Liability for Peer Harassment of Gay Students

By Sandhya Gopal and Laurie L. Mesibov

An increasing number of students are openly identifying themselves as gay, lesbian, bisexual, or transgendered, and many of them report being harassed at school because of their sexual orientation.[1] Numerous gay students, and some perceived to be gay, say they receive little or no support from public school faculty and administrators, even when they are physically and psychologically injured. School officials who—by their words, actions, or lack of action—demonstrate indifference to these students' problems once they know about them may incur liability for the school board or for themselves as individuals.

In its 1993 *Policy Statement on Homosexuality and Adolescence*, the American Academy of Pediatrics makes three statements relevant to any discussion of the educational environment for gay students: (1) "one's sexual orientation is not a choice . . . individuals no more choose to be homosexual than [to be] heterosexual"; (2) "many youths engage in sexual experimentation . . . [and] [s]exual behavior during this period does not predict future orientation"; and (3) "the psychosocial problems of gay . . . adolescents are primarily the result of societal stigma, hostility, hatred, and isolation."[2] These statements help create the context for addressing peer harassment of gay students, an issue that is important in establishing and maintaining an educational environment in which all students feel safe and are able to learn. Although the issue has not received much public attention in North Carolina and no cases have come before the courts here, there are gay students in the public schools, and it is likely that some of them are experiencing peer harassment.[3]

This article examines the federal and state laws that courts in other jurisdictions have used to grant relief to students suffering from harassment based on their sexual orientation or perceived sexual orientation. Courts have imposed liability on school districts by relying on state statutes, Title IX, and the First and Fourteenth Amendments of the U.S. Constitution. Discussed below are some of the federal and state decisions from other jurisdictions that North Carolina courts are likely to consider if called upon to analyze the potential liability of school boards or employees for peer harassment of gay students. The article also suggests measures North Carolina's school boards can implement to prevent this form of harassment, promote a safe learning environment, and avoid future liability.

Claims of Peer Harassment by Gay Students

Federal Law

Claims under federal law are advantageous to plaintiffs because governmental immunity does not apply and successful plaintiffs generally recover attorney fees. Lawsuits claiming school

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1. *See* Nancy D. Goldstein, *Zero Indifference: A How-to Guide for Ending Name Calling in Schools*, GLSEN Education Department Resource, http://www.glsen.org/templates/resources/record.html?section=14&record=1053 (last visited January 6, 2004).

Throughout this article, the term *gay* will be generally used in reference to gay, lesbian, and bisexual students. A *transgendered* student is one who wishes to be considered a member of the opposite sex.

2. *Available at* http://www.aap.org/policy/05072.html (last visited November 10, 2003).

3. *See* Kelly Starling-Lyons, "Young and Gay," *Raleigh News and Observer*, October 7, 2003; Delawese Fulton, "Sexual Identity Is Tough Topic for Schools," *id.*, April 23, 2003.

liability for peer harassment of gay students have been based on Title IX of the Education Amendments of 1972, the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment. In addition, dicta in a recent decision suggest that the Due Process Clause of the Fourteenth Amendment may also, under certain circumstances, become the basis for a school district's liability for peer harassment of gay and lesbian students, although no court has yet allowed a due process claim for gay harassment to go forward.

Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in "any education program . . . receiving [f]ederal financial assistance."[4] 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. However, a gay student subjected to same-sex peer harassment may bring a claim of discrimination based on sex under Title IX, just as a sexually harassed heterosexual student may.[5]

In *Davis v. Monroe County Board of Education*, the Supreme Court addressed the liability of a school board for student-on-student harassment under Title IX.[6] In *Davis*, a female fifth-grader was harassed by one of her male classmates over a period of five months. The harassment included attempts by the boy to touch the girl's breasts and genitals, rubbing up against her in a sexually suggestive manner, and telling her, "I want to get in bed with you" and "I want to feel your boobs."[7] All the harassment took place on school grounds, in the female student's regular classroom, in physical education class, or in the school hallways. The girl reported each incident of harassment to her classroom teacher or the physical education teacher. She also told her mother about each incident; the mother in turn informed the classroom teacher and the principal of the harassing incidents. Nonetheless, the student alleged, no action was taken against the boy. As a result of the harassing incidents, the girl claimed, her grades went down and she contemplated suicide.

The Court held that when student-on-student sexual harassment is alleged, Title IX permits a private action for damages against a school board receiving federal funds 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 . . . that it effectively bars the victim's access to an educational opportunity or benefit." The Court limited "a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs" (i.e., when the harassment occurs on school grounds while the harassing student is under the school board's disciplinary authority).[8] The Court did not rule on the merits of the lawsuit but considered only whether Davis could proceed with her suit against the school board.

Because the student and her mother had reported the harassing incidents to teachers and administrators at the school, the Court concluded, she could show that the school district had actual knowledge of the harassment. In addition, school officials' failure to investigate the harassment or try to stop it suggested that the district acted with deliberate indifference. Finally, because the girl was subjected to "severe, pervasive, and objectively offensive" sexual harassment that was both physical and verbal in nature over a five-month period and because the harassment had a "concrete, negative effect on [the student's] ability to receive an education," the Court found that the harassment may have barred her access to an educational opportunity or benefit.[9] The Court therefore allowed the student to proceed with her lawsuit.

Since *Davis*, several plaintiffs have brought Title IX claims against school districts in cases of same-sex peer sexual harassment. In *Montgomery v. Independent School District No. 709*, a male student in Minnesota sued his school district for its alleged failure to stop harassment by other students because of his gender and his perceived sexual orientation.[10] Montgomery was subjected to daily harassment by his peers from kindergarten through the tenth grade, including being called names such as "fag," "fairy," "homo," "princess," and "queen." The alleged harassment was not limited to verbal abuse but, he alleged, included being pushed down in the school hallways, deliberately tripped and knocked down, kicked on the school bus, and punched on the playground. Montgomery also alleged that his peers sexually harassed him by grabbing his thighs, crotch, and buttocks.

Montgomery claimed that the persistent harassment he suffered at school infringed on his access to significant portions of his educational environment. To avoid harassment, he stayed home from school, avoided participation in intramural sports, and, unless absolute necessary, avoided the school cafeteria, school bathroom, and school bus. At the end of his tenth-grade year, Montgomery transferred to another school district to escape the persistent harassment.

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4. 20 U.S.C.A. § 1681(a) (2003).

5. Montgomery v. Independent Sch. Dist, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2001).

6. *Davis*, 526 U.S. 629 (1999).

7. *Id*. at 633.

8. *Id*.

9. *Id*. at 653, 654.

10. 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000); *see also* Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001).

Montgomery reported the harassment incidents to a variety of school officials, including teachers, bus drivers, principals, and school counselors. He and his parents also informed the superintendent's office about many of the incidents. School officials did take some measures in response to their reports. In some instances, the harassing students were verbally reprimanded or given assigned seats on the bus or in the cafeteria. On other occasions, school administrators made them apologize to Montgomery or required all the students to meet together to create strategies for dealing with the situation. The most severe punishment was administered after the plaintiff's mother filed a formal complaint with the school district detailing the daily harassment her son was receiving on the school bus and in art class. The school district's Human Resources Department investigated the allegations and concluded that Montgomery had been sexually harassed. As a result, one of the harassers was suspended for five days and another for one day. The remaining harassers were lectured on the school district's harassment policy, deprived of their bus privileges, or transferred out of the plaintiff's art class. Nonetheless, Montgomery filed suit against the school district, claiming that these disciplinary measures failed to stop the harassment.

In fitting claims of same-sex harassment into Title IX, the court identified as a key issue the argument that harassers are motivated not by sexual desire but by hostility toward homosexuals.[11] Because both Title VII and Title IX require plaintiffs to show sex-based discrimination, this court resolved this issue by looking to Title VII, which prohibits discrimination based on sex in employment. In its Title VII analysis, the district court relied on the U.S. Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, which held that "claims based on same sex harassment are cognizable under Title VII."[12] In addition, the court determined that the language "because of sex" in Title IX could be construed to mean discrimination based on the claimant's failure to meet stereotypes associated with his or her sex. Thus, Montgomery had a claim under Title IX against the school district based on evidence that he suffered harassment because he failed to meet stereotypes of masculinity. The court denied the school district's motion for judgment on the pleadings against the plaintiff's Title IX claim and denied both the plaintiff's and the district's summary judgment motions on the Title IX claim, allowing the suit to proceed.

A gay student whose school fails to address peer harassment may also seek an administrative remedy under Title IX. In 1998, in *Wagner v. Fayetteville Public Schools*, a gay student in Arkansas filed a sex discrimination complaint with the Office of Civil Rights (OCR) in the U.S. Department of Education, the agency responsible for enforcing Title IX.[13] Wagner alleged that peers at his school harassed and assaulted him for two years, resulting in a broken nose and bruised kidney. He also alleged that school officials did not address the harassment. OCR investigated the incident and created an enforcement agreement that required the school district to "'recognize the various forms of sexual harassment,' including 'sexual harassment directed at gay or lesbian students,' and to revise its policies on sexual harassment, develop procedures, and conduct in-service training for faculty, staff, and students, with written progress reports due to the Office of Civil Rights through June 1999."[14]

Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment says that "no State shall deny to any person within its jurisdiction the equal protection of the laws."[15] In cases of student harassment, equal protection claims arise when a school district treats opposite-sex sexual harassment differently from same-sex sexual harassment or when a school district treats harassment of males differently from harassment of females. Students making equal protection claims against school boards for harassment based on their sexual orientation seek a private remedy pursuant to 42 U.S.C. §1983 (Civil action for deprivation of rights; hereinafter Section 1983).[16] To establish a Section 1983 equal protection claim, plaintiffs must show that defendants, acting under color of state law, discriminated against them as members of an identifiable class (here homosexual persons) and that the discrimination was intentional.[17]

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.[18] In this 1996 Wisconsin case, the Seventh Circuit, finding sufficient evidence of an equal protection violation to reverse the district court's grant of summary judgment for the school district, allowed the student's lawsuit to proceed. Nabozny, a male student who became aware that he was gay in the seventh grade, was open about his orientation with his fellow students. He alleged that his

11. *Montgomery*, 109 F. Supp. 2d at 1090.

12. *Id*. at 1091 (citing *Oncale*, 523 U.S. 75, 79 [1998]).

13. *See* Lambda Legal Defense Fund, "Complaint by Gay Student Triggers Historic Civil Rights Agreement," http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=252 (last visited November 23, 2003).

14. *Id*. (citing OCR enforcement agreement with Fayetteville Public Schools).

15. U.S. Const. amend. XIV.

16. Section 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

17. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1134 (9th Cir. 2003).

18. *Nabozny*, 92 F.3d 446 (7th Cir. 1996).

openness resulted in persistent verbal and physical harassment by his peers. He reported that his peers repeatedly called him "faggot" and hit and spat on him. When Nabozny sought help from the school's guidance counselor, informing her of his sexual orientation and the harassment he had suffered, she ordered the harassing students to stop harassing him and placed two of them on detention. For a while, the harassment stopped. When it resumed, Nabozny again sought help, this time from the school's new counselor, who referred him to the school principal instead of addressing the boy's complaints directly. Nabozny then met with the principal and informed her of his homosexuality and the harassment he had suffered. The principal allegedly promised to protect Nabozny but took no specific action.

After meeting with the principal, Nabozny alleged, the worst incident of his seventh-grade year occurred. He claimed that two boys subjected him to a mock rape in science class while twenty other students in the class looked on and laughed. Nabozny fled the classroom for the principal's office and told the principal about the mock rape. She allegedly told him "[B]oys will be boys" and said he should expect that kind of treatment if he was "going to be so openly gay."[19] Nabozny then left school without permission. When he returned the next day, he was disciplined for leaving school without permission, but no action was taken against the students who allegedly had conducted the mock rape.

The boy's eighth-grade year was filled with similar incidents. After he was hit and pushed by several boys in the bathroom, his parents went with him to meet the principal, who allegedly again stated that Nabozny should expect such harassment because he was open about his sexual orientation. Nonetheless, after each new harassing incident, Nabozny and his parents met with the principal, identified the perpetrators, and received the principal's promise to take action against them, though she did not. Nabozny took a week and a half off from school, but upon his return the harassment resumed. He then attempted suicide, was hospitalized, and finished the eighth grade in a Catholic school.

The next year Nabozny returned to the public schools for the ninth grade, and the harassment soon resumed. His claim that he was assaulted in the bathroom by a fellow student prompted a meeting with the high school principal and assistant principal at which Nabozny and his parents recounted many of the incidents of harassment he had suffered in high school thus far. As a result, he was referred to the guidance counselor, who was directed to change the boy's schedule so he would have minimal contact with the harassing students. Nabozny alleged that no action was taken against the perpetrators of the harassment. The school eventually placed him in special education classes for the last half of the ninth grade. He made a second suicide attempt and was again hospitalized. After his recovery, Nabozny ran away to another city. When his parents promised to send him to private school the following year, he returned home. However, Nabozny's parents did not enroll him in private school, and the Department of Social Services ordered him to return to the public high school.

Nabozny's tenth-grade year was no better. Because his parents had moved farther out of town, he was forced to ride the school bus. He claimed other students repeatedly physically and verbally abused him, threw dangerous objects at him on the bus, and brutally kicked him in the school's hallways. He reported the kicking incident to the school's police liaison, who discouraged him from pressing charges against the boys who kicked him. When Nabozny reported the incident to the school's discipline official, the official allegedly laughed and told him he deserved that treatment because he was gay. Only the counselor urged the school's administration to take action against the harassers.

During the eleventh grade, Nabozny finally withdrew from public school after the counselor allegedly told him that school administrators were unwilling to help him. He was then diagnosed with post-traumatic stress disorder. He sued the school district and several school officials, including his school principals and the school official in charge of discipline.

Nabozny alleged that the school denied him equal protection on the basis of gender and his sexual orientation. In its decision, the court stated that "[a] plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation."[20] In an earlier decision, the Seventh Circuit stated that acting with deliberate indifference, in some circumstances, provides the requisite intent because "reckless disregard of a great risk is a form of knowledge or intent" and reckless conduct can be equated with deliberate conduct.[21] Therefore, to prove his equal protection claim, Nabozny had to show that school officials had acted intentionally or with deliberate indifference.

With regard to the gender claim, Nabozny presented evidence that the school district responded more aggressively to complaints of male-female sexual harassment than to his own complaints of male-male sexual harassment. The court found this evidence sufficient to reject the school district's motion for summary judgment on the equal protection claim based on gender. A school district's departure from its established policy of punishing perpetrators of harassment may be

19. *Id.*

20. *Id.* at 454.

21. Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. Wis. 1988) (*en banc*), *cert. denied* 489 U.S. 1065 (1989).

sufficient to establish discriminatory intent. The court, pointing out that gender-based discrimination must be substantially related to an important governmental objective in order to "survive constitutional scrutiny," found sufficient dispute between the parties' factual evidence on this matter to reject the district's motion for summary judgment.[22]

Nabozny also alleged that the school district intentionally discriminated against him based on 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 as evidence that the defendants knew homosexuals are such a minority. Thus, to rebut Nabozny's claims that he was discriminated against as a homosexual, the district had to satisfy the court that it had some rational basis for its conduct. The court, however, could find no "rational basis for permitting one student to assault another student based on the victim's sexual orientation" and rejected the school district's summary judgment motion against the plaintiff's equal protection claim for discrimination based on sexual orientation.[23]

A two-day jury trial followed, resulting in a jury verdict for Nabozny. After the verdict, the school district and Nabozny settled the case for over $900,000.[24]

At least two other federal courts have adopted the *Nabozny* rationale in cases where students have sued their school districts because of peer harassment based on sexual orientation or perceived sexual orientation.[25] In both *Montgomery* (discussed above under "Title IX," p. 17) and *Flores v. Morgan Hill Unified School District*, the school districts, to prevail, would have had to show they had a rational basis for handling student claims of harassment based on sexual orientation differently than claims of male-female peer harassment. In *Montgomery*, the school district had a sexual harassment policy in place, while the district in *Flores* had earlier adopted both antiharassment and antidiscrimination policies. However, in neither case did the court need to rely on the existence of a policy specifically prohibiting discrimination or harassment based on sexual orientation to find a violation of the Equal Protection Clause.[26]

When a school district has a policy or practice prohibiting student-on-student discrimination or harassment, a court may find evidence of an equal protection violation if school officials enforce the policy or practice differently for homosexual students than for heterosexual students. Whether liability is ultimately established or not, if the facts show a school district treating claims of same-sex harassment and claims of opposite-sex harassment differently or responding differently to claims of sexual harassment from one sex or the other, a court is unlikely to grant summary judgment to a school district against the plaintiff's equal protection claim.

In *Flores*, the Ninth Circuit recently upheld an equal protection claim brought by gay, lesbian, and bisexual students who claimed that their school administrators failed to enforce the school district's antiharassment and antidiscrimination policies to prevent peer harassment based on perceived sexual orientation. The plaintiffs were former students who had suffered anti-gay harassment by their classmates and were perceived by other students to be gay, lesbian, or bisexual.

One plaintiff found in her locker harassing and threatening notes and pornography and a note saying, "Die, dyke bitch." The plaintiff asked the school's assistant principal if she could be assigned to another locker. The assistant principal agreed to change the student's locker but never actually did so. In this conversation, the assistant principal allegedly replied, "Yes, sure, sure, later. You need to go back to class. Don't bring me this trash anymore. This is disgusting."[27] The assistant principal also allegedly asked the plaintiff if she was, in fact, gay. When the plaintiff responded that she was not, the assistant principal asked why she was so upset by the note if she was not gay.

Two additional female plaintiffs alleged that the school district failed to adequately address anti-gay harassment directed toward them. When these two students began dating each other during their senior year in high school, they were verbally abused by a group of boys in the school parking lot. When the girls reported the incident to the assistant principal, they were instructed to report the incident to the campus police officer instead. The assistant principal allegedly did not follow up with the plaintiffs and did nothing to investigate the incident herself.

Another female plaintiff was subjected to name-calling and food-throwing at school and no action was taken when she reported the incidents to the campus monitor. She too was called "dyke" and "queer." The other girls in her gym class told her not to "look at [them]" or to be their gym partner, and her gym teacher allegedly directed her to change clothes away from the locker room, "so that her classmates would not feel uncomfortable."[28]

Finally, a male plaintiff alleged that six other students beat him during an incident at one of the school district's middle

22. *Nabozny*, 92 F.3d at 456.

23. *Id.* at 458.

24. Patricia M. Logue, "Near $1 Million Settlement Raises Standard for Protection of Gay Youth," Lambda Legal Defense Fund, http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=56 (last visited February 10, 2004).

25. Montgomery v. Indep. Sch. Dist., 109 F. Supp. 2d 1081 (D. Minn. 2000); Flores v. Morgan Hill Unified Sch. Dist, 324 F.3d 1130 (9th Cir. 2003).

26. *See also Nabozny*, 92 F.3d at 457 n.11.

27. *Flores*, 324 F.3d at 1133.

28. *Id.*

schools. The boy was hospitalized and treated for severely bruised ribs. When the beating was reported to the school principal and assistant principal, only one of six students was punished and the plaintiff was transferred to another school.

The plaintiffs in *Flores* sued the school district, school administrators, and school board members, charging a violation of their constitutional right to equal protection. In analyzing the plaintiffs' claims, the court ruled that the students were "members of an identifiable class for equal protection purposes because they allege[d] discrimination on the basis of sexual orientation."[29] The court then looked for evidence that the school district had intentionally discriminated against them or acted with deliberate indifference toward them, explaining that "'[d]eliberate indifference' is found if the school administrator 'responds to known peer harassment in a manner that is clearly unreasonable.'"[30] The appeals court concluded that the students' allegations supported their claims that administrators had responded with deliberate indifference. Significant allegations noted in the court's conclusion were that (1) a principal failed to follow up with further punishment for one of the perpetrators of harassment when the initial punishment was clearly ineffective; (2) a principal punished only one of the six students who physically assaulted a gay student; (3) a principal took no measures to stop a student from receiving harassing notes in her locker, even after the girl requested a locker change; and (4) the school district failed to train teachers and students about policies prohibiting discrimination on the basis of sexual orientation.[31] Therefore, the district court's denial of summary judgment was affirmed and the students' lawsuit was allowed to proceed.

Even though Section 1983 gives plaintiffs a private cause of action against a person who deprives them of their constitutional rights or other rights secured by federal laws, the use of Section 1983 has its limitations. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the Supreme Court held that when "the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983."[32] In another case, the Court has held that federal statutes can preempt a Section 1983 constitutionally based claim that relies on the same factual predicate as the statutory violation.[33]

Similarly, because a private right of action is available directly under Title IX, some courts have precluded a constitutional claim brought pursuant to Section 1983 on the same facts. In *Henkle v. Gregory*, for example, the district court dismissed two of the plaintiff's Section 1983 claims: one alleged a violation of Title IX and the other alleged a violation of the Equal Protection Clause. The district court stated that "Title IX's administrative remedies and private right of action" were sufficient "remedial devices" to preclude a suit under Section 1983—a rationale that has also been adopted by the Third, Seventh, and Second circuits but rejected by the Sixth, Eighth, and Tenth circuits in Title IX cases.[34] The *Henkle* court did not allow the plaintiff "to pursue constitutional claims through §1983 based on identical facts as the Title IX claims" and cited both Ninth Circuit and Supreme Court precedent for its decision.[35]

Although the Fourth Circuit has not yet addressed this issue, three district courts in its jurisdiction have held that Title IX does *not* preclude a Section 1983 claim.[36] However, until the Fourth Circuit or the U.S. Supreme Court resolves this issue, it is unclear whether a gay student claiming Title IX violations and constitutional violations can pursue a remedy under both Title IX and Section 1983.

The Due Process Clause

Some gay students have attempted to use the Due Process Clause of the Fourteenth Amendment to impose liability on school districts for failing to address peer harassment based on sexual orientation. They allege that the school district has a constitutional duty to protect them from severe harassment at the hands of their peers. In *Montgomery*, for example, the student alleged that the school district's policy of requiring students to report sexual harassment to school officials created a duty for school officials to protect students who file such reports. The district court quickly rejected the student's due process claim, citing an Eighth Circuit decision emphasizing that "an affirmative duty to protect" does not arise "from . . . knowledge of the individual's predicament or from . . . expressions of intent to help him."[37] The court also relied on the U.S. Supreme Court decision in *DeShaney v. Winnebago County*

29. *Id*. at 1134–35.

30. *Id*. at 1135 (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649 [1999]).

31. *Id*. at 1135–36.

32. 453 U.S. 1, 20 (1981).

33. Smith v. Robinson, 468 U.S. 992 (1984).

34. *See* Bruneau v. South Kortright Central School Dist., 163 F.3d 749 (2d Cir. 1998) *cert. denied* 526 U.S. 1145 (1999); Waid v. Merrill Area Public Schools, 91 F.3d 857 (7th Cir. 1996); Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990) (all holding that the availability of a remedy under Title IX does preclude a § 1983 claim). *Compare* Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) (all holding that § 1983 action is not barred by the availability of a remedy under Title IX).

35. *Henkle*, 150 F. Supp. 2d at 1073, 1074 (citing *Smith*, 468 U.S. at 992; Dept. of Educ., State of Hawaii v. Katherine D., 727 F.2d 809 [9th Cir. 1984]).

36. Jennings v. Univ. of N.C., 240 F. Supp. 2d 492, 501 (M.D.N.C. 2002); Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 623 (S.D. W.Va. 1998); Alston v. Virginia High Sch. League, 176 F.R.D. 220, 223 (W. D. Va. 1997).

37. *Montgomery*, 109 F. Supp. 2d 1081, 1096 (citing Dorothy J. v. Little Rock Sch. Dist, 7 F.3d 729 [8th Cir. 1993]).

Department of Social Services, which held that the Due Process Clause does not generally impose an affirmative duty to act upon the government.[38] Thus, in *Montgomery* the court concluded that the school district's policy of requiring students to report sexual harassment to school officials did not give rise to a due process claim and dismissed the plaintiff's due process claims altogether.

In *Nabozny v. Podlesny* (discussed above under "Equal Protection Claims"), the student also made due process claims against the school district. He argued that the school district acted with deliberate indifference in failing to punish his peers for harassment, which encouraged a harmful environment that violated his due process rights. The court quickly dismissed this argument, because of a prior decision that local school administrators have no affirmative due process duty to protect students.[39] The earlier decision also relied on *DeShaney* to conclude that school administrators do not have a "special relationship" with students that creates a duty to protect a potential victim.

However, Nabozny made a second due process argument, which the court treated somewhat more favorably. He alleged that the school district violated his due process rights by failing to punish the perpetrators of the harassment, thereby increasing the risk that he would be harmed. Nabozny relied on an earlier Seventh Circuit decision that imposed liability on a state actor if the state actor's conduct substantially contributed to creating danger for its citizens or rendered its citizens more vulnerable to danger than they otherwise would have been.[40] The court found insufficient evidence that the school district's failure to address peer harassment claims placed Nabozny in danger or increased the preexisting threat of peer harassment and granted the school district's motion for summary judgment on the due process claim. However, it did not altogether rule out the applicability of this due process claim to peer harassment cases. The court agreed "in principle that the defendants could be liable under a due process theory if Nabozny could show that the defendants created a risk of harm, or exacerbated an existing one."[41]

A district court in the Fourth Circuit has also addressed a due process claim in the context of a peer harassment case, although the case did not involve a gay student. In *Stevenson v. Martin County Board of Education*, the plaintiff, a sixth grader, alleged that other students robbed, assaulted, threatened, and repeatedly harassed him on the middle school campus during school hours.[42] One student was suspended for a week after throwing books at Stevenson, and another started a fight with Stevenson in a classroom. Both the second student and the plaintiff were suspended for two days.

Stevenson's father then met with school officials and was assured that his son would not be in classes with his harassers. Nonetheless, because his suspension was delayed, the main harasser remained in Stevenson's classes and allegedly continued to harass and physically assault him. In one instance, the harasser punched Stevenson in the head in a classroom. When Stevenson went to the classroom teacher, she allegedly responded that "there was nothing she could do for him and that he probably deserved what he got."[43] He told the teacher that he was going to the principal's office for help. On his way there, the harasser and another student knocked Stevenson to the floor and kicked and stomped him for about ten minutes. A music teacher who witnessed the attack and tried to stop it was also assaulted. As a result of the attack, Stevenson suffered severe contusions, lacerations, and temporary eye dysfunction. Both of the attacking students were suspended for several weeks and sent to a different school. In a final incident, friends of the suspended students allegedly threatened Stevenson, who informed a school official who assured him he would "take care of it."[44] The students then attacked Stevenson after lunch, and only one of them was suspended. Stevenson's father then withdrew him from the school.

Stevenson sued the school district and school officials, including his classroom teacher, alleging that he was deprived of a liberty interest protected by the Due Process Clause. The district court rejected the due process claim and adopted the Seventh Circuit's rationale, stating that "the government, acting through local school administrators, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises."[45] The court refused to recognize a due

38. *DeShaney*, 489 U.S. 189, 196–97 (1989). However, the Due Process Clause does impose an affirmative duty of care and protection upon the government in "certain limited circumstances," such as custodial situations in which the government "takes a person into its custody and holds him there against his will." *See id*. at 199–200. In custodial situations, the government can create danger by restraining the individual's liberty so that the individual cannot act to protect himself or herself. The government may then have a constitutional duty to protect the individual. *Id*. at 200. Many lower courts, including the Fourth Circuit, also interpret *DeShaney* as imposing an affirmative duty to act where the state plays a direct role in creating the danger, whether or not there is a custodial relationship. *See* Pinder v. Johnson, 54 F.3d 1169, 1176–77 (4th Cir. 1995), *cert. denied* 516 U.S. 994 (1995). *See also* Armijo v. Wagon Mound Public School Dist., 159 F.3d 1253, 1262–63 (10th Cir. 1998); Morse v. Lower Marion School Dist., 132 F.3d 902, 907–08 (3d Cir. 1997).

39. *Nabozny*, 92 F.3d at 459 (citing J.O. v. Alton Cmty. Sch. Dist. 11, 909 F.2d 267, 272–73 [7th Cir. 1990]).

40. *Id*. at 460 (citing Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 [1993]).

41. *Id*. at 461.

42. *Stevenson*, 93 F. Supp. 2d 644 (E.D. N.C. 1999), *aff'd* 243 F.3d 541 (4th Cir. 2001), *cert. denied* 534 U.S. 821 (2001).

43. *Id.* at 646.

44. *Id*.

45. *Id*. at 648.

process liberty interest that would entitle the plaintiff to affirmative protection by the school district. Stevenson also alleged deprivation of a property interest under the Due Process Clause, citing *Goss v. Lopez*, in which the Supreme Court stated that a student has a property interest in public education when the state establishes and maintains a public school system.[46] The district court found no deprivation of a property interest because Stevenson left public school to attend a private school.

The First Amendment

In some situations in which gay students are harassed because of their homosexuality, school boards may be held liable for infringing their First Amendment rights of free expression. These situations can arise when school officials encourage students to hide their homosexuality in order to avoid harassment, take adverse action against the students because of their expressed homosexuality, or regulate students' attire or other speech.

In *Henkle v. Gregory* (discussed above), a gay student sued his school district, claiming violations of his First Amendment rights.[47] The plaintiff, a ninth-grade student, participated in a local television program discussing the experiences of gay high school students. After this appearance, he was regularly harassed by his classmates during school hours. They called him names such as "fag," "fairy," and "homo," showed him sexually explicit pictures, and threatened him with being dragged behind a truck. After one incident, Henkle reported it to the vice principal, who allegedly laughed and took no action against the harassing students Henkle identified. When Henkle reported another incident to his English teacher, he was told to keep his sexuality to himself. Again, no action was taken against the identified perpetrators of the harassment. Moreover, Henkle alleged, one school administrator witnessed an incident in which another student threw a metal object at Henkle but subsequently initiated no investigation or disciplinary measure.

At the end of the semester, Henkle asked to leave his high school and was transferred to an alternative high school. He alleged that the transfer was granted on condition that he keep his sexual orientation to himself. Before attending classes at the alternative school, Henkle removed from his backpack several buttons that would have revealed his homosexuality.

His problems were not solved by the transfer. He alleged that his new principal instructed him not to reveal his homosexuality and to "stop acting like a fag."[48] When Henkle requested another transfer, he was allegedly told that a traditional high school was inappropriate for him because he was gay. Nonetheless, Henkle was transferred to a third high school on the same condition—that he keep his homosexuality to himself. Students at the new school, however, learned of his homosexuality and continuously harassed him. Henkle then tried to transfer back to the alternative high school, but the principal there allegedly rejected his transfer, even though space was available. School officials finally placed Henkle in an adult education program at a local community college where he could earn a GED but not a high school diploma.

Henkle sued school officials, including his school principals, his English teacher, the school vice principal, and the school district. He made two First Amendment claims: (1) that school officials prohibited him from engaging in constitutionally protected speech, and (2) that they retaliated against him for engaging in constitutionally protected speech. In analyzing the plaintiff's first claim, the court first assessed whether the Henkle's speech was constitutionally protected. He alleged that school officials told him to remove buttons supporting homosexuality from his backpack and made his school transfers conditional upon keeping his homosexuality to himself—an unconstitutional suppression of speech. In deciding this issue, the court relied on prior Supreme Court decisions recognizing three types of student speech: "(1) vulgar, lewd, obscene, and plainly offensive speech; (2) school sponsored speech; and 3) speech that falls into neither of these categories"—that is, private student speech that happens to occur on school grounds.[49]

Because the court found that Henkle's speech was neither vulgar nor school sponsored, but fell into the third category of speech, it applied the Supreme Court's standard in *Tinker v. Des Moines Independent Community School District* in evaluating Henkle's claim. *Tinker* allows student speech that is not school-sponsored nor vulgar speech to be suppressed only when it "materially disrupts class work or involves substantial disorder or invasion of the rights of others."[50] The school district pointed to incidents of harassment that occurred after the plaintiff appeared on a television program talking about gay high school students and after he wore "Out" buttons on his backpack. The court refused to say "as a matter of law, that [p]laintiff's speech caused a 'substantial disruption of or material interference with school activities' or that [school officials] might have reasonably believed such disruption or

46. *Id.* at 648 (citing Goss v. Lopez, 419 U.S. 565 [1975]).
47. *Henkle*, 150 F. Supp. 2d 1067.
48. *Id.* at 1070.
49. *Id.* at 1075.
50. *Tinker*, 393 U.S. 503, 513 (1969).

interference would likely occur."[51] The court allowed Henkle's first First Amendment claim to go forward.

Henkle's second First Amendment claim was that school officials took adverse action against him because he expressed his homosexuality. He made the necessary showing that his speech was both constitutionally protected and the motivating factor for the adverse action. As noted above, the court found that Henkle's speech was constitutionally protected and also that many of the school officials' actions—specifically, his transfer to an alternative high school after he appeared on the television show, the instruction to keep his homosexuality to himself when transferring schools, and the comment that traditional high schools were not appropriate for someone who was openly gay—did have an "inference" of retaliation.[52] The court therefore rejected the school officials' motion to dismiss and allowed the plaintiff's First Amendment retaliation claim to go forward. At trial, this showing would have shifted the burden to the school officials to show that they would have taken the same actions against the plaintiff even if he had not engaged in constitutionally protected speech.

Because *Henkle* was subsequently settled (for $451,000), the court never resolved the First Amendment issues. However, it is worth noting that one component of the settlement required the school district to amend its policy on student expression to include a statement that "students' freedom of expression specifically includes the right to discuss their sexual orientation and issues related to sexual orientation at school."[53] (The settlement terms also included staff training about responding to and preventing sexual harassment and student education about harassment and intimidation.)

First Amendment issues also may arise when a student's clothing is regulated. In *Chambers v. Babbitt*, a student wore to school a T-shirt imprinted with the phrase "Straight Pride."[54] The next day, the school principal informed Chambers that he was prohibited from wearing the shirt again because other students found it offensive and because of concern for Chambers's own safety if he wore it.

During that school year, several incidents had reflected tension between various groups of students. On one occasion, students at a meeting of a student-led Christian group engaged in a "heated discussion" about homosexuality. Chambers argued that homosexuality was a sin, while other students disagreed. In another incident, a student's car was "keyed" (i.e., scratched with the jagged edge of a key) and urinated on; school officials believed the incident occurred because the student was perceived to be homosexual. The school took a number of measures intended to promote diversity and tolerance, exhibiting diversity posters and designating certain teachers in the school as "safe staff."[55]

Chambers sued and sought a preliminary injunction against the principal's ban of his shirt, claiming that it violated his First Amendment right to express his religious beliefs. He was able to meet the standard four-part test for a preliminary injunction, demonstrating (1) a likelihood of success on the merits, (2) that the balance of harm favors the plaintiff, (3) that the public interest favors the plaintiff, and (4) that the plaintiff will suffer irreparable harm if the preliminary injunction is not granted.[56]

In assessing the plaintiff's likelihood of success on the merits, the district court used the *Tinker* standard, considering whether school officials had a "reasonable belief that such expression could 'materially and substantially interfere with the work of the school or impinge on the rights of other students.'"[57] The court found that the evidence of the handful of incidents that had occurred at the school did not support a reasonable belief that disruption would occur. It determined that the principal's ban on the plaintiff's shirt "appear[ed] to be unconstitutionally tentative" and granted the plaintiff's motion for a preliminary injunction.[58]

To regulate student speech, the *Tinker* standard requires a school district to show a reasonable belief that the speech in question will substantially disrupt the school's educational program. However, courts may well differ on what facts substantiate a reasonable belief that a material and substantial disruption will occur. Where the court in *Chambers* did not find the heated discussion about sexual orientation between students and the keying incident sufficiently disruptive, another court might see those incidents as substantiating the principal's reasonable belief that future disruption would occur.

A student's school attire was also at issue in *Doe v. Yunits*, a case involving a transgendered student—not a student asserting homosexuality or heterosexuality. The plaintiff was a student who, though born male, had a female gender identity and had been diagnosed with gender identity disorder. The plaintiff's therapist believed it was "medically and clinically necessary" for the plaintiff to wear girls' clothing to school.[59]

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51. *Henkle*, 150 F. Supp. 2d at 1075 (citing *Tinker*, 393 U.S. at 513).

52. *Id*.

53. Lambda Legal Defense Fund, "Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School & Protected From Harassment," http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1119 (last visited December 9, 2003).

54. *Chambers*, 145 F. Supp. 2d 1068 (D. Minn. 2001).

55. *Id*. at 1070. "Safe staff" was a designation given to school faculty members who were "willing to listen to [students] and have information to help [students] with issues regarding race, sexual orientation, religion, disabilities, or gender." *Id*. at n.1.

56. *Id*. at 1071.

57. *Id*. (citing *Tinker*, 393 U.S. 503, 739 [1969]).

58. *Id*.

59. *Doe*, 2000 WL 33162199 (Mass. Super. 2000), *aff'd* 2000 WL 3342399 (Mass. App. Ct. 2000), at *1.

When the plaintiff wore girls' clothing and accessories to school—padded bra, high heels, skirts, dresses, and wigs—she was often sent home to change. Sometimes the plaintiff changed clothes and returned to school but at other times did not return. Eventually, she stopped attending school altogether, alleging that school administrators had created a "hostile environment" for her. Because of repeated absences, she had to repeat the eighth grade.

The school district claimed that the plaintiff's conduct, including her clothing, created a disruption at school. She allegedly blew kisses at male students, yelled and danced in the halls, "primp[ed], pose[d], appl[ied] make up, and flirt[ed] with other students in class."[60] In addition, the school district suspended the plaintiff at least three times for using the women's bathroom after being warned not to. When she tried to enroll to repeat the eighth grade, she was told she could not attend school wearing girls' clothing. At the time that the lawsuit was filed, the plaintiff was not attending school but was receiving home tutoring provided by the school district.

The plaintiff alleged that her state constitutional rights, including her right to freedom of expression, had been violated. She sought a preliminary injunction against the school district's decision prohibiting her from wearing girls' clothing at school. Although the plaintiff made state law claims, the Massachusetts Superior Court analyzed the claims by looking at First Amendment case law.

The superior court found that the plaintiff's symbolic acts constituted expressive speech—and so were protected. The court stated that symbolic acts are expressive speech "if the actor's intent to convey a particularized message is likely to be understood by those perceiving the message."[61] The plaintiff's desire to wear girls' clothing was an expression of her desire to identify with the female gender, which was important for her own well-being. The hostile reactions to her dress showed that other students and teachers understood it as an expression of her female gender identity.

The court found that because the school district prohibited the plaintiff from wearing clothing that biological females would be allowed to wear, it intended to suppress the plaintiff's speech. The school administrators' actions did not meet the standard in *United States v. O'Brien* that allows the government to restrict speech when its motivation "is not directly related to the content of the speech."[62] In *Doe*, the plaintiff's speech was suppressed because of its content: expression of the plaintiff's female gender identity.

Finally, separating the clothing issue from Doe's conduct, the court analyzed the school district's actions under the *Tinker* standard. It rejected the district's argument that "any other student who came to school dressed in distracting clothing would be disciplined as the plaintiff was."[63] Instead, the court found that the district saw the plaintiff's dress as distracting only because she was a biological male, whereas biological females could wear the same attire without punishment. In addition, because the court didn't want to grant the threatening students a "heckler's veto," it refused to accept the school district's contention that the plaintiff's dress induced threats from other students.[64]

With regard to the plaintiff's conduct, the court distinguished between actions that expressed female gender identity, such as blowing kisses and applying makeup, and misconduct for which any student should be punished. The court noted that "[A]ny student should be punished for engaging in harassing behavior towards classmates" and, therefore, that the plaintiff should be punished if her conduct meets that standard. The court's key concern was that the plaintiff not be punished solely because of her female dress, even though she could be punished for wearing clothing that is deemed inappropriate for any student or for conduct that is prohibited for all students. The court enjoined the school district from prohibiting the plaintiff from wearing girls' clothing to school and from disciplining her "for any reason for which other students would not be disciplined."[65]

Over twenty years ago, a federal district court ruled that a school district that forbids a student to bring a same-sex date to a school function may be infringing the student's First Amendment rights. In *Fricke v. Lynch*, the plaintiff, who identified himself as homosexual, wanted to bring a male date to the senior prom and asked the principal's permission to do so.[66] The principal denied the request because, he alleged, he feared the prom would be disrupted or the plaintiff or his date would be harmed. During the previous school year, the principal had denied a similar request by another gay student for the same reasons. After Fricke filed a widely publicized suit against the school, a student assaulted him at school; the attacker was suspended, and school officials began escorting the plaintiff from class to class.

Fricke alleged that his First Amendment rights of association and free speech and Fourteenth Amendment equal protection rights were violated. The court found that his request

60. *Id*.

61. *Id*., at *3 (citing Spence v. Washington, 418 U.S. 405, 410–11 [1974]).

62. *Id*., at *4. *See also* United States v. O'Brien, 391 U.S. 367, 377 (1968).

63. *Doe*, 2000 WL 33162199, at *4 (citing Tinker v. Des Moines Community Sch. Dist., 393 U.S. 503, 739 [1969]).

64. *Id*., at *5 (citing Fricke v. Lynch, 491 F. Supp. 381, 387 [D. R.I. 1980] ("[E]ven a legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner. . . . To rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard.)).

65. *Id*., at *5, *8.

66. *Fricke*, 491 F. Supp. 381 (D. R.I. 1980).

to bring a same-sex date to the prom had sufficient "communicative content" to be protected by the First Amendment because he believed that doing so expressed his homosexual identity.[67] In addition, Fricke believed that his attendance at the prom with a same-sex date was a political statement for equal rights and human rights. The plaintiff's proposed conduct was therefore protected speech.

The court analyzed the school's decision according to the standard in *United States v. O'Brien.*[68] In this case, the U.S. Supreme Court established a four-part inquiry for assessing the government's authority to regulate speech: (1) Was the regulation within the constitutional power of the government? (2) Did it further an important, substantial governmental interest? (3) Was the governmental interest unrelated to the suppression of free expression? and (4) Was the incidental restriction on alleged First Amendment freedoms no greater than was essential to the furtherance of the government's interests? The school district in *Fricke* easily met the first two requirements. "[T]he school unquestionably has an important interest in student safety and has the power to regulate student's conduct to ensure safety." With regard to the third prong, the court determined that there was a suppression of free expression because the school feared other students' reaction to the plaintiff's conduct. Finally, the court found that the school's action failed the fourth prong of the *O'Brien* test, because it did not adopt the "least restrictive" method of regulating student speech. School officials could have controlled the threat of disruption at the senior prom by taking "appropriate security measures" and by making a clear statement that "any disturbance will not be tolerated."[69] The school's suppression of the plaintiff's expressive conduct was therefore not permissible under *O'Brien*.

The court also assessed whether the school's actions were constitutional under *Tinker*. The court found that the standard was not met and noted that since the one incident of assault on the plaintiff, no other disruption had occurred at the school. The court went further and addressed the "heckler's veto" issue: that is, whether or not the school's justifiable fear that the plaintiff's speech may lead to a violent reaction from others allowed the school to prohibit the speech. The court concluded that the school's "legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner." Moreover, the court stated that the school has "an obligation to protect and foster free speech, not to stand helpless before unauthorized student violence."[70] The court granted the plaintiff a preliminary injunction, ordering school officials to allow him to attend the senior prom with a male escort. Because the court found the plaintiff's free speech claim dispositive, it did not address the plaintiff's freedom of association or equal protection claims.

Qualified Immunity

School officials often assert a defense of qualified immunity in response to federal claims brought by plaintiffs. In *Harlow v. Fitzgerald*, the U.S. Supreme Court stated: "If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." But when a gay student brings claims alleging violation of constitutional provisions, most courts have held that the applicable law was clearly enough established to put school officials on notice that their conduct may be unlawful.[71]

Preventing Liability under Federal Law for Peer Harassment of Gay Students

Title IX Sexual Harassment

In 2001, in response to *Davis* and other Supreme Court decisions, the Office for Civil Rights in the U.S. Department of Education issued *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Revised Guidance)* to assist school districts to comply with Title IX. This document, drafted during President Clinton's administration, updates earlier sexual harassment guidance issued by OCR in 1997. However, the 2001 *Revised Guidance* has not yet been approved or officially released by President Bush's administration. Nonetheless, the *Revised Guidance* may be useful for understanding a school board's obligation under Title IX to respond to student-on-student sexual harassment. Although it is not always specific, the *Revised Guidance*, relying on case law and Title IX regulations, outlines a range of responsibilities schools are expected to fulfill and includes both suggested and required compliance measures.

It states that "Title IX protects students in connection with all of the academic, education, extracurricular, athletic and other programs of the school." Title IX's purpose is to protect

67. *Id*. at 386.
68. 391 U.S. 367 (1968).
69. *Fricke*, 491 F. Supp., at 385, 386.
70. *Id*. at 387.

71. *Harlow*, 457 U.S. 800, 818 (1982). *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137–38 (9th Cir. Cal. 2003) (stating that the Equal Protection Clause clearly requires similar enforcement of peer harassment policies for homosexual and heterosexual students); Henkle v. Gregory, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001) (stating that First Amendment law establishes that students in public schools have the right to freedom of speech and expression); Nabozny v. Podlesny, 92 F.3d 446, 456 (7th Cir. 1996) (stating that the Equal Protection Clause clearly requires equivalent levels of protection for male and female students).

male and female students from sexual harassment by other students. The *Revised Guidance* states explicitly that "[S]exual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a school's program constitutes sexual harassment prohibited by Title IX." It makes it clear that Title IX prohibits sexual harassment, "even if the harasser and the person being harassed are members of the same sex."[72]

The *Revised Guidance* also identifies the circumstances in which a school board has a legal duty to address sexual harassment: when the harassment "rises to a level that . . . denies or limits a student's ability to participate in or benefit from the school's program."[73] If the harassment does not rise to this level, OCR notes, Title IX imposes no responsibility to act, although doing so may be the best course of action for both the school and the student. In assessing the impact of harassment on students, OCR considers

1. the degree to which the conduct affects one or more students' education,
2. the type, frequency, and duration of the conduct,
3. the relationship between the alleged harasser and the subject(s),
4. the number of individuals involved in the harassment,
5. the ages of the alleged harasser and victim(s),
6. other recent incidents at the school, including
7. incidents of gender-based but not sexual harassment.

Significantly, the school board's obligation under Title IX is to address only *unwelcome* sexual conduct, although the age of the student and the nature of the conduct alleged are relevant factors in deciding whether the sexual conduct is unwelcome.[74]

Like *Davis*, the *Revised Guidance* requires a school district to address sexual harassment by a student only if it has notice of a sexually hostile environment. A school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known" about the harassment.[75] The *Revised Guidance* interprets OCR regulations as requiring a school to respond to sexual harassment of which it has actual or *implied* knowledge—in contrast to the *Davis* standard, which allows a private action for damages only when the district has actual knowledge of the harassment.[76] The *Revised Guidance* mentions several ways in which the school can receive notice of the harassment, including direct complaints to school staff or administrators and such indirect sources as the media.

Under the *Revised Guidance's* interpretation of OCR regulations, once school administrators have notice of sexual harassment and determine that it is unwelcome and denies or limits a student's ability to participate in the school's program, the school district is obligated to respond, promptly and effectively, to end the harassment and prevent its recurrence. School officials should follow the principle that once they know about a problem of sexual harassment, doing nothing is always wrong.[77] A responsible and legally safe course of action for a school is to assume that the *Revised Guidance* sets the standard.

OCR notes that Title IX regulations require schools to adopt and publish both a policy against sex discrimination and grievance procedures for resolving sex discrimination complaints promptly and equitably.[78] Although Title IX does not require schools to establish a separate policy or grievance procedure for sexual harassment claims, a general sex discrimination policy will not be adequate unless students are made aware of the type of conduct that constitutes sexual harassment. Because students also need to know the procedure for filing complaints of sexual harassment, these procedures "should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated."[79]

The regulations also require a school to designate at least one employee to coordinate its Title IX responsibilities and to "notify all of its students and employees of the name, office address, and telephone number of the employee" designated.[80] The designated employee must "have adequate training as to what constitutes sexual harassment and [be] able to explain how the grievance procedure operates."[81]

OCR also allows schools to use informal grievance procedures (such as mediation) to resolve sexual harassment complaints but advises school officials not to encourage the complaining student to try resolving the issue independently with the alleged harasser. He or she must also be "notified of the right to end the informal process at any time and begin the formal stage of the complaint process"—that is, bringing a complaint under the school's grievance procedures.[82]

Finally, the *Revised Guidance* outlines specific steps school officials must take in responding to reports of sexual harassment from a parent or student or to harassment directly

72. OCR, *Revised Guidance*, 2–3.
73. *Id*. at 5.
74. *Id*. at 7. If the sexual conduct is welcome, OCR does not define it as sexual harassment and therefore imposes no responsibility to act on the school.
75. *Id*. at 13.
76. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).
77. OCR, *Revised Guidance*, iii.
78. See 34 C.F.R. § 106.8(b) (2004); OCR, *Revised Guidance*, 19.
79. *Revised Guidance*, 19–20.
80. 34 C.F.R. § 106.8(a) (2004); OCR, *Revised Guidance*, 21.
81. *Revised Guidance*, 21.
82. *Id*.

observed by a school employee. In either case, the school should contact the student who was harassed (or the student's parent depending upon the age of the student), explain that the school is responsible for taking steps to correct the harassment . . . [and] explain the avenues for informal and formal action, including a description of the grievance procedure that is available for sexual harassment complaints and an explanation of how the procedure works.

Even if the harassed student or his or her parents decide not to file a formal complaint, OCR states, "the school must promptly investigate the incident to determine what occurred and take appropriate steps to resolve the situation."[83]

Gender-Based Harassment

Although sexual harassment is the primary focus of the *Revised Guidance*, it also states that gender-based harassment can constitute a violation of Title IX if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program. Gender-based harassment includes verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex stereotyping and is considered a form of sex discrimination. The *Revised Guidance* interprets Title IX as imposing an obligation on school districts to address the harassment of students who fail to meet conventional sex stereotypes—a common form of harassment suffered by gay and lesbian students. Although gender-based harassment is within the scope of Title IX, the *Revised Guidance* contains no specific requirements for dealing with it beyond stating that the standards for addressing sexual harassment generally also apply to gender-based harassment.[84]

State Law as the Basis for Liability

In some states, gay students suffering from harassment may be able to turn to state statutes for redress. A handful of states—though not North Carolina—have adopted statutes prohibiting discrimination based on sexual orientation, either specifically in educational contexts or within broader antidiscrimination statutes. A Minnesota statute, for example, makes it unlawful "[t]o discriminate in any manner in the full utilization of or benefit from any education institution, or the services rendered thereby to any person because of race, color, religion, national origin . . . sexual orientation, or disability." Wisconsin has a similar statute, which reads: "No person may be denied . . . participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability." Connecticut and Massachusetts also have statutes prohibiting discrimination based on sexual orientation in schools.[85]

Other states, such as New Jersey and New York, have broader antidiscrimination statutes applicable in noneducational settings as well. New Jersey's legislature "declares its opposition to . . . practices of discrimination when directed against any person by reason of . . . sex . . . or sexual orientation" and states that "legal remedies, including compensatory and punitive damages" are "available to all persons protected" under the statute. New York has a similarly broad civil rights statute that includes sexual orientation.[86] At least nine other states prohibit discrimination based on sexual orientation.[87]

Even in a state that does not have an antidiscrimination statute, a state board of education may adopt a regulation expressly protecting gay students from harassment in the public schools. In June 2003, for example, the Maryland Board of Education voted "to include 'sexual orientation' as one of the categories in which students 'have the right to educational environments that are safe.'" State boards in nine states presently have regulations explicitly protecting students' safety regardless of their sexual orientation.[88]

State statutes not only give students experiencing peer harassment based on sexual orientation a possible basis for liability, they may also cause a federal court to look to state law in analyzing school officials' claims of qualified immunity. The existence of a statute expressly prohibiting discrimination on the basis of sexual orientation may be seen as evidence that school officials knew that homosexuals are an identifiable minority.[89] In addition, in school districts that adopt a policy prohibiting discrimination against students on the basis of gender or sexual orientation as required by a state statute, a plaintiff may use the district's failure to carry out that policy to prove discrimination. The Wisconsin school district in

83. *Id*. at 15.
84. *Id*. at v.

85. Minn. Stat. § 363A.13 subd.1 (2004); Wis. Stat. § 118.13(1) (2003); Mass. Gen. Laws. ch. 76 § 5 (2000); Conn. Gen. Stat. Ann. § 10-15c (2003).
86. N.J. Stat. Ann. § 10:5-3 (2003); N.Y. Civ. Rights § 40-c (2003).
87. David S. Buckel, "Legal Perspective on Ensuring a Safe and Nondiscriminatory School Environment for Lesbian, Gay, Bisexual, and Transgendered Students," *Education and Urban Society* 32 (May 2000): 394, http://www.lambdalegal.org/sections/library/memos/edu.pdf (stating that as of May 2000, eleven states—California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin—prohibited discrimination based on sexual orientation).
88. Mike Bowler, "Maryland Votes for the Rights of its Gay Students," http://www.glsen.org/cgi-bin/iowa/all/news/clippings/index.html (last visited February 20, 2004).
89. *See* Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. Wis. 1996); *cf.* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (stating that existence of a state statute prohibiting discrimination based on sexual orientation is not necessary to rebut a claim of qualified immunity).

Nabozny, for example, conceded that it had such a policy; the court pointed out that "departures from established practices may evince discriminatory intent"—which a plaintiff must prove in order to succeed on an equal protection claim.[90]

In addition to state statutes prohibiting discrimination based on sexual orientation, a gay student may look to state tort law when suing school officials or school boards for peer harassment. In *Henkle v. Gregory*, in addition to his federal claims, the plaintiff brought state claims for negligence, negligent supervision and training, and negligent and intentional infliction of emotional distress. Because the case was settled, the court never addressed these state law claims.[91]

North Carolina State Law Provisions

North Carolina does not have a statute prohibiting discrimination based on sexual orientation in schools or in any other setting. However, other state statutes, as well as an equal protection clause in the state constitution and the requirements of the state's public education statute, are relevant to the responsibility of school boards to prevent peer harassment of gay students.

The North Carolina constitution's equal protection clause states that "[n]o person shall be denied the equal protection of the laws."[92] If school officials treat same-sex harassment differently than opposite-sex harassment or take harassment allegations from females more seriously than harassment allegations from males, a gay student may allege a violation of the state constitution.

North Carolina's Basic Education Program (BEP) encourages local school districts to teach "character education" to their students and directs local boards of education to "develop and implement character education instruction with input from the local community." The program requires schools to incorporate character education into the standard curriculum and to include instruction on a variety of traits, including "showing high regard for . . . other people . . . and understanding that all people have value has human beings." Local boards are also encouraged to teach children responsibility for school safety, including "helping to create a harmonious school atmosphere that is free from threats, weapons, and violent or disruptive behavior."[93] Beginning in the school year 2004–2005, school districts' school safety instruction should include "a consistent and age-appropriate anti-violence message."[94] Allowing peer harassment of gay students is thus inconsistent with North Carolina's requirement that local boards teach students respect and encourage their students to create a safe school atmosphere.

North Carolina's local school boards are also required to adopt safe school plans ensuring that their schools are "safe, secure, and orderly" and maintain "a climate of respect."[95] These plans must include clear statements of consequences for those who violate the safety standards, mechanisms for addressing disruptive conduct, and assignment of explicit responsibilities to school officials for ensuring a safe school environment. A school board may want to include procedures for addressing peer harassment of gay students in identifying school officials' responsibilities under its safe school plan.

Finally, under state tort law, a gay student who suffers from peer harassment may make claims—including claims for negligence and intentional infliction of emotional distress—against school officials and the school board. However, unlike claims under federal law, state tort claims allow a school board to assert government immunity and do not let a plaintiff recover attorney fees.[96]

Conclusion

Courts in several states have allowed student suits alleging persistent peer harassment based on sexual orientation to go forward against school districts. While some issues related to liability for such harassment are not well settled, the case law indicates clearly that school boards need to take affirmative measures to stop peer harassment of gay students—to avoid injury and potential liability and to ensure a safe learning environment for all students. Such measures include addressing all claims of peer harassment in the same manner and adopting policies prohibiting sexual harassment and sex-based discrimination. When school officials know about harassment, they must take immediate, reasonable steps to end it. ■

Editor's Note: In January 2004, the Flores *case (discussed above, pp. 20–21) was settled. Under the settlement, students and staff are to undergo training on preventing harassment based on sexual orientation and gender identity.**

90. *Nabozny*, 92 F.3d at 456.

91. Lambda Legal Defense Fund, "Henkle v. Gregory Litigation Timeline," http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1121 (last visited November 23, 2003).

92. N.C. Const. art. I, § 19.

93. N.C. Gen. Stat. § 115C-81(h) (2003) (hereinafter G.S.).

94. *Id*., amended by SL 2003-284 sec. 7.40.

95. G.S. 115C-105.47 (2003).

96. A full discussion of possible state tort claims is beyond the scope of this article. *See generally* Sasha Ransom, "How Far is Too Far? Balancing Sexual Harassment Policies and Reasonableness in the Primary and Secondary Classrooms," *Southwestern University Law Review* 27 (1997): 265 (discussing briefly the application of common law tort to sexual harassment).

* American Civil Liberties Union Settlement Fact Sheet: Flores v. Morgan Hill Unified School District, http://aclu.org/LesbianGayRights.cfm?ID=146588&C=106 (last visited April 21, 2004).