

Inquiry & ANALYSIS

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Prohibiting Sexual Orientation Discrimination and Harassment

PROHIBITING SEXUAL ORIENTATION DISCRIMINATION AND HARASSMENT AGAINST STUDENTS*

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Sexual orientation discrimination and harassment is a problem that deserves the careful attention of every school district. If the district addresses the issue as a matter of safety and fairness, and appropriately engages the community in policy discussions, it can foster a learning and working environment where all are treated equitably and with tolerance and respect. The district can also reduce the potential for liability by promoting an awareness of discrimination based on sexual orientation, and help district and school staff to recognize, prevent, and effectively respond to this problem.

THE LAW

Several states and a number of local governments have laws or ordinances prohibiting discrimination and harassment on the basis of sexual orientation. These provisions most frequently apply to public employment and accommodations. Some specifically ban such discrimination in public school systems. School districts must ensure that their policies and practices comply with these state and local anti-discrimination mandates.

Several federal laws should also be considered by school districts seeking to prevent and respond effectively to discrimination and harassment based on sexual orientation.

Title IX

The language of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, does not prohibit discrimination or harassment on the basis of sexual orientation. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), cert. denied, 493 U.S. 1089

(1990). However, in a recent case, *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000), the court held that a student who alleged that other students assaulted and harassed him based on their perception that he was a homosexual, could bring suit under Title IX. Drawing support from the Supreme Court's opinion in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), which held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, covers same-sex harassment, the *Ray* court said:

[T]he court finds no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser's perception that he is homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality, and is not distinguishable to this court.

107 F. Supp. 2d at 1170. This position is consistent with recent guidance issued by the Office for Civil Rights (OCR) of the U.S. Department of Education. In OCR's view, "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX . . . the school would need to respond promptly and effectively . . . just as it would if the victim were heterosexual." *Revised*

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Sexual Harassment Guidance, Harassment of Students by School Employees, Other Students or Third Parties (OCR, Jan. 19, 2001).

While OCR's guidance makes it clear that it will investigate complaints of sexual harassment filed by gay and lesbian students in the same manner as it would those of heterosexual students, the *Ray* court reiterated the standard of liability to impose monetary liability for violations of Title IX. The plaintiff must show that a school official with authority to address discrimination: 1) acted with deliberate indifference to sexual harassment of which he had actual notice, and 2) the sexual harassment was so severe, pervasive, and objectively offensive that it deprived the victim of access to educational opportunities or benefits.

Fourteenth Amendment and Section 1983

At least one court has held that a student may bring an action under section 1983 for discrimination on the basis of gender and sexual orientation in violation of his equal protection rights under the Fourteenth Amendment. In *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), the student alleged that the school district had failed to protect him to the same extent other students were protected from harassment and harm inflicted by other students, due to his gender and sexual orientation. In this case, the student alleged that he had

reported repeated incidents of harassment and assault, including a mock rape, but that school officials failed to enforce their anti-harassment policies which, in compliance with state law, prohibited discrimination on the basis of gender or sexual orientation. Using a rational basis review, the court declared, "[w]e are unable to garner any rational basis for permitting one student

to assault another based on the victim's sexual orientation."

With respect to the student's due process claim, the Seventh Circuit noted that the student did not challenge its previous ruling in *J.O. v. Alton Community Unit School District*, 909 F.2d 267 (7th Cir. 1990), which had held that where school administrators do not have a special relationship with students, they have no affirmative constitutional duty to protect students from harm. The court hinted in a footnote that there

strated that the defendants' failure to act increased the risk he faced.

First Amendment and Equal Access Act

The rulings in two reported cases brought under the Equal Access Act, 20 U.S.C. §§ 4071-4074, indicate that a school district must allow a gay and lesbian student club to meet on secondary school campuses if other non-curriculum related clubs are allowed to meet. *E.g., Colin v. Orange Unified School Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School Dist.*, 81 F. Supp.2d 1166 (D. Utah 1999). A similar conclusion was reached under the First Amendment. *East High School Prism Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000) (granting preliminary injunction to a student club denied access to school premises open only to curriculum related student clubs; the club intended to examine historical contributions, impact and experiences of gay and lesbians).

Schools should also take note of the Supreme Court's decision in *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), in which the Court held that the Boy Scouts have a First Amendment right of association to prohibit homosexuals from serving as troop leaders. In general, schools should treat requests by the Boy Scouts for access to school facilities in the same manner as it treats requests from other outside groups. For more discussion of this issue, see *Inquiry & Analysis*, Dec. 2000, at 5.

For more information about preventing and responding to harassment, see *Sexual Harassment by School Employees* (NSBA Council of School At-

torneys, March 2001) and *Student-to-Student Sexual Harassment* (NSBA Council of School Attorneys, March 2000). To order these publications, call 1-800-706-6722. **I&A**

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EFFECTIVE POLICY DEVELOPMENT AND IMPLEMENTATION

School board and/or school administrators should:

- Involve members of the community, including gay and lesbian groups and religious organizations, in the policy making process, and keep these groups informed.
- Develop policies in compliance with federal and state law and local ordinances prohibiting discrimination.
- Refrain from making sexual orientation discrimination a singular focus; rather, incorporate it into preventive and responsive policies aimed at all protected categories.
- Emphasize the need to promote a safe environment for everyone.
- Keep discussions about curriculum issues (e.g., whether to teach about gay and lesbian lifestyles) separate from harassment prevention efforts.
- Ensure policies are widely disseminated and clearly identify to whom harassment or discrimination should be reported.
- Promptly investigate and take appropriate action when incidents occur.
- Provide yearly reminders of anti-discrimination policies to district and school communities.
- Provide adequate training to school community members as needed. For example: 1) Board members should be able to explain to their constituents the legal rationale for the policy; 2) school officials responsible for addressing harassment and discrimination should be able to recognize when unlawful harassment occurs and know what actions to take; 3) staff should know that slurs and jokes targeting gays and lesbians are unacceptable; and 4) students should be clearly informed about those to whom harassment should be reported.

might be some cases where a school is in a custodial relationship with its students such that the duty to protect might emerge. The court agreed in theory with the student's claim that the school could be liable if it had created a risk of harm or exacerbated an existing one. However, the court felt that despite the student's "wrenching" allegations, he had not demon-