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Cover Story



Your legal duty to
protect gay kids
from harassment

BY REBECCA JONES

"I don't feel safe here anymore"

M

ike Cassavaugh quit

school on his 18th birthday, just four months shy of graduating from a New England high school last year. By the time he left, he'd been beaten in the school bathroom, taunted in the hallway, and threatened with mutilation and death. Back then, he felt helpless, but now he's talking to lawyers about suing the school district that wouldn't -- or couldn't -- protect him from homophobic thugs.

Many school board members and administrators around the country seem genuinely surprised at the growing number of students and former

students who are threatening similar lawsuits. Officials in districts where suits have been filed often say they had no idea the plaintiffs felt they were under attack in their schools. Some suggest the students are exaggerating; others wonder how they can be expected to prevent harassment that occurs out of adult earshot, in the relative secrecy of school bathrooms, hallways, locker rooms, and playing fields.

But reasonable people -- even those whose religious faith tells them that homosexuality is a sin -- know that no student should have to endure the kind of abuse Mike describes. Recent court decisions and guidelines from the U.S. Department of Education's Office for Civil Rights (OCR) make it clear that school districts must take action to protect gay students -- which leaves school boards grappling with decisions about the once-verboden topic of sexual orientation and its proper place in policy, curriculum, and the lives of children.

Many people believe sexual orientation is not an appropriate topic for schools and children. But the cat is out of the bag on that one. Kids today see openly gay people on TV shows, at the movies, in their neighborhoods, and sometimes in their own homes. This early exposure helps explain why the average "coming-out" age for gay males has dropped so precipitously in recent years -- from age 20 in 1979 to age 13 in 1998, according to a Cornell University study.

"That one study shows why the gay civil rights movement is smack-dab in the middle of the nation's public schools," says David Buckel, a Lambda Legal Defense attorney and part of the legal team that won *Nabozny v. Podlesny*, recognized as the landmark case regarding gay students in public schools. The Cornell study also explains why public schools have become, whether school officials like it or not, part of the coming-out process for young gays and lesbians.

Jamie Nabozny's ordeal

It's hard to listen to the details of Jamie Nabozny's high school years in Ashland, Wis., without shuddering. Jamie was mock-raped in a classroom, urinated upon in a bathroom, and kicked so badly that he required surgery to stop the internal bleeding. When Jamie and his parents complained, a school official told them, according to the lawsuit, that Jamie "had to expect that kind of stuff" because he was homosexual.

Jamie eventually moved to Minneapolis, where he got a graduate equivalency degree, but in 1995 he sued the Ashland School District. A federal judge initially dismissed the case, but the 7th U.S. Circuit Court of Appeals ruled that Jamie deserved his day in court: "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation." A jury found school officials had violated the Fourteenth Amendment's Equal Protection Clause, and the school district had to pay \$900,000 in damages.

That case opened the floodgates to lawsuits -- and, perhaps more important, to *threats* of lawsuits -- from other gay students who said their complaints about harassment had been ignored. School officials saw the potential for liability. "Before *Nabozny*, I could barely keep a school administrator on the phone," says Buckel. "Now they're interested."

As well they should be: This year's U.S. Supreme Court decision, *Aurelia Davis v. Monroe County Board of Education*, confirms that school districts may be held liable if school employees are deliberately indifferent to

complaints of peer-to-peer sexual harassment. The victim in *Davis* was a girl and the harassers were boys, but school attorneys say the same standards would apply in same-sex harassment cases.

"The courts have backed school districts into a corner, so we have to be even-handed with kids," says Gregg Meyers, an attorney and a member of the Charleston, S.C., school board. "We can't pick which kids get protection from harassment and which kids don't."

Attorneys for the Davis family sought justice under Title IX -- a strategy that is expected to become more common in gay-harassment cases, especially now that the OCR has clarified that Title IX prohibits sex discrimination against gays. Title IX, often thought of as the federal measure that brought girls' soccer teams to high schools, bars sex discrimination in public schools that receive federal funds.

Title IX does not prohibit sexual-orientation discrimination. "There is no federal law that squarely protects students simply on the basis of their sexual orientation," says Arthur L. Coleman, deputy assistant secretary for OCR. "There is no federal law that says, 'Thou shalt not discriminate on the basis of sexual orientation,' ... but sometimes Title IX applies to cases of sex discrimination in which sexual-orientation issues may be present."

When Title IX applies

The latest OCR anti-harassment publication -- *Protecting Students from Harassment and Hate Crime: A Guide for Schools*, which was sent to every school district in the country earlier this year* -- explains that Title IX prohibits harassing conduct of a sexual nature, such as targeting a lesbian student for physical sexual advances, if such conduct creates a sexually hostile environment. Title IX does not apply, according to OCR guidelines, to simple heckling about a person's sexual orientation. It does not prohibit, for instance, comments like, "Gay students are not welcome in this school." (For additional free copies of the 157-page guide, contact OCR at (800) 421-3481.)

"Harassment based on sex is the trigger for Title IX," Coleman says. That makes it a significant weapon in the fight against anti-gay harassment because studies show teenage boys -- the primary perpetrators of anti-gay harassment -- tend to sexualize their anger and prejudice. Jamie Nabozny's mock rape, for instance, occurred when two boys wrestled him to a classroom floor -- the teacher was out of the room -- and pretended to rape him while 20 other students watched and laughed.

Potential Title IX claims of sex discrimination also stem from the way complaints of harassment are handled. Many administrators turn away from boys being harassed, Buckel says, "because of the age-old belief that what boys should do to handle harassment is to put up their fists and fight it out and, in so doing, learn how to become a real man" -- something that would not be expected of, or suggested to, a girl.

Buckel also sees sex discrimination when school officials chastise victims of harassment for "not acting the way they should in accordance with their gender." Supreme Court precedent makes clear that "you can't tell a young woman that the way to stop harassment is to grow her hair out, put on makeup, and wear short skirts," he says. "That's sex discrimination."

Although Title IX and the Constitution's Equal Protection Clause are the most frequently invoked, they are not the only bases for lawsuits relating

to sexual-orientation discrimination and harassment. Eleven states -- California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin -- have laws prohibiting discrimination on the basis of sexual orientation. (The specifics vary from state to state, so check with your school district's attorney.) Professional ethics codes in four states -- Alaska, Connecticut, Florida, and Pennsylvania -- also address issues of sexual orientation. "In these four states, administrators jeopardize their licenses, potentially, if they do not take sexual-orientation discrimination seriously," says Buckel.

All of these protections rely, in the end, on a student's willingness to complain about discrimination and harassment. But many gay students learn not to complain.

The risk in complaining

"Die Mike Die." When Mike Cassavaugh saw those words, he didn't finish reading the note. He just turned it over to his principal, who turned it over to the police. Mike still doesn't know who wrote the note, even though he says he was called to testify in a juvenile court proceeding. That's when the harassment got worse.

One attack in a school bathroom was particularly frightening. "I was pulled away from the urinal by two people," he says. "My eyes were covered, and I was kicked and hit, and then they threw me in a corner, crying. I didn't even look up. At that point, I was so frightened that they were going to hit me again that I rolled over and stayed there."

Later, he says, he went to the assistant principal and said, "I'm getting hurt. I need help. I don't feel safe here anymore." He says he was told that he needed to report exactly what had happened -- and who had done it. "I couldn't," he says, "because after I reported something the first time, it got worse."

Mike's principal and superintendent declined to discuss his situation with *ASBJ*. But it's not hard to imagine their predicament: If a kid won't identify his harassers, what can a school official do?

One idea is to make school a less hostile place for gay students. In today's schools, "students think there's nothing more demeaning than to be called gay," says Buckel, noting that "anti-gay harassment is not just directed at gays and lesbians; it's the most common form of harassment." One survey shows that most boys in this country would rather be punched in the face than called gay.

"Gay" is, of course, the least offensive of the taunts. Mike LeVasseur, a senior at a Connecticut high school, says his 6-foot-4-inch, 260-pound frame has saved him from physical harassment, but he hears "the smart remarks, passing through the hallways ... queer, queen, fag, gay ..., etc. They get to be amusing after a while."

Not to everyone. Published reports indicate such taunts might have been a motivating factor in the Littleton, Colo., and Paducah, Ky., school shootings. Whether true or not, these accusations point to the terrible power of those words. Not all slurs leads to violence, gay activists like to say, but all violence begins with a slur.

Kate Frankfurt, director of advocacy at the Gay, Lesbian, and Straight Education Network (GLSEN) in New York City, says the word *faggot*

should be banned -- the same way offensive racial and ethnic slurs have been. "Right now," she says, "people hear anti-gay slurs and think, 'Oh, that's just what kids say.'"

GLSEN also advocates allowing gay students to form support groups, such as Gay-Straight Alliances (see sidebar on page 31), and including discussions of homosexuality, when appropriate, in the curriculum. Knowing the sexual orientation of Virginia Wolff and Walt Whitman is part of understanding their work, Frankfort says. "These are things we talk about in literature classes all the time," she says. "But if we assume Walt Whitman was writing about a woman, we're really misinterpreting a lot of what he was writing."

Do discussions involving sexual orientation really belong in the classroom? Reasonable people disagree on this, and the Supreme Court established, in a case about student expression, that a school has the authority to decide whether a topic fulfills "a legitimate pedagogical objective" in the curriculum. "A biology teacher can't just announce she's a lesbian and spend 20 minutes talking about it if there's no relationship to the subject that's to be taught," Buckel says. On the other hand, issues involving sexual orientation should not be banned from classrooms "just because you're going to get 100 calls from parents," he says. "That's not a legitimate pedagogical objective."

Learning about specific gay people in history provides role models for gay students, Frankfurt says, and makes it less likely that straight students will objectify gays. "What happens in a lot of gay-bashing incidents," she says, "is that the perpetrators in those incidents stop seeing the person whose head they're bashing in as a real person. They just see him as a faggot."

Several districts have tried to create safe havens by setting up separate schools for gay students, such as the Harvey Milk School in New York City. Other districts, such as Portland, Ore., have banned military recruiters because their don't-ask-don't-tell policy discriminates against gay students. The Portland board's action reaped "angry letters from ex-Marines for two years, hate mail, hate phone calls," says board member Marc Abrams, whose position became an issue in his re-election campaign.

Abrams won re-election, but seats in other districts continue to be threatened by positions board members have taken, one way or the other, on sexual-orientation discrimination.

Anti-gay crusade

When a student board member suggested adding sexual orientation to the Grossmont (Calif.) Union High School District's nondiscrimination policy, board president Ted Crooks thought it sounded like a good idea. The Grossmont board meetings normally attract between 100 and 200 people, so he was surprised when public hearings on the nondiscrimination policy drew "a thousand people or so, yelling and screaming at the top of their lungs about how this was going to lead to decay and corruption and so on." Some people charged the district was committing itself to hiring "a quota of pedophiles" and teaching homosexual techniques in its sex-ed classes, Crooks says, even though board members "must have said 50 times during the hearings that this will not affect instruction or curriculum."

The board eventually voted 3 to 2 in favor of adding sexual orientation to the nondiscrimination policy, and Crooks was targeted for recall. At press time, his opponents were gathering signatures to put the recall vote on the

March ballot. (If you want to check on their doings, see the [website](#).)

Crooks says the uproar has benefited him politically. "I can't go to the grocery store without somebody coming up to me and telling me I did the right thing, and they just can't understand why these people are so upset," he says.

One of the most upset is California Assemblyman Steve Baldwin, who says he has watched "the homosexual agenda" take over other school districts in the state. California law already protects homosexuals from discrimination, he contends, so the Grossmont board's action must have another purpose: "We believe it's creating the legal framework for changes that may occur two, three, four, five years down the road" -- such changes as hiring gay teachers, sponsoring gay dances, and promoting the gay lifestyle in the curriculum. "Schools are in jeopardy of being sued if they don't do that," he says, adding that heterosexual students and teachers have been harassed because of their views.

Baldwin agrees schools have a duty to protect gay students from harassment, but says schools have another duty as well: "When a school sees a child leaning toward homosexuality, the school should notify the parents and put them in touch with a counselor, if they want, who specializes in guiding people toward heterosexuality."

These arguments appeal to many God-fearing people, including the Rev. Louis P. Sheldon, founder and chairman of the Traditional Family Values Coalition based in Anaheim, Calif. Sheldon sees homosexuality as "a gender-identity conflict issue," a condition that, he believes, is usually temporary. Homosexuality, he says, is "a large revolving door. Many come in, many go out. Very few stay."

Sheldon says schools should "protect gay students, and anyone else, from harassment. ... But I think you need to deal with [homosexuality] in high school like you do with prostitution or any other sexual behavior that is considered inappropriate." Schools need to state the truth, he says: that no gene has been discovered to cause homosexuality, that homosexuality isn't as common as gay-rights advocates claim, and that gay teens do not commit suicide because of harassment. The storied high suicide rate among gay teens "is a big fat lie," Sheldon says.

For proof, he and others point to a recent University of Minnesota study that shows gay teenagers kill themselves largely for the same reasons straight teens do -- because they're having family problems, for instance, or are in trouble with the law. The study also lists "gender nonconformity" as a contributing factor, which Sheldon says proves how damaging the homosexual lifestyle is to teenagers. "They know the abnormal, inappropriate behavior of having anal intercourse or oral copulation with each other," Sheldon says. "They just can't live with the contradiction."

"That's a distortion of what I've written," says Dr. Gary Remafedi, the associate professor of pediatrics who authored the Minnesota study. "There is no scientific support for what they're saying, so they take existing scientific evidence and distort it for their own purposes." Remafedi defines gender nonconformity as relating to whether a gay boy is nurturing or domineering and cites 16 studies connecting the high suicide rate among gay teenage boys to the stigma and isolation of being gay.

So what's a board to do?

School attorneys agree that the courts have been clear: School boards must protect and educate *all* students, regardless of their sexual orientation. "If a kid with a gender issue is being harassed and the school doesn't mobilize, the institution fails," says Chicago attorney Anthony Scariano, who represents 200 Illinois school districts and was scheduled to lead a session on sexual-orientation legal issues at a fall meeting of the National School Boards Association's (NSBA's) Council of School Attorneys.

Board member/attorney Meyers agrees: "I know that many people are just driven to distraction by the question of sexual orientation, but I think it is not any part of my function as a school board member to worry about whether a child is heterosexual or homosexual because sexual performance is not part of the curriculum. ... Until sexual performance becomes part of the curriculum, then it seems to me that all kids need to be safe at school."

Attorneys recommend starting with a nondiscrimination policy. To avoid the community outrage that might accompany discussions of sexual-orientation discrimination, some suggest writing a simple policy -- sometimes called a "stealth policy" -- that forbids discrimination of any kind, without mentioning specific types of discrimination.

But most of the attorneys consulted for this article recommend specifying sexual-orientation discrimination, along with other types of discrimination, in the policy. Such wording "puts people on notice that sexual-orientation discrimination will not be tolerated," says NSBA staff attorney Naomi Gittins. In the event of a lawsuit, she says, "it provides proof that the district is making a serious attempt to respond to problems of discrimination and harassment."

The policy should be supported by procedural guidelines and staff training. "A district has to have a mechanism to intervene, investigate, and make decisions based on its investigation," says Meyers.

Those who've written such policies, and provided the staff training and procedures to enforce them, know the firestorm they sometimes bring. But better a firestorm than another beating in another school bathroom.

[Rebecca Jones](#) is a senior editor of American School Board Journal.

Photoillustration by [Davis Freeman](#).

Support groups offer respite—and controversy

Almost everywhere you turn, it seems, a kid is starting (or asking to start) a group for gay students. In the summer of 1998 the [Gay Lesbian Straight Education Network](#) (GLSEN) -- the national organization most closely associated with the grass-roots Gay-Straight Alliances (GSAs) -- knew of 99 such groups in U.S. high schools. Within a year, more than 600 GSAs had registered with GLSEN. And there's no telling how many groups have sprouted up without registering with GLSEN.

Gay students say these groups provide respite and friendship in the often-hostile hallways of their high schools. "The most important thing a GSA can ever do is make just one person feel less like an outcast and more accepted," says 17-year-old Adam Free in Iowa City, Iowa.

But these support groups offend many people who fear they encourage

homosexuality, the same way school bands encourage musical talent and French clubs encourage interest in other countries. "You can't have advocacy and promotion of a lifestyle that millions of Americans believe is extremely high-risk and inappropriate," says the Rev. Louis P. Sheldon, chairman and founder of the Traditional Family Values Coalition based in Anaheim, Calif.

Ironically, gay-student groups are finding legal shelter in the Equal Access Act, the 1984 federal law aimed at allowing Bible clubs in public schools. Under this law, schools that allow *any* noncurriculum-related, student-initiated group to meet on a secondary school's premises must allow *all* such groups to meet at school. So, if students start a Bible Club -- or any other noncurriculum club -- that meets at a school, attorneys say a GSA must be allowed to meet there, too.

The Equal Access Act has forced some schools into accepting groups that school officials didn't want. A Manchester, N.H., principal, for instance, told students they would need permission from the Manchester school board before starting a GSA last spring. After the school board turned down the request, the students filed a federal civil rights lawsuit, invoking the Equal Access Act and charging that no other student organization had been required to jump through so many hoops. The Manchester school board approved the GSA in July, and the lawsuit was dropped.

When placed in a similar position in 1996, the Salt Lake City school board decided to comply with the Equal Access Act by banning 46 noncurriculum-related groups, including Students Against Drunk Driving and the Latino Student Alliance, rather than allow one GSA to meet at East High School. Other, curriculum-related student groups were allowed to continue meeting at the school.

Which raised the question: Who decides which club is related to the curriculum?

That question was argued out in court last spring. [American Civil Liberties Union](#) (ACLU) and gay-activist attorneys asserted that some of the so-called curriculum-related clubs, such as the Future Business Leaders of America and the Future Homemakers of America, were more social than curricular.

Steven Clark, staff attorney at the ACLU of Utah, says he has no objection to a social club in a high school. "It's a terrific opportunity for students," he says. "It's a wonderful thing, and we're not saying it should be eliminated." But if the district recognizes some social/noncurricular clubs, he argues, it must recognize the gay students' club as well.

At press time, attorneys were still waiting for a ruling in the case. In the meantime, a community group has been renting space at East High School, under Utah's Civic Center Act, so gay kids would have a place to meet. It seemed important to continue those meetings, especially after the then-president of East High School's banned Gay-Straight Student Alliance hanged himself in September 1997, just nine days after the start of another school year. -- *R.J.*

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