

# Schools' Legal Obligations to Gay Students

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**S**chools should be safe places. Students who are safe, respected, and valued are more likely to learn and achieve than students who are not.<sup>1</sup> Current North Carolina statutes and policies express the same view—for example:

*The General Assembly finds that all schools should be safe, secure, and orderly.*<sup>2</sup>

*It is the priority of the State Board of Education to provide each and every student in North Carolina's public schools and public charter schools with a safe, orderly, and caring learning environment that is free from harassment, bullying, and discrimination.*<sup>3</sup>

*Character education must be incorporated into the standard curriculum and should address several traits. Two of these traits are respect . . . and kindness.*<sup>4</sup>

*Local school boards are encouraged to include instruction on students' responsibility for school safety and for helping to create a harmonious school atmosphere . . . [.] and for cultivating an orderly learning environment . . .*<sup>5</sup>

These statements apply to all schools and to each and every student. "Each and every" includes students who are not heterosexual, are not perceived as heterosexual, or are unsure of their sexual orientation, as well as the vast majority of students who are heterosexual. It also includes "transgendered" students—that is, those who feel that their gender does not correspond to their biological sex.

An increasing number of young people are openly identifying themselves as gay,

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lesbian, bisexual, or transgendered.<sup>6</sup> Other young people are questioning their sexual orientation or gender identity.<sup>7</sup> Not surprisingly, controversies involving sexual orientation and gender identity have sprung up in public schools across the country. Controversies may occur over peer harassment of students based on real or perceived sexual orientation; First Amendment issues, including dress codes; or establishment of a gay/straight alliance.

School officials are being called on to explain and defend their responses in court, in the media, and in their community as well as at school. School officials' responses are likely to be appropriate if school boards have reviewed their policies with these controversies in mind. In addition, school boards must take affirmative steps to stop known harassment of gay students, both to prevent injury and avoid potential liability, and to provide students with a safe learning environment. Attention to these issues helps students learn and achieve and also may affect rates of dropping out, substance abuse, depression, homelessness, and poor health.

Sexual orientation and gender identity are complicated issues for many school officials and employees. Some wish that





schools could ignore these issues altogether. Others want more acknowledgment of and support for gay students. Still others have strong religious beliefs or private feelings that seem to be at odds with their public obligations.

The issues also are complicated because schools do not exist in a vacuum. Issues related to gay students occur partly in response to conditions external to schools.

In recent years, significant changes have occurred in health professionals' views of sexual orientation, in popular culture, in businesses seeking both customers and employees, in political discourse, in some religious institutions, and in the number of gay parents involved in their children's education. Across the country, some states, political subdivisions, and school boards have adopted nondiscrimination statutes, ordinances, or policies. Many universities, private organizations, and corporations have adopted similar policies. (For guidance from professional associations on sexual orientation and youth, see the sidebar on page 18.)

Changes have taken place in the legal culture too, with increases in the number of openly gay attorneys, the number of advocacy groups, the amount of pro bono work done by lawyers, and the number of law school courses dealing with issues affecting gay people. Further, the law itself has evolved, most notably with two Supreme Court decisions based on the Fourteenth Amendment to the Constitution. In the first decision, the Court said that the Equal Protection Clause does not permit a state to prohibit all legislative, executive, or judicial action, at any level of state or local government, designed to protect homosexual persons.<sup>8</sup> In the second decision, the Court held that the Due Process Clause protects homosexual acts by consenting adults in the privacy of their

## Guidance from Professional Associations on Sexual Orientation and Youth

**Barbara L. Frankowski and Committee on Adolescence (American Academy of Pediatrics), *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827 (2004)**, available at <http://pediatrics.aappublications.org/cgi/content/full/113/6/1827> (last visited June 5, 2006)

### Excerpts

Young people whose sexual orientation is not heterosexual can have risks to their physical, emotional, and social health, primarily because of societal stigma, which can result in isolation. . . .

Human sexual orientation most likely exists as a continuum from solely heterosexual to solely homosexual. . . . The mechanisms for the development of a particular sexual orientation remain unclear, but the current literature and most scholars in the field state that one's sexual orientation is not a choice. . . .

. . . . If their environment is critical of their emerging sexual orientation, these adolescents may experience profound isolation and fear of discovery, which interferes with achieving developmental tasks of adolescence related to self-esteem, identity, and intimacy. . . .

Nonheterosexual youth are represented within all populations of adolescents, all social classes, and all racial and ethnic groups. . . .

. . . . It is critical that schools find a way to create safe and supportive environments for students who are or wonder about being nonheterosexual or who have a parent or other family member who is nonheterosexual.

**JUST THE FACTS ABOUT SEXUAL ORIENTATION & YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS AND SCHOOL PERSONNEL (Washington, D.C.: American Psychological Association, 2006)**, available at [www.apa.org/pi/lgbcc/publications/justthefacts.html](http://www.apa.org/pi/lgbcc/publications/justthefacts.html) (last visited June 5, 2006)

This publication was developed and is endorsed by the American Academy of Pediatrics, the American Counseling Association, the American Association of School Administrators, the American Federation of Teachers, the American Psychological

Association, the American School Health Association, the Interfaith Alliance Foundation, the National Association of School Psychologists, the National Association of Social Workers, and the National Education Association.

### Excerpts

Sexual orientation is one component of a person's identity. . . .

Sexual behavior does not necessarily equate to sexual orientation. . . .

Gay, lesbian, and bisexual adolescents follow a developmental path that is both similar to and different from that followed by heterosexual adolescents. All teenagers face certain developmental challenges. . . . Gay, lesbian, and bisexual youth must also cope with prejudiced, discriminatory, and violent behavior and messages in their families, schools, and communities. Such behavior and messages negatively affect the health, mental health, and education of lesbian, gay, and bisexual young people. These students are more likely than heterosexual students to report missing school due to fear, being threatened by other students, and having their property damaged at school. . . .

For these reasons, the experience of gay, lesbian, and bisexual teenagers is often one of isolation, fear of stigmatization, and lack of peer or familial support. . . . Because of their legitimate fear of being harassed or hurt, gay, lesbian, or bisexual youth are less likely to ask for help. Thus, it is important that their environments be as open and accepting as possible, so these young people will feel comfortable sharing their thoughts and concerns. To be able to provide an accepting environment, school personnel need to understand the nature of sexual orientation development and be supportive of healthy development for all youth.

**Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity (Nat'l Sch. Bds. Ass'n, n.d.)**, available at [www.nsba.org/site/docs/34600/34527.pdf](http://www.nsba.org/site/docs/34600/34527.pdf) (last visited June 5, 2006)

This publication provides practical guidance on schools' legal rights and responsibilities with respect to students, programs, and curriculum.

homes, with the result that adults may not be criminally prosecuted in these circumstances.<sup>9</sup>

This article's goal is to introduce a rapidly developing area of education law, not to review all relevant issues and cases.<sup>10</sup> The law is still developing and expanding, and laws differ from one jurisdiction to another. No reported case has involved a North Carolina

school. North Carolina does not have a state statute barring discrimination on the basis of sexual orientation, and most school boards have no policy protecting gay students (or employees) against discrimination.<sup>11</sup> At the same time, gay students attend school in every jurisdiction, and some may face situations similar to ones that have led to lawsuits in other places (for an example,

see the sidebar on page 21). Understanding the law helps school board members and employees meet their responsibilities and helps the larger community understand the constraints within which school officials must make decisions. The following discussion of peer harassment, First Amendment issues, and gay/straight alliances is intended to promote that understanding.<sup>12</sup>

## Peer Harassment Based on Actual or Perceived Sexual Orientation

Although every case has different facts, the story lines are remarkably similar. A student who is gay or perceived to be gay alleges that he or she has been subjected to harassment by other students, ranging from teasing to severe physical assault. The student reports that harassment to school officials, who do not adequately respond. Their inadequate response allegedly causes injury to the student. The student then sues, claiming a violation of Title IX, the Equal Protection Clause, the Due Process Clause, or some combination of them.

Several cases have decided only whether a particular lawsuit may proceed. Such cases still may be resolved before a trial, be withdrawn, be settled, or go to trial. Settlements may involve damages, attorneys' fees, court costs, policy review and modification, and instructions for students and training for employees. Settlements may be substantial.

### Title IX Claims

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program that receives federal financial assistance.<sup>13</sup> It applies to all public elementary and secondary schools. One kind of prohibited discrimination is sexual harassment.<sup>14</sup> In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court spelled out the elements required for a school board to be liable for student-student harassment under Title IX.<sup>15</sup> When student-student sexual harassment is alleged, Title IX permits a student to recover damages from a school board when (1) the school board has actual knowledge of the harassment, (2) the board acts with deliberate indifference to known acts of harassment, and (3) the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. The Court limited any liability to circumstances in which the school board exercises substantial control over both the harasser and the context in which the known harassment occurred.



Jesse Montgomery, a student in Minnesota, sued his school district for its alleged failure to respond when he informed them that he was harassed because of his gender and perceived sexual orientation.<sup>16</sup> He claimed that he was subjected to daily harassment by his peers—name-calling, pushing, kicking, tripping, punching, and grabbing—from kindergarten through the tenth grade, when he transferred to another district. Montgomery further claimed that the harassment infringed on his access to significant portions of the educational environment because to avoid harassment, he stayed home sometimes, did not participate in sports, and tried not to use the cafeteria, the school bathroom, and the school bus. He reported the incidents of harassment to a variety of school officials, including teachers, bus drivers, principals, counselors, and personnel in the superintendent's office. Some school officials did not respond. Others did respond, but Montgomery claimed that their responses were inadequate.

The court identified as a key issue the defendant's argument that the harassers were motivated by hostility to homosexuals, not by sexual desire. Because Title IX prohibits discrimination based on sex, not sexual orientation, a student cannot bring an actionable claim under Title IX for discrimination based solely on sexual orientation or perceived sexual orientation.<sup>17</sup> However, the court ruled, Title IX could be construed to prohibit discrimination based on the claimant's failure to meet stereotypes associated with his or her sex. Thus, Montgomery's lawsuit was allowed to proceed.<sup>18</sup>

This Title IX theory of gender stereotyping was successful in a recent case from Kansas. Dylan Theno sued his school district on the basis of the district's alleged deliberate indifference to same-sex harassment while Theno was in junior and senior high school. The court denied the district's motion for a ruling in its favor before trial.<sup>19</sup> The case went to trial, and the jury returned a \$250,000 verdict against the district. The district then asked the court to enter judgment

in its favor in spite of the verdict. The court denied this motion.<sup>20</sup>

The court explained that the trial record contained adequate evidence for the jury to have found that (1) Theno was harassed because of his gender—that is, because he did not conform to stereotypical gender expectations for a teenage boy in his community; (2) the harassment was so severe, pervasive, and objectively offensive that it effectively denied his access to educational opportunities or benefits; and (3) the school district acted with deliberate indifference to known acts of harassment. The court noted, “The record reflects that a sufficiently significant number of school administrators essentially turned a blind eye to the harassment by ignoring, tolerating, or trivializing the harassment.”<sup>21</sup>

### Equal Protection Claims

In cases of student-student harassment, equal protection claims arise when a school district allegedly treats same-sex harassment differently from opposite-sex harassment (offering more help in opposite-sex situations) or treats harassment of males differently from harassment of females (offering more help to females).

*Nabozny v. Podlesny* was the first case to rely on an equal protection theory to grant relief to a gay student subjected to peer harassment at school.<sup>22</sup> Starting in the seventh grade, Jamie Nabozny was open about his sexual orientation. He alleged that this resulted in persistent verbal and physical harassment by his peers. Nabozny repeatedly reported the problems to counselors and principals and a school police liaison, but the problems, including serious physical assaults, continued for years. He claimed that his two suicide attempts and post-traumatic stress disorder were caused by the situation at school and the failure of school officials to respond properly to his requests for help.

Nabozny sued, alleging that the school denied him equal protection of the laws on the basis of gender and sexual orientation. To succeed, he had to show intentional or purposeful discrimination. Nabozny presented evidence that the school district responded more aggressively to complaints of male-female sexual harassment than to his own com-

plaints of male-male sexual harassment. The court found that a school district’s departure from its established policy of punishing perpetrators of (female-male) harassment may establish discriminatory intent. A two-day trial followed, resulting in a jury verdict for Nabozny. After the verdict the school district and Nabozny settled the case for more than \$900,000.<sup>23</sup> At least two other federal courts have adopted the *Nabozny* rationale.<sup>24</sup>

### Due Process Claims

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teenth Amendment to impose liability on school boards for failure to address peer harassment.<sup>25</sup> They have not been successful because courts have ruled that local school administrators have no affirmative due process duty to protect students from other students.<sup>26</sup>

However, in *Nabozny* (discussed earlier), the court left the door open for a due process claim in some future case. Nabozny alleged that because the school district did not punish the students who harassed him, the district increased the risk that he would be harmed, and therefore the district had an affirmative duty to protect him. The court did not find sufficient evidence that the district’s actions placed Nabozny in danger or increased any preexisting danger. However, the court did not rule out the possibility that the Due Process Clause might apply if a plaintiff’s evidence showed that the school created a risk of harm or exacerbated an existing risk.

### First Amendment Issues

In some situations, schools may take adverse actions against students who are open about their homosexuality, encourage students to hide their homosexuality, regulate attire that has references to sexual orientation, or make other decisions based on a student’s expressed homosexuality. In these circumstances the board may find itself facing a lawsuit alleging infringement of the student’s First Amendment rights.

### Dress Codes

Local boards of education in North Carolina are required to adopt a reasonable dress code for students.<sup>27</sup> Their authority to determine what is reasonable is limited by students’ First Amendment rights. The First Amendment protects student dress only if it communicates a message that is understood by others and so is properly considered “speech.” Most private (non-school-sponsored) student speech at school may be restricted by boards only if they can show that the speech would materially and substantially interfere with discipline at school or the rights of others (or could reasonably be forecast to do so).<sup>28</sup>

In *Chambers v. Babbitt*, a high school student in Minnesota wore a T-shirt that said “Straight Pride” on the front and bore a symbol of a man and a woman holding hands on the back. He was told not to wear it again because it offended some students and because of safety concerns.

Elliot Chambers sued and asked for a preliminary injunction declaring that the principal’s decision violated his First Amendment right to express his religious beliefs. Although the school presented evidence of incidents that reflected tension around the issue of homosexuality, the court granted him a preliminary injunction against the principal’s ban of the shirt.<sup>29</sup> The court noted that maintaining a school community of tolerance includes tolerance of such viewpoints as expressed by “Straight Pride” as well as tolerance of homosexuality.

In April 2002, Natalie Young, a middle school student in New York, was sent home for the day when she refused to change her “Barbie Is a Lesbian” T-shirt. Young sued the school district,

claiming that she had a First Amendment right to wear the shirt. The suit was settled for \$30,000.<sup>30</sup>

### Speech about Homosexuality

In *Henkle v. Gregory*,<sup>31</sup> a gay student appeared on a local television show discussing the experiences of gay high school students. Following the broadcast, Derek Henkle alleged that he was regularly harassed by his classmates during school hours. He reported the problems but allegedly was told to keep his sexuality to himself and to remove buttons supporting homosexuality from his backpack. He was reassigned to an alternative high school, where, Henkle alleged, the principal told him to “stop acting like a fag.” He was transferred to a third high school and again told to keep his homosexuality to himself. Then he was transferred yet again to an adult education program at a local community college.

Henkle sued, claiming that school officials tried to suppress his constitutionally protected speech and then retaliated

against him for engaging in it. The court allowed his claims to go forward.

Henkle’s case ultimately was settled (for \$451,000), so the court never resolved the First Amendment issues.<sup>32</sup> However, the settlement did include a requirement that the school district amend its policy on student expression to include a statement that students’ freedom of expression includes the right to discuss their sexual orientation and issues related to sexual orientation at school (subject, of course, to limitations imposed on other non-school-sponsored student speech).

### Gay/Straight Alliances

“Gay/straight alliances” are student-initiated groups that include students irrespective of sexual orientation working together to improve the school climate for gay students and promote respect for all students.<sup>33</sup> These alliances (and clubs with similar aims that go by other names) exist in secondary schools across the country.<sup>34</sup>

A federal statute, the Equal Access Act (EAA), has come to play the key

role in defining a school’s obligation to students seeking to create an alliance.<sup>35</sup>

If the statute applies, it prohibits a secondary school from discriminating against student-initiated groups on the basis of “the religious, political, philosophical or other content” of their speech.<sup>36</sup> The EAA covers only secondary schools that receive federal funds and choose to create a “limited open forum” by allowing one or more non-curriculum-related student groups to meet on school premises during noninstructional time.<sup>37</sup> A school board that allows only curriculum-related clubs is not affected by the EAA.<sup>38</sup>

The EAA has been the basis for successful lawsuits by students attempting to establish gay/straight alliances when school boards have attempted to deny them recognition as official noncurriculum clubs.<sup>39</sup> Students’ claims of EAA violations have been allowed to proceed in at least six cases. The court ruled in favor of the school district in only one case.<sup>40</sup> In that case, students wanted to post fliers containing links to Internet

## Recent Developments in North Carolina

### Opposition to a Gay/Straight Alliance

When students at South Rowan High School established a Gay/Straight Alliance early in 2006, many community members and some outside organizations strongly opposed the action. On April 10 the Rowan-Salisbury Board of Education voted 7-0 “to adopt a board policy to ban all sexually oriented clubs, gay/straight or otherwise, and to address any student emotional issues concerning the above with our guidance counselors, if the creation of the club would materially and substantially interfere with the orderly conduct of educational activities within the school” (pp. 3–4 of the minutes). Many people and media reports apparently assume that this motion automatically bans the alliance. However, it is not yet clear whether that is the motion’s effect or whether any formal legal challenge will be made to the board’s action if the board bans the alliance.

Minutes of the school board meeting summarize the discussion. They are available at [www.rss.k12.nc.us/BOE/0506BOEMnts/BOE4-10-06.pdf](http://www.rss.k12.nc.us/BOE/0506BOEMnts/BOE4-10-06.pdf) (last visited June 14, 2006).

### Problems Described in School Climate Reports

In 2005 the Gay, Lesbian and Straight Education Network’s Research Department published *From Teasing to Torment: A Report on School Climate in North Carolina*, which is based on student interviews conducted in December

2004. Students reported frequently hearing homophobic and sexist remarks as well as negative remarks about gender expression. They also reported hearing “biased” language from some faculty and school staff, and said that some faculty and school staff did not intervene when they heard biased language from students. Some students reported that they were bullied, called names, or harassed because of personal characteristics, especially their physical appearance, actual or perceived sexual orientation, or nontraditional gender expression. Also, according to the report, some school employees did not take “appropriate action” when students reported harassment or assault. The report is available at [www.glsen.org/cgi-bin/iowa/all/news/record/1881.html](http://www.glsen.org/cgi-bin/iowa/all/news/record/1881.html) (last visited June 14, 2006).

Safe Schools NC is a statewide partnership of organizations and individuals dedicated to eliminating bullying, harassment, and discrimination on the basis of actual or perceived sexual orientation and gender identity in North Carolina schools. It recently published a report on homophobic language and verbal harassment in high schools, based on student reports at six high schools in Orange, Durham, and Wake counties. The report also makes recommendations for schools. It is available at [www.safeschoolsnc.com/Docs/SafeSchoolsNC-Research-Report-2006.pdf](http://www.safeschoolsnc.com/Docs/SafeSchoolsNC-Research-Report-2006.pdf) (last visited June 14, 2006).

sites that contained sexually explicit material and to educate students about safe sex, AIDS, and hatred, as well as to establish an alliance. The school district had an abstinence policy for all students. The court ruled in favor of the district before trial, explaining that sexually explicit material available through links on a website and the goal of discussing sex fell within the purview of “indecent speech,” which could be barred on the campus without violating either the First Amendment or the EAA. The court found that restrictions on student-initiated clubs made because of concerns about safety, potential harassment based on sexual orientation, and interference with teaching the curriculum are valid under the EAA.

Unless unusual facts justify a departure from the general rule, a school subject to the EAA must allow students to establish a gay/straight alliance on the same terms as it allows students to establish other non-curriculum-related clubs. Although equal access is not required if the student group itself substantially interferes with the school’s ability to maintain order and discipline, a school may not deny equal access to a gay/straight alliance merely because of concerns about opposition from within the school or from the community.

## Conclusion

In responding to these new developments, school boards and employees are best guided by old principles of fairness and neutrality. School officials’ behavior that might have been unchallenged in the past may now become the basis for a legal challenge. Even if that does not happen, the impact on students and others of the handling of controversies involving sexual orientation is real. Everyone benefits from having safe, welcoming schools where teachers and students can concentrate on teaching and learning.

## Notes

1. Three of many possible references substantiating this statement are as follows: Stefanie DeLuca & James E. Rosenbaum, *Are Dropout Decisions Related to Safety Concerns, Social Isolation, and Teacher Disparagement?* (Northwestern Univ., Dec. 2000), available at [www.civilrightsproject.harvard.edu/](http://www.civilrightsproject.harvard.edu/)

[research/dropouts/dropouts\\_papers.php](http://www.glsen.org/dropouts/dropouts_papers.php) (last visited Mar. 19, 2006); Jeffrey Grogger, *Local Violence and Educational Attainment*, 32 JOURNAL OF HUMAN RESOURCES 659 (1997); and Harris Interactive, Inc. & Gay, Lesbian & Straight Education Network, *From Teasing to Torment: School Climate in America. A Survey of Students and Teachers* (2005), available at [www.glsen.org/cgi-bin/iowa/all/library/record/1859.html](http://www.glsen.org/cgi-bin/iowa/all/library/record/1859.html) (last visited Mar. 19, 2006).

2. N.C. GEN. STAT. § 115C-105.45 (hereinafter G.S.).

3. N.C. State Bd. of Educ., *Policy SS-A-007* (July 1, 2004), in POLICY MANUAL (Raleigh: NCSBE) (emphasis added), available at <http://sbepolicy.dpi.state.nc.us/> (follow “NCSBE Policy Manual Table of Contents” hyperlink; then follow “SS Series” hyperlink; then follow “SS-A” hyperlink (last visited Mar. 12, 2006).

4. G.S. 115C-81(h).

5. G.S. 115C-81(h1).

6. This article uses the term “gay” to cover gay, lesbian, and bisexual students. Issues specific to transgendered students are not discussed.

7. “Sexual orientation refers to an individual’s pattern of physical and emotional arousal . . . . In contrast, gender identity is the knowledge of oneself as being male or female.” Barbara L. Frankowski and Committee on Adolescence [of the American Academy of Pediatrics], *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827 (2004), available at <http://pediatrics.aappublications.org/cgi/content/full/113/6/1827> (last visited Mar. 12, 2006).

8. *Romer v. Evans*, 517 U.S. 620 (1996).

9. *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. Significant issues beyond the scope of this article include harassment of employees, state tort claims, and criminal law.

11. I know of 2 (of 115) school boards in North Carolina, Chapel Hill–Carrboro City Schools and Guilford County, that have adopted policies prohibiting discrimination on the basis of sexual orientation or gender identity. There may be others, but the number still would be very small.

12. A new resource, *Public Schools and Sexual Orientation: A First Amendment Framework for Finding Common Ground*, recommends a process for dialogue about gay students. This document has been endorsed by the American Association of School Administrators, the Association for Supervision and Curriculum Development, BridgeBuilders, Christian Education Association International, the First Amendment Center, and the Gay, Lesbian & Straight Education Network. It is available at [www.firstamendmentcenter.org/PDF/sexual.orientation.guidelines.pdf](http://www.firstamendmentcenter.org/PDF/sexual.orientation.guidelines.pdf) (last visited Mar. 19, 2006).

13. 20 U.S.C.A. § 1681(a) (2003).

14. “Sexual harassment is unwelcome conduct of a sexual nature . . . [and] can include unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program.” U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES: TITLE IX (Washington, D.C.: OCR, 2001), available at [www.ed.gov/offices/OCR/archives/shguide/index.html](http://www.ed.gov/offices/OCR/archives/shguide/index.html) (last visited Mar. 12, 2006).

15. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). For a comprehensive discussion of harassment issues, see OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. & NAT’L ASS’N OF ATT’YS GEN., *PROTECTING STUDENTS FROM HARASSMENT AND HATE CRIME* (Washington, D.C.: OCR, 1999), available at [www.ed.gov/offices/OCR/archives/Harassment/harassment.pdf](http://www.ed.gov/offices/OCR/archives/Harassment/harassment.pdf) (last visited Mar. 12, 2006). Page 6 of this document has a useful checklist of steps in a comprehensive approach to dealing with harassment.

16. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); see also *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004).

17. Most claims of sexual harassment involve a heterosexual student who alleges harassment by a student of the opposite sex. A gay student subjected to same-sex harassment also may bring a claim of discrimination based on sex.

18. A student whose school fails to address peer harassment may seek an administrative remedy under Title IX. In 1998, William Wagner filed a sex discrimination complaint with the U.S. Department of Education’s Office for Civil Rights (OCR), the agency responsible for enforcing Title IX. Wagner alleged that school officials did not address harassment. OCR investigated and created an enforcement agreement that required the school district to recognize various forms of sexual harassment, including sexual harassment directed at gay students, and to revise its policies on sexual harassment, develop procedures, and conduct inservice training for faculty, staff, and students, with written progress reports due to OCR through June 1999. *Commitment to Resolve*, Fayetteville Pub. Sch., OCR Case No. 06971182 (June 8, 1998). For a discussion of this complaint, see Joan E. Schaffner, *Recent Development, Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARVARD WOMEN’S LAW JOURNAL 159, 205 (1999).

19. *Theno v. Tonganozie Unified Sch. Dist.* No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005).

20. *Theno v. Tonganozie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299 (D. Kan. 2005).

21. *Id.* at 1311.

22. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

23. See Lambda Legal Defense and Education Fund, *Nabozny v. Podlesny*: Victory, [www.lambdalegal.org/cgi-bin/iowa/cases/record?record=54](http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=54) (last visited Mar. 12, 2006). Nabozny also alleged that the school district intentionally discriminated against him on the basis of his sexual orientation. The court agreed that homosexuals are an identifiable minority and used the existence of a Wisconsin statute expressly prohibiting discrimination on the basis of sexual orientation to show that the school was aware that homosexuals were an identifiable minority. Therefore, to rebut Nabozny's claims, the school district would have to show that it had some rational basis for its conduct. The court could find no rational basis for permitting one student to assault another student on the basis of the victim's sexual orientation.

24. *Montgomery*, 109 F. Supp. 2d 1081; *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003). *Flores* was settled for approximately \$1 million. Press Release, Morgan Hill Unified Sch. Dist. (Jan. 6, 2004) (on file with author). Some school districts have argued that a gay student cannot pursue both Title IX and constitutional claims based on the same set of facts, on the theory that Title IX's remedies preclude a constitutional claim.

25. *Montgomery*, 109 F. Supp. 2d 1081.

26. In a case from North Carolina that involved an injured student but did not involve sexual orientation as an issue, the court agreed with this general rule. *Stevenson v. Martin County Bd. of Educ.*, 93 F. Supp. 2d 644 (E.D. N.C. 1999), *aff'd*, 8 Fed. Appx. 25, 2001 WL 98358 (4th Cir. 2001) (unpublished per curiam), *cert. denied*, 534 U.S. 821 (2001).

27. G.S. 115C-391(a).

28. This standard was established in *Tinker v. Indep. Sch. Dist.*, 393 U.S. 503 (1969). Two other Supreme Court cases also set out limits on student speech: *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), authorizes schools to discipline students for offensively lewd and indecent speech. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), sets out limits on schools' regulation of the content of speech that is, or is reasonably perceived to be, sponsored by the school.

29. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001).

30. *Vanessa Juarez, They Dress to Express*, NEWSWEEK, Oct. 4, 2004, at 62.

31. *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001).

32. Press Release, Lambda Legal Defense and Educ. Fund, Groundbreaking Legal

Settlement Is First to Recognize Constitutional Right of Gay and Lesbian Students to Be Out at School & Protected from Harassment (Aug. 28, 2002), available at [www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1119](http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1119) (last visited Mar. 12, 2006).

33. Some opponents of alliances say that the groups intend to recruit students to a "gay lifestyle," but alliances themselves do not identify this as a goal.

34. A state-by-state listing of gay/straight alliances is available at the Gay, Lesbian & Straight Education Network's website, [www.glsen.org/cgi-bin/iowa/student/student/index.html](http://www.glsen.org/cgi-bin/iowa/student/student/index.html) (last visited Mar. 12, 2006). In March 2006 the network listed nearly fifty gay/straight alliances in North Carolina public and private schools. Melissa Weiss, executive director of Safe Schools North Carolina, says that her organization hopes to see a gay/straight alliance started in every Triangle-area high school and middle school. Mindy B. Hagen, *Gays, Straights, Allies at Riverside*, HERALD SUN (Durham), Nov. 28, 2004, at B1.

35. 20 U.S.C. §§ 4071-74 (1999).

36. 20 U.S.C. § 4071(a) (1999).

37. In 1990 the U.S. Supreme Court upheld the constitutionality of the EAA and set out criteria for courts and schools to use in determining whether a group is curriculum related. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239-240 (U.S. 1990). A student group relates directly to a school's curriculum if (1) the subject matter of the group is actually taught in a regularly offered course, (2) the subject matter of the group concerns the body of courses as a whole, (3) participation in the group is required by a regularly offered course, or

(4) participation in the group results in academic credit. A court will look at a school's practice, as well as its formal policy, in making that determination.

38. Students in this situation may ask the court to rule on a First Amendment claim.

39. *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166 (D. Utah 1999); *East High Sch. Prism Club v. Seidel*, 95 F. Supp. 2d, 1239 (D. Utah 2000); *Collin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088 (E.D. Cal. 2001); *Franklin Cent. Gay/Straight Alliance v. Franklin Township Cmty. Sch. Corp.*, 2002 WL 32097530 (S.D. Ind. 2002); *Boyd County High Sch. Gay Straight Alliance v. Dept. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003). The parties in *Boyd County* entered into a consent decree that required, among other things, that the school put into effect written antiharassment policies and conduct diversity training for staff and students. A significant portion of the training was about issues of sexual orientation and gender harassment. The student training was mandatory, and failure to attend resulted in an unexcused absence. Several students and parents sued the school board, alleging that the school's policies and practices violated their right to free speech, equal protection, and free exercise of religion, as well as the parents' right to direct the ideological and religious upbringing of their children. The court, ruling on pretrial motions, rejected these claims. *Morrison v. Bd. of Educ. of Boyd County*, 419 F. Supp. 937 (2005).

40. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004).

## Plan Ahead!

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