

Basic Elements:

(1) Categories Covered

- The statute should provide for protection from harassment and discrimination on the basis of sexual orientation and gender identity or expression.
 - Ideally, gender identity or expression should be added as a separate category. But, if this is not possible, it can be included in the definition of sex, gender, or sexual orientation.

EXAMPLES:

“‘Harassment, intimidation or bullying’ means any gesture or written, verbal or physical act that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as . . . sexual orientation, gender identity and expression . . .” N.J. Stat. § 18A:37-14.

“No student . . . shall be subjected to discrimination based on a person’s actual or perceived . . . sexual orientation, gender, or sex . . .” N.Y. Dignity for All Students Act (“DASA”) § 12.¹ See also § 11(7).
“‘Gender’ shall mean actual or perceived sex and shall include a person’s gender identity or expression.” N.Y. DASA § 11(6).

“‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Minn. Stat. Ann. § 363.01, Subd. 45.

(2) Actual or Perceived

- “Actual or perceived” should modify all protected categories.

EXAMPLES:

“‘‘Harassment, intimidation or bullying’ means any gesture or written, verbal or physical act that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as . . . sexual orientation, gender identity and expression . . .” N.J. Stat. § 18A:37-14.

¹ Although the N.Y. Dignity for All Students Act has not yet been enacted, we have included references to its language because the bill is very comprehensive.

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“No student . . . shall be subjected to discrimination based on a person’s actual or perceived . . . sexual orientation, gender, or sex . . .” N.Y. DASA § 12.

“‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Minn. Stat. Ann. § 363.01, Subd. 45.

(3) Coverage for Discrimination on the Basis of Association

- Ideally, the statute should explicitly prohibit harassment on the basis of association (which would cover harassment of students with LGBT parents).
 - If that is not possible, however, statutes that have been written to prohibit discrimination or harassment against any person on the basis of race, color, sex, sexual orientation, gender identity, etc. have been interpreted to cover discrimination on the basis of a person’s association with an individual who falls within one of the protected categories.²

EXAMPLES:

“Harassment of and discrimination and violence against students on the basis of real or perceived identity or expression of . . . sex or gender . . . or sexual orientation, on the basis of stereotypes of persons identified by these categories, or on the basis of association with others identified by these categories are prohibited by any student or school employee . . .” Florida DASA § 3(a).³

(4) Prohibited Conduct

- The statute should prohibit “discrimination.”
 - Harassment is a form of discrimination, so a statute that prohibits discrimination also requires a school to respond to incidents of harassment. But, not all forms of discrimination are “harassment,” so a statute that only prohibits “harassment” would not, for example, prohibit a school from excluding a student from class on the basis of the student’s sexual orientation. Thus, it is very important to make sure that the statute explicitly prohibits “discrimination.” To make it clear that the statute also prohibits harassment, the

² See, e.g., Indiana Civil Rights Com’n v. Alder, 714 N.E.2d 632 (Ind. 1999); Minneapolis v. State, 310 N.W.2d 485 (Minn. 1981); West Virginia Human Rights Com’n v. Wilson Estates, Inc., 202 W. Va. 152, 503 S.E.2d 6 (W. Va. 1998); Winchell v. English, 62 Cal. App. 3d 125, 133 Cal. Rptr. 20 (citing cases). Thus, statutes written this way (or something similar, such as prohibiting discrimination “on account of . . .”) are likely to prohibit harassment directed at a student because the student has (an) LGBT parent(s).

A statute is less likely to be interpreted to cover such associational discrimination if the statute is worded to prohibit discrimination against any person because of the sexual orientation (or other protected category) “of such person.” See generally Civil Rights: Actionability Under State Statutes of Discrimination Because of Complaining Party’s Association With Persons of Difference Race, Color, or the Like, 35 A.L.R. 3d 859.

³ Similarly, although the Florida Dignity for All Students Act has not yet been enacted, we have included references to its language because the bill is very comprehensive.

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statute can explicitly prohibit both “harassment” and “discrimination,” as the New York bill does.

EXAMPLES:

“No student shall be subjected to harassment . . . nor shall any student be subjected to discrimination . . .” N.Y. DASA § 12 (emphasis added).

(5) Retaliation

- The statute should prohibit retaliation against any person who reports discriminatory or harassing behaviors (this provision is sometimes referred to as a “whistle-blower” clause).

“Retaliation against a student by another student or school employee for asserting or alleging a violation of this act is prohibited.” Florida DASA § 3(b).

“Protection of people who report discrimination or harassment. Any person having reasonable cause to suspect that a student has been subjected to discrimination or harassment by an employee or student, on school grounds or at a school function, who, acting reasonably and in good faith, either reports such information to school officials, to the commissioner, or to law enforcement authorities or otherwise initiates, testifies, participates or assists in any formal or informal proceedings under this article, shall have immunity from any civil liability that may arise . . . and no school district or employee shall take, request or cause a retaliatory action against any such person . . .” N.Y. DASA, § 16.

(6) Activities Covered

- The statute should cover any activity or program occurring on the grounds of a covered institution during the hours in which school is in session, all school-related and school-sponsored programs or activities, and transportation on a school bus to or from school or a school-related or school sponsored program or activity.

EXAMPLES:

Prohibiting “[h]arassment, intimidation or bullying” that “takes place on school property, at any school-sponsored function or on a school bus . . .” N.J. Stat. § 18A:37-14.

“Harassment of and discrimination and violence against students . . . are prohibited by any student or school employee during the conduct of any education program or activity by an educational institution which receives or benefits from state or federal financial assistance, as well as on any school bus traveling to or from a school or a school-related or school-sponsored program or activity.” Florida DASA § 3(a).

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(7) People Covered

- Ideally, the statute should cover students, teachers, employees, and staff.

EXAMPLES:

“It is an unfair discriminatory practice (1) to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person . . .” Minn. Stat. Ann. § 363.03, Subd. 5 (emphasis added).

(8) Types of Schools Covered

- The statute should cover all grade levels -- k-12 and, if possible, post-secondary.
 - Post-secondary schools can be covered within the same statute (see NJ), or by way of a separate statute (see CA).
- Ideally, the statute should cover public and private schools.
 - If the statute does cover private schools, it may be advisable or necessary to include a religious exemption.

EXAMPLES:

“‘Educational institution’ means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, and a business, nursing, professional, secretarial, technical, vocational school; and includes an agent of an education institution.” Minn Stat. Ann. § 363.01, Subd. 15 (emphasis added).

“‘A place of public accommodation’ shall include . . . any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey . . .” N.J. Stat. Ann. § 10:5-5(l) (emphasis added).

“It is the policy of the State of California to afford all persons, . . . regardless of any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state. . .” Cal. Educ. Code § 66251 (emphasis added). Compare Cal. Educ. Code § 200 (applying to “educational institutions of the state”).

“This article shall not apply to an educational institution which is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” Cal. Educ. Code § 220.5 (emphasis added).

(9) Implementing Policies and Procedures

- The statute should authorize the State Board of Education (or its equivalent) to promulgate rules and regulations to implement the statute.

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EXAMPLES:

“The State Board of Education shall adopt regulations . . . to implement this chapter.” Cal. Educ. Code § 221.1.

“The Florida Board of Education shall adopt rules pursuant to §§ 120.536(a) and 120.54 to implement and monitor compliance with this act.” Florida DASA § 5.

(10) Severability and Construction Clause

- The statute should include a severability clause.
- It is also helpful to have a sentence stating that the statute is to be liberally construed.

EXAMPLES:

“Severability and construction. The provisions of this title shall be severable, and if any court of competent jurisdiction declares any phrase, clause, sentence or provisions of this title to be invalid, or its applicability to any government agency, person or circumstance is declared invalid, the remainder of this article and its relevant applicability shall not be affected. The provisions of this article shall be liberally construed to give effect to the purposes thereof.” N.Y. DASA § 18.

Requirements for School Districts:

(1) School District Policies

- The statute should require all school districts to adopt anti-harassment/non-discrimination policies consistent with the statute.
- Ideally, the statute should require the policy to include enforcement mechanisms, and should require the school board to provide notice of the policy to the school community.
 - If it is not possible to include these requirements directly in the statute, the statute should authorize the State Board of Education (or its equivalent body) to adopt regulations, and these requirements should be included in these implementing regulations.

EXAMPLES:

“Each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus. . . . the policy shall contain, at a minimum, the following components:

- (1) a statement prohibiting harassment, intimidation or bullying of a student;
- (2) a definition of harassment, intimidation or bullying no less inclusive than that set forth in section 2 of this act;
- (3) a description of the type of behavior expected from each student;
- (4) consequences and appropriate remedial action for a person who commits an act of harassment, intimidation or bullying;
- (5) a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report;

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- (6) a procedure for prompt investigation of reports of violations and complaints, identifying either the principal or the principal's designee as the person responsible for investigation;
- (7) the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified;
- (8) a statement that prohibits reprisals or retaliation against any person who reports an act of harassment, intimidation or bullying and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation;
- (9) consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of harassment, intimidation or bullying; and
- (10) a statement of how the policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions."

N.J. Stat. § 18A:37:15.

"Educational institutions covered under this act shall develop and implement methods and strategies for the following: (a) Providing procedures for the filing and the prompt processing, hearing, and adjudication of claims of violations of this act, as well as imposition of punitive and remedial measures. . . (c) Providing specific and continuing steps to annually notify students, parents, and employees of harassment, discrimination, and violence unlawful under this act, and the procedures for reporting violations. This requirement may be satisfied by including this information in bulletins, handbooks, or other such materials which publish at least annually policies governing student and employee conduct. . . (f) Reporting to the Florida Board of Education all incidents of harassment, discrimination, and violence in violation of this act. . . (h) Providing guidance and counseling services to students affected by harassment, discrimination, or violence in violation of this act. (i) Providing specified sanctions for students or employees found to have perpetrated harassment of or discrimination or violence against students in violation of this act." Florida DASA § 4.

"A school board must adopt a written . . . policy that conforms with sections 363.01 to 363.15. The policy shall apply to pupils, teachers, administrators, and other school personnel, include reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy . . . The policy must be conspicuously posted throughout each school building, given to each district employee and independent contractor at the time of entering into the person's employment contract, and included in each school's student handbook on school policies. Each school must develop a process for discussing the school's . . . policy with students and school employees." Minn. Stat. Ann. § 121A.03, Subd. 2.

(2) Employee Training

- The statute, or its implementing regulations, should require school employee training programs to include information about preventing and responding to discrimination and harassment.

EXAMPLES:

"To the extent funds are appropriated for these purposes, a school district shall: (1) provide training on the school district's harassment, intimidation or bullying policies to school employees and volunteers who have significant contact with students; and (2) develop a process for discussing the district's harassment, intimidation or bullying policy with students. Information regarding the school district policy against harassment, intimidation or bullying shall be incorporated into a school's employee training program." N.J. Stat. § 18A:37:17.

"Educational institutions covered under this act shall develop and implement methods and strategies for the following: . . . (b) Providing instruction to teachers, school administrators, and counseling staff on identifying, preventing, and responding to all forms of harassment, discrimination, and violence that are unlawful under this act." Florida DASA § 4.

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“The board of education and the trustees or sole trustee of every school district shall create policies and guidelines that shall include, but not be limited to: 2. Guidelines to be used in school training programs to discourage the development of discrimination or harassment and that are designed: a. to raise awareness and sensitivity of school employees to potential discrimination or harassment, and b. to enable employees to prevent and respond to discrimination or harassment . . .” N.Y. DASA, § 13.

(3) Curriculum

- The statute, or its implementing regulations, should require schools to incorporate LGBT issues into the curriculum in an age-appropriate way.

EXAMPLES:

“Educational institutions covered under this act shall develop and implement methods and strategies for the following: . . . (d) Promoting school environments which are free of harassment, discrimination, and violence unlawful under this act. (e) Incorporating into civility, citizenship, and character education curricula awareness and sensitivity to the prohibition under this act of harassment, discrimination, and violence.” Florida DASA § 4.

“The board of education and the trustees or sole trustee of every school district shall create policies and guidelines that shall include, but not be limited to: . . . 3. Guidelines relating to the development of nondiscriminatory instruction and counseling methods . . .” N.Y. DASA, § 13.

(4) Data Collection

- It is helpful if the statute or its implementing regulations require schools to collect data about the problem of harassment and discrimination.

EXAMPLES:

“Educational institutions covered under this act shall develop and implement methods and strategies for the following: . . . (g) Providing for annual confidential surveys of students as to the hospitability of school atmospheres towards students on the basis of real or perceived identity or expression of race, color, religion, national origin, marital status, sex or gender, handicap, and sexual orientation.” Florida DASA § 4.

Enforcement:

(1) Private Cause of Action

- Ideally, the statute should provide a private cause of action to sue in state or federal court.
- The statute may also allow provide for an administrative remedy – such as allowing a party to file a complaint with the Commissioner of Education, State Board of Regents, or its equivalent.
 - It is also helpful to make clear that any remedies specifically provided by the statute do not waive one’s right to pursue other remedies.

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EXAMPLES:

“It is the intent of the Legislature that . . . the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.” Cal. Educ. Code § 201(g).

(2) Relief

- Ideally the statute should provide that monetary damages, injunctive relief, and any other appropriate relief may be awarded for a violation of the statute.

IMPORTANT CAVEATS:

Because education statutes have complex and interrelated relationships with other statutes, such as employment and public accommodations – relationships which vary by state – activists are strongly advised to consult an attorney familiar with this area of law before making any decisions about enforcement provisions.

In addition, when considering whether and how to draft a private cause of action, activists should also analyze the various state immunity doctrines in place in their state – such as qualified immunity, and tort immunities.