

FREQUENTLY ASKED QUESTIONS ON SAFE SCHOOL POLICIES

This fact sheet is designed to address many of the frequently asked questions about how schools can best protect lesbian, gay, bisexual and transgender (LGBT) students from harassment and discrimination and, at the same time, protect themselves from potential liability.

The questions below will address existing legal obligations under federal law; why having an inclusive anti-harassment policy helps school fulfill their legal obligations; how to draft the most effective policy or law; concerns about liability; and ways to respond to objections to the proposed policy.

Are LGBT students at risk of experiencing harassment and discrimination in schools?

Yes. There is now extensive evidence that LGBT students are disproportionately targeted for harassment and discrimination in schools. Left unchecked, this harassment and discrimination may often escalate to the level of physical violence or violent crime.

Specifically, results from the 2001 National School Climate Survey indicate that:

- Over 80% of LGBT students reported being verbally harassed because of their sexual orientation; and
- Nearly 70% of LGBT students reported feeling unsafe in school because of their sexual orientation.¹

Moreover, studies also indicate that school officials often fail to respond to or, in some cases, even participate in the discrimination and harassment.² One study documented this problem, reporting that:

- 80% of prospective teachers reported negative attitudes towards LGBT people; and
- 66% of guidance counselors maintain negative feelings about and towards LGBT people.³

The climate of fear created may result in increased absenteeism, decreased academic performance and increased risk of suicide. The National School Climate Survey also found that over 30% of LGBT students had missed at least one entire day of school in the past month because they felt unsafe.⁴

Do schools have a legal obligation to protect LGBT students from harassment and discrimination?

Yes. All students have a federal constitutional right to equal protection under the law. This means that schools have a duty to protect lesbian, gay, bisexual and transgender (LGBT) students from harassment on an equal basis with all other students. If school officials failed to take action against anti-LGBT harassment because they believed that the LGBT students should expect to be harassed; or because they believed that LGBT students brought the harassment upon themselves simply by being openly LGBT; or because the school was uneducated about LGBT issues and was uncomfortable addressing the situation, then the school has failed to provide equal protection to the student.⁵

In addition, Title IX of the Education Amendments of 1972, which applies to all schools that receive federal financial assistance, prohibits discrimination on the basis of sex. Although Title IX does not prohibit discrimination on the basis of sexual orientation, it does prohibit sexual harassment directed at an LGBT student.⁶ Title IX also prohibits gender-based harassment, including harassment on the basis that a student fails to conform to stereotypical notions of masculinity and femininity.⁷

Moreover, the First Amendment and the federal Due Process and Equal Protection Clauses protect the right of a transgender student to dress in accordance with his or her gender identity.⁸

In addition to these federal protections, there are state laws that also require schools to protect LGBT students.

With all these existing Federal laws, why is a local policy necessary?

One critical step that local school districts can take both to ensure they fulfill their legal obligation to protect LGBT students and, at the same time, to respond to the alarming statistics about harassment and discrimination of LGBT students is to pass and implement anti-harassment policies that explicitly include sexual orientation and gender identity.⁹ These policies are the most effective way to protect students from discrimination and to help schools fulfill their legal responsibility to provide safe and effective learning environments for all students.

Schools have a legal obligation to respond to harassment of LGBT students whether or not they have a policy. A comprehensive policy that is publicized and implemented will clarify for all staff that such behavior is unacceptable and must be responded to. Thus, having an effective anti-harassment policy helps schools fulfill their existing legal obligations.

Will the existence of these policies open up schools and teachers to additional legal liability?

No. To the contrary, enacting such legislation will help protect school districts and teachers from potential liability.

This is because school districts are already legally required, under state and federal law, to appropriately respond to harassment of all students, including LGBT students. This duty to protect or take action is not based on the existence or absence of a school policy, but rather is based on already existing federal and state laws and constitutional provisions.

Without a policy that explicitly includes sexual orientation and gender identity as protected categories, many school officials are not aware of this legal obligation to appropriately respond to anti-LGBT harassment and discrimination. Or, if they are aware, they often do not feel comfortable and supported in responding to harassment of LGBT students. It is conduct-failing to act or failing to act in a reasonable manner-that opens up school districts to liability, not the adoption of an anti-harassment policy.

Having a policy that explicitly includes sexual orientation and gender identity will help protect the school district from liability by providing clear direction to teachers, administrators and students about what types of conduct are prohibited and what steps they need to take when they learn of incidents of prohibited conduct. This guidance will help staff and school districts comply with their preexisting legal obligations to respond to harassment of LGBT students.

Moreover, such anti-harassment policies also give teachers and staff the backing they need in order to feel confident about responding to LGBT harassment.

Is a blanket prohibition against discrimination and harassment without enumerated categories sufficient to protect LGBT students?

No. While harassment of any kind is unacceptable and should be dealt with quickly, firmly and with appropriate consequences and remedies, certain groups of people have suffered systematic institutional prejudice, discrimination and, as a result, are at a disproportionate risk of being the target of harassment and violence. Evidence shows that school officials often do not recognize that anti-LGBT harassment and discrimination are unacceptable behaviors.¹⁰ And even when teachers and staff do recognize that it is unacceptable, they are often reluctant to intervene for fear of becoming targets of harassment themselves.

Without specifically enumerating sexual orientation and gender identity as protected categories, many school officials may continue to believe that they do not have a responsibility to respond to anti-LGBT harassment. As the United States Supreme Court has explained: "Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."¹¹ Inclusion of the enumerated categories will provide clear direction to teachers, administrators, and students about the scope of the law or policy. It is also necessary to give teachers and staff the backing they need in order to feel confident about responding to LGBT harassment.

Is it necessary to add gender identity in particular?

Yes. Transgender youth are disproportionately likely to face harassment. In a recent survey, 89.5% of transgender students reported feeling unsafe based on their gender expression.¹² Also, the harassment tends to be particularly violent. A recent survey analyzing reported instances of bias-motivated violence against LGBT people from 1995 through 1998 found that although anti-transgender violence accounted for only a relatively small percentage of all reported cases, those incidents accounted for 20% of all reported murders and approximately 40% of all police-initiated violence.¹³ These conditions put transgender youth at great risk of suicidal feelings and behavior. Moreover, harassment on the basis of gender non-conformity-behaving in a manner outside of traditional gender characterizations-perpetuates and reinforces gender-based stereotypes that hurt everyone.

Will it be difficult to adopt and effectively implement such a policy?

No. Under existing federal law, as well as the laws in many states, school districts are already legally required to promulgate, annually publicize and implement sexual harassment policies. Thus, all school districts should already have mechanisms in place for annually publicizing and enforcing harassment policies. Thus, the only additional requirement being placed on school districts is to ensure that the categories enumerated in their existing policies include sexual orientation and gender identity.

Should such a policy be limited to high schools?

No. Children notice differences among people at a very early age. And it is well documented that harassment and discrimination begin at a very young age, often as early as kindergarten or elementary school.¹⁴ Biases and negative stereotypes undercut all children's healthy development and ill-equip them to interact effectively in a diverse world. Thus, it is essential that all schools, including middle schools and elementary schools, have anti-harassment policies that are effectively implemented and enforced.

Obviously, discussions about the policies must be age-appropriate and will differ for different-age children, but all children should be taught that harassment and discrimination are wrong, and strong anti-harassment and nondiscrimination policies should be in place for all grades.

Does having anti-harassment policy that includes sexual orientation violate the religious freedom of those teachers, staff, and administrators that believe homosexuality is a sin?

No. Requiring staff to appropriately respond to violence, discrimination and harassment, and ensuring that all students are provided with a safe and effective learning environment, does not violate the religious freedoms of staff and administrators. Teachers and staff are free to hold any beliefs they choose about homosexuality. The policy simply requires that they fulfill their legal obligation to make sure that no student is harassed or discriminated against.

Lesbian, gay, bisexual and transgender (LGBT) students are disproportionately targeted for harassment and discrimination in schools. School districts can be held legally accountable for failing to protect LGBT students.¹⁵

The most effective way for school districts to ensure that they fulfill their legal obligations and, at the same time, protect students from harassment and discrimination is to adopt and implement a policy that clearly prohibits discrimination and harassment on the basis of real or perceived sexual orientation and gender identity.

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Endnotes

1. GLSEN National School Climate Survey, 2001, available at www.glsen.org.
2. See, e.g., HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 14 (2001) (hereinafter Hatred in the Hallways), available at www.hrw.org/reports/2001/uslgbt/ ("Recommendations to State Governments. Enact legislation to protect students from harassment and discrimination on the basis of sexual orientation and gender identity.").
3. James Sears, *Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs*, in COMING OUT OF THE CLASSROOM CLOSET (Karen Harbeck ed., 1992).
4. GLSEN National School Climate Survey, 2001.
5. See *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding student could maintain claims alleging discrimination on the basis of gender and sexual orientation under the Equal Protection Clause where school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation). See also *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000) ("We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one.") (citing *Nabozny*, 92 F.3d at 458).
6. See Office of Civil Rights, Revised Sexual Harassment Guidance, § III (Jan. 2001) ("OCR Revised Guidance") ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title . . ."). See also *Montgomery*, 109 F. Supp. 2d 1081.
7. See OCR Revised Guidance, § III ("Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond . . .") (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding sex-stereotyping is a form of sex discrimination prohibited by Title VII) (emphasis added). See also *Montgomery*, 109 F. Supp. 2d 1081; *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).
8. See, e.g., *Doe v. Yunits*, 2000 WL 33162199, at * 3-4 (Mass. Super.), *aff'd sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass. App. 2000).
9. See, e.g., Hatred in the Hallways.
10. See, e.g., Sears, *supra* note 3.
11. *Romer v. Evans*, 517 U.S. 620 (1996).
12. GLSEN National School Climate Survey, 2001
13. *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, A Report of the National Coalition of Anti-Violence Programs (1999).
14. See, e.g., *Montgomery*, 109 F. Supp. 2d at 1083 (noting that the plaintiff began experiencing frequent and continual harassment beginning in kindergarten).
15. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

