violence to the appropriate school administrator, the administrator told the student and his parents that such acts should be expected because the student was openly gay. *Id.* at 451. See also Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000) ("We 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.") (citing Nabozny, 92 F.3d at 458).

The school district eventually settled the *Flores* case for over \$1.1 million, in addition to mandatory training for all school staff and all 7th and 9th grade students. For more information about this case, see www.nclrights.org. The school district in Nabozny eventually settled the case for almost \$1 million in damages. For an overview of 15 lawsuits against school districts, see *Fifteen Expensive Reasons Why Safe Schools Legislation Is In Your State's Best Interest*, available at <http://www.nclrights.org/site/DocServer/15reasons.pdf?docID=1621>.

² 20 U.S.C. § 1681(a). Title IX provides, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

³ See Office of Civil Rights, Revised Sexual Harassment Guidance, § III (Jan. 2001) ("OCR Revised Guidance"), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual."). See also Montgomery, 109 F. Supp. 2d 1081; Theno v. Tonganoxie Unif. Sch. Dist. No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005) (same-sex student-on-student harassment is actionable under Title IX).

⁴ See OCR Revised Guidance, § III (“Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to the level that denies or limits a student’s ability to participate in or benefit from the educational program. . . . A school must respond to such harassment in accordance with the standards and procedures described in this guidance. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.”) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding sex-stereotyping is a form of sex discrimination prohibited by Title VII) (emphasis added). See also Montgomery, 109 F. Supp. 2d 1081 (male student who suffered same-sex harassment because of his failure to meet masculine stereotypes could bring a Title IX claim); Miles v. New York Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

⁵ Davis v. Monroe County Sch. Dist., 119 S. Ct. 1661, 1673 (1999).

It is important to note, however, that in order for a school to be held liable, a person with authority to address the situation had to have known about the harassment. Thus, it may not be sufficient for a student to tell a teacher about the harassment. Students and their parents should be advised to report any harassment to the principal, vice-principal, and or district officials, preferably in writing.

⁶ See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998). See also Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009) (school may be liable under Title IX for failing to take reasonable steps to protect students from harassment if the school knows that its methods for dealing with harassment are ineffective but fails to take any other actions to address the issue).

⁷ See Franklin v. Gwinnett Co. Public Schs., 503 U.S. 60 (1992).

⁸ 34 C.F.R. 106.9.

⁹ 34 C.F.R. 106.8(b).

¹⁰ 34 C.F.R. 106.8(a).

¹¹ See, e.g., Doe v. Yunits, 2000 WL 33162199 (Mass. Super. 2000) (holding that transgender student had first amendment right to wear clothing consistent with her gender identity and that treating transgender girl differently than biological girls was discrimination on the basis of sex).

¹² ARK. CODE § 6-18-514; CAL. EDUC. CODE §§ 220, 210.7, 212.6, 32228, & 51500; COLO. REV. STAT. §§ 2-4-401(13.5), 22-32-109(//)(l), 22-32-109.1 12-59-106(1)(s), 22-30.5-104(3), 22-30.5-507(3), 22-38-104(1)(d), & 24-34-301(7); D.C. CODE §§ 2-1401.02 & 2-1402.41; 105 ILL. COMP. STAT. ANN. 5/27-23.7;; IOWA CODE §§ 216.9, 280.28; ME. REV. STAT. ANN. tit. 5, §§ 4552, 4553(9-C), 4601, & 4602(4); MD. CODE ANN. EDUC. §§ 7-424, 7-724.1; MINN. STAT. §§ 363A.03 subd. 44, 363A.13; N.J. STAT. ANN. §§ 10:5-5, 10:5-12(f)(1), & 18A:37-14; N.C. GEN. STAT. §§ 115C-407.15, 115C-407.16, 115C-407.17; OR. REV. STAT. §§ 659.850, 174.100, 339.351(d)(3), & 338.125; VT. STAT. ANN. tit. 16, § 11(26); WASH. REV. CODE §§ 49.60.030 & 49.60.040(2), (26).

¹³ N.Y. EXEC. LAW §§ 291(2), & 292(27); N.Y. EDUC. LAW § 10-18 (effective July 1, 2012).

¹⁴ CONN. GEN. STAT. § 10-15(c); MASS. GEN. LAWS Ch. 76, § 5; NEV. REV. STAT. §§ 651.050, 651.070, 651.110; WIS. STAT. § 118.13.

¹⁵ See e.g., HAW. CODE R. §§ 8-19-2, 8-19-13.