

A photograph of a classroom. A female teacher with glasses and a white shirt is sitting at a desk, talking to two students, a girl and a boy, who are also sitting at the desk. They are looking at books and papers. In the background, another student is sitting at a desk, and there are classroom doors and a whiteboard.

Protecting Students From Harassment and Discrimination: It's the Law

Learn how the law protects LGBTQ students at school – and how to draft school policies that protect your students and staff.

Does the law protect LGBTQ students from discrimination and harassment at school?

The United States Constitution guarantees all people, including LGBTQ people, “equal protection of the laws.” State constitutions contain similar protections. This means that public school officials and employees may not single out a student for negative treatment based on prejudices against LGBTQ students. Nor may they discriminate against students just because they (or members of the community) disapprove of being gay or because they feel uncomfortable around those who do not conform to traditional gender stereotypes. The Constitution’s equality guarantee also means that school officials may not turn a blind eye to anti-LGBTQ harassment or treat

it less seriously than other forms of harassment. If a public school official deliberately ignores antigay or antitransgender peer abuse, or refuses to apply antibullying protections on a nondiscriminatory basis, the official – and even the school district itself – may be held liable for violating students’ constitutional rights.

Federal civil-rights statutes – particularly Title IX – reinforce these provisions. Under Title IX, public and private schools receiving federal funds can be held liable when they discriminate against students based on sex or gender expression, or when they knowingly permit their employees or students to engage in sexual harassment or harassment based on sexist stereotypes. LGBTQ youth are frequent targets of these forms of harassment, and have



TAKING ACTION:

Derek Henkle

Antigay abuse and school blunders cut short this Nevada youth's education – but he was vindicated in court.

From the age of 14, when Derek Henkle came out on public-access television, his life in the Nevada school system was a nightmare. "I would be spit on, punched and kicked," he remembers. "I was humiliated every day." School

administrators and teachers stood by while other students harassed, threatened and physically assaulted Henkle. One assistant principal actually laughed after students tried to tie Henkle to a truck and drag him down the street. Rather than addressing the antigay harassment and violence, school administrators transferred Henkle to other schools — as if he were the problem. At 16, Henkle, who had been in a program for gifted and talented students since the fourth grade, was forced to resort to adult-education classes, where it was impossible to obtain a high school diploma. Henkle fought back. He contacted Lambda Legal and with our help secured a precedent-setting court ruling recognizing the rights of gay students. After the ruling, the school district agreed to sweeping policy changes to protect students from harassment, paid a \$450,000 settlement and put a letter in his academic file explaining why his education was cut short.

successfully asserted their rights under Title IX in a number of court cases.

State and local civil rights laws provide additional protections, and often go into more detail about what they require of schools. As of 2009, about half the states in the U.S. – plus the District of Columbia – have enacted statutes, regulations or other policies that specifically address harassment and/or discrimination based on sexual orientation. While only about a quarter of states (and D.C.) expressly include gender identity in student civil-rights protections, courts and enforcement agencies increasingly recognize that sex-discrimination provisions are properly interpreted to prohibit discrimination against transgender and other gender-nonconforming students.

In addition, in a growing number of cities and counties – from small rural towns to major metropolitan areas like Dallas, Detroit, Miami-Dade and Nashville – local governments and school boards have adopted antidiscrimination

safeguards that specifically include sexual orientation and/or gender identity. (See "Put It In Writing" on page 10 for information on enacting an antidiscrimination policy in your school or district.)

What if the antidiscrimination laws in my area don't expressly include sexual orientation or gender identity?

The federal Constitution and federal laws apply throughout the country with equal force, regardless of what additional protections may or may not exist at the state or local level.

This has been powerfully demonstrated in several landmark civil-rights cases brought by Lambda Legal against school officials for antigay discrimination, which were won in federal courts applying federal law.

Henkle v. Gregory ended in a settlement of \$450,000, even though no state law at the time specifically addressed antigay harassment in school. In *Nabozny v. Podlesny* (see "Jamie Nabozny," page 9), which ended with a

nearly \$1 million settlement, a unanimous federal appeals court specifically noted that school officials could be liable for antigay discrimination under the federal Constitution regardless of what state law provided.

Moreover, even in states and localities without a statute or other policy that explicitly mentions sexual-orientation or gender-identity discrimination, various other laws may require schools to take preventive and remedial action against harassment and bullying.

A large majority of states, for example, have enacted anti-bullying laws that require local school districts to adopt specific measures addressing physical and verbal peer abuse at school. The federal Constitution prohibits schools from discriminating against LGBTQ students in the implementation of these laws.

“Negligent supervision” laws can also protect LGBTQ students from harassment by imposing liability on schools for harms suffered by students in their care.

See pages 10 and 11 for ideas on how to create

a safe school environment for LGBTQ students and on responding to anti-LGBTQ harassment.

What if the target of harassment isn't “out” or even LGBTQ?

Students don't need to be “out” to be protected under the law, or even LGBTQ. By guaranteeing “equal protection of the laws” to all people, the Constitution also protects students who are perceived to be LGBTQ, as well as students who associate with LGBTQ people. Many state and local civil rights policies, moreover, expressly protect students from discrimination and harassment based on perceived sexual orientation and/or perceived gender identity.

Where do I get more information about the laws governing my school?

Given the enormous diversity of laws that exist at the state and local level, school professionals should contact their state's Department of Education, a local attorney or Lambda Legal's Help Desk at 1-866-542-8336 or visit www.lambdalegal.org/help/online-form if they have specific questions about protections and requirements in their jurisdiction.

TAKING ACTION:

Jamie Nabozny

Take proactive steps to reduce the risk of this happening at your school: This former high school student endured unspeakable abuse. A court found his school liable for nearly \$1 million.

Jamie Nabozny attended a public high school in Ashland, Wisconsin, enduring both physical and verbal antigay abuse for four years from fellow students. Students urinated on him and even simulated raping him while in class. At one point, finding Nabozny alone, a few students repeatedly kicked him in the stomach so many times that he required surgery. School officials, however, ignored these instances of abuse, telling Nabozny that because he is gay, he should expect that kind of reaction from his fellow students. Overcoming the mental distress that led him to three suicide attempts and his dropping out of school, Nabozny sought to protect other LGBT students from the kind of torment that he faced — he sued the school. Although Nabozny's initial lawsuit was dismissed, Lambda Legal later took over his case in a federal appeals court. The decision was a first of its kind — the appeals court found that the school district could be held liable for not stopping the antigay abuse. Going back to the trial court, the case was eventually settled for nearly \$1 million.

Put It In Writing!

WRITTEN POLICIES ARE CRUCIAL TO PROTECTING STUDENTS AND ENSURING COMPLIANCE WITH THE LAW.

Components of an effective school district policy on discrimination and harassment include:

- ✓ A clear prohibition of discrimination and harassment, applying to both staff and students.
- ✓ Enumeration of "actual or perceived," "sexual orientation" and "gender identity" among the prohibited bases for discrimination and harassment.
- ✓ Procedures and guidelines for reporting harassment. Students suffering mistreatment should not be restricted to reporting harassment to any particular person, but there should be a procedure to ensure the information reaches the principal. And any staff member who witnesses or learns of discriminatory misconduct should have a clear duty set forth in the written policy to report that misconduct to the staff members designated to handle such concerns.
- ✓ A prohibition on retaliation against any person who reports harassment or discrimination.
- ✓ Information about the disciplinary consequences of violating the policy.
- ✓ A procedure for promptly investigating complaints.
- ✓ Requirements that the policy be displayed prominently at school, be distributed annually to students, parents, faculty and staff, and appear in school publications (including web pages) that set expectations for student or staff conduct.
- ✓ Procedures for regularly measuring and evaluating compliance with the policy by employees at all levels.
- ✓ Clear designation of supportive staff members with a responsibility to address discrimination, harassment, bullying and violence.

For information about additional requirements that may exist under state law, contact Lambda Legal's Help Desk at 1-866-542-8336 or visit www.lambdalegal.org/help/online-form, a local attorney or speak with a representative of your state's Department of Education.