

Gay, Lesbian and Transgender Students: Legal and Practical Guidance for Colleges

An EducationAdminWebAdvisor Webinar

Presented by:

Jessica D. Gabel, Esq.

Professor of Law

Georgia State University College of Law

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General Overview of LGBT Issues

- Lesbian, gay, bisexual, and transgender (LGBT) students often face discrimination and harassment in their colleges.
- Many college officials know very little about how the law requires them to protect LGBT students.

Why Now?

- Colleges need to recognize and address the needless suffering of some of their gay, lesbian, bisexual and transgender (GLBT) students, as well as the pain and isolation of students questioning or confused about their sexual orientation

Why Now?

- Nearly 30 percent of youth suicides are committed by gay, lesbian and bisexual youth annually.
- Many gay and lesbian youth drop out of college
 - because of discomfort in the college environment, and GLBT youth comprise as much as 25 percent of all youth living on the streets in this country.
- Many young people are infected with HIV, the virus that causes AIDS
- AIDS cases are growing most dramatically among people under age 20.

Why Now?¹

- Some transgendered individuals report having negative experiences in college, including hostility from peers, teachers, or college administrators.

Why Now?₂

- Increased levels of victimization correspond with decreased academic performance and lower education aspirations.

Above All

- Colleges do not have the right to “out” an LGBT student to anyone without the student’s permission.

Federal/State Law

- Federal and state laws and constitutional provisions should ensure the right of all students, including lesbian, gay, bisexual and transgender students (LGBT) to attend college in safety.

Federal/State Law

- Unlawful harassment compromises a student's ability to take advantage of educational opportunities and often interferes both with a student's academic performance and emotional and physical well-being.

Federal/State Law

- When harassment is based on the student's sex or sexual orientation, failure to redress it properly and promptly violates the law

Office of Civil Rights

- There is no excuse for inaction from colleges when it comes to harassment. Federal regulations require federal fund recipients to adopt and publish sexual harassment grievance procedures.
- The federal Department of Education (“DOE”), Office of Civil Rights (“OCR”), accepts complaints from students based on the harassing conduct of both college employees and fellow students.

Office of Civil Rights

- OCR has also issued an informative document entitled Revised Sexual Harassment Guidance: Harassment of Students by College Employees, Other Students or Third Parties, which provides guidelines on a wide variety of harassment-related issues (on the web at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>).

Office of Civil Rights

- Based on those precedents, there are good reasons to expect courts to impose liability on an educational institution for sexual harassment; and, regardless of the courts' receptivity to claims, colleges are well-advised to strictly enforce anti-sexual harassment policies in order to avoid OCR oversight and intervention.

Peer Harassment

- It is the position of OCR that colleges are not legally responsible for the actions of students sexually harassing other students.

Peer Harassment

- But OCR does hold colleges responsible for their own discrimination in failing to respond to harassment once they know harassment is happening.

Peer Harassment

- When a college has notice of a hostile environment created by its students, but takes immediate and appropriate steps to remedy the harassment, it will likely avoid legal liability.

Overview of LGBT Rights in Public Colleges vs. Private Colleges

Legal Requirements

- Public colleges are legally required to protect against harassment of LGBTQ students.
- For example, sections 200-220 of the California Education Code say that Colleges must protect students from different kinds of bias, including harassment based on sexual orientation or gender identity.

Legal Requirements

- What does this mean?
- A college cannot harass or discriminate against a student for being LGBTQ, for people thinking you are LGBTQ, or for having friends or family members who are LGBTQ.

Legal Requirements

- Also means that a student cannot be harassed for gender-related appearance and behavior, such as if a boy wants to wear a skirt.

Conflicts in the Laws

- Sometimes the constitutionally protected rights of students and teachers conflict with the courts' deference to the historically broad discretion enjoyed by college committees to advance their own policies through the local curriculum.
- Hard and fast rules governing the resolution of these conflicts are few.

Conflicts in the Laws

- One clear rule is that college policies must be related to “legitimate pedagogical concerns.”⁵
- More broadly, college committees and administrative personnel in a college may not impose one and only one viewpoint on a subject matter.

5. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273, (1988).

Conflicts in the Laws

- Such actions “directly and sharply implicate basic constitutional values and invite legal review.”

Legal Requirements

- College administrators can't just ignore anti-LGBTQ harassment or discrimination of students by saying that such students should "expect" to be harassed or have brought the harassment upon themselves by being open about their gender identity or sexuality.

Legal Requirements

- Check the state constitution: both the California and U.S. Constitutions guarantee all students equal protection under the law.

14th Amendment, U.S. Constitution

- “No State shall... deny to any person within its jurisdiction the equal protection of the laws.”

Romer v. Evans⁶

- In 1992, Colorado passed a constitutional amendment (via state referendum) that denied homosexual people the ability to make legal discrimination claims based on their sexual orientation.
- The US Supreme Court ruled that Colorado's constitutional amendment violated the US Constitution's Equal Protection Clause.

6. Romer v. Evans, 517 U.S. 620, 633 (1996).

Romer v. Evans⁶

- The court stated:
- “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”

6. Romer v. Evans, 517 U.S. 620, 633 (1996).

It's All About the Policy

- If you're being harassed or see it happening to someone else, you should report it immediately to the principal, a counselor, or another college official.

It's All About the Policy

- Colleges are legally required to have an anti-harassment policy, which must be clearly posted around the college, as well as a clear process for filing complaints.

It's All About the Policy

- Colleges are also responsible for preventing anyone from retaliating against an LGBT student for reporting them
- Colleges must keep complaints strictly confidential.

More Policy Notes

- If the college has a policy against harassment, students should use it.
- Under Title IX, colleges are supposed to have sexual harassment grievance procedures, although some do not.

More Policy Notes

- If students don't understand the policy, they should ask someone in the administration, like the principal, vice-principal, a counselor, sexual harassment coordinator, for example, to explain the procedures.
- At the same time, they should inform these administrative personnel about their problems.

Student Expression

- Under the First Amendment of the U.S. Constitution, student expression is protected both on campus and outside the classroom
- Some state constitutions have even stronger freedom of speech protections.

California Constitution

- “Every person may freely speak, write and publish his or her sentiments on all subjects... A law may not restrain or abridge liberty of speech or press.”

1st Amendment, U.S. Constitution

- “Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...”

Student Expression

- May protect the right to discuss LGBTQ issues and topics in college.
- A public college can't keep students from talking about being LGBTQ or from discussing LGBTQ issues.

Student Expression

- A college can also put some limits on where and when certain kinds of speech are allowed
- But generally, if other students are allowed to speak at an event or in class at college, other students should also be allowed to talk about LGBTQ issues.

Expression of Opinion

- Public colleges must allow students to express opinions, including about LGBTQ issues, on badges, buttons, armbands, bulletin boards, printed materials, petitions, and college publications.

Private Colleges

Private Colleges, Private Rules

- Private colleges have the right to sanction and prohibit certain behaviors.
- Can expel students
- Expect lawsuit

Private Colleges

- Private colleges may have more discriminating policies re: homosexuality

Beyond the Student

- In some private colleges, students who condone or tolerate homosexuality and individual gay students can be punished with dismissal.

Landmark Case

- Also in 1985, the Supreme Court refused to hear an appeal of *Gay Student Services v. Texas A&M University*
- Let stand an appellate ruling ordering the university to provide official recognition of a student organization for homosexual students.
- The case set a national precedent by removing legal restrictions against gay rights groups on college campuses.

Managing Student Organizations That Promote or Prohibit LGBT Causes

Gay-Straight Alliances

- Gay-Straight Alliances (GSAs) are student clubs that allow students with a common interest to get together and have discussions or activities about that interest.
- GSAs are made up of students of any sexual orientation

Gay-Straight Alliances

- They can be support groups, or they can be educational or political organizations dedicated to making a college a safer space for all students, or both.

Gay-Straight Alliances

- Colleges often don't know much about the law or think they can find some way to get around it.
- Blocking a GSA from forming or treating it differently from other campus clubs is against the law

The Flip Side: Campus Clubs that Exclude

- University policy should dictate whether such clubs are allowed to discriminate
- Public schools may run afoul of federal law depending on the club and the extent of discrimination

Support for GLBT Students

Best Practices

- LGBT students hide who they are and even refrain from revealing the harassment they experience, despite the laws that support them to “come out” in college and to be safe in college.

Best Practices

- LGBT employees have less legal protection from discrimination, depending on the state in which they live.
- But ALL students and employees, including LGBT students and employees, deserve to be safe and supported in college.
- The appropriate individuals in college need to know how to talk to GLBT students and employees about problems they may be encountering.

Best Practices

- Legal advisors agree that employees who are not counselors should not provide counseling.
- Legal advisors also agree that employees should not meet to talk with students alone and behind closed doors for any reason, because they may run the risk of being accused of impropriety.

Discipline & Harassment Issues

Harassment

- Harassment includes conduct that is severe or pervasive and interferes with a student's opportunity to learn.

Forms of Harassment

- Repeated and severe acts of bullying
- Sexual harassment (unwanted and unwelcomed sexual behavior)
- Frequent anti-gay epithets or comments directed at a person
- Exclusion of a LGBT student from college activities or facilities

Federal Law

- Federal law requires public colleges to remedy peer-to-peer harassment by students.
- Some state laws address anti-GLBT bullying and/or harassment.

Institutional Remedies

1. Survey staff and students about what they see and experience on campus.
2. Allow for anonymous feedback and confidential walk-in hours when people can report incidents.
3. Update bullying and harassment policies to reflect LGBT concerns.
4. Train college personnel on policies and LGBT issues.

Sample Inclusive College Harassment Policy¹¹

“...Harassment of any kind is not appropriate...whether it is sexual harassment or harassment on the basis of race, color, religion, ethnic or national origin, gender, age, disability, sexual orientation, gender identity, gender expression, veteran’s status, or any factor that is a prohibited consideration under applicable law.”

11. Emory University Equal Opportunity and Discriminatory Harassment Policy.
<http://college.emory.edu/home/assets/documents/faculty/discriminatory.pdf>

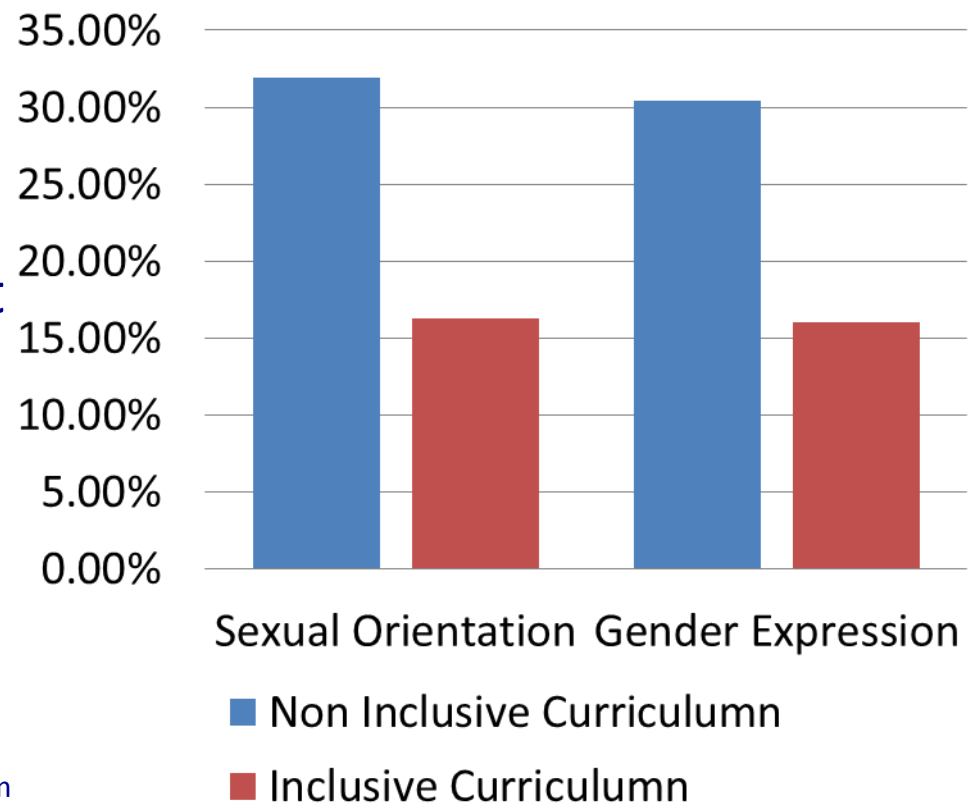
Institutional Remedies

5. Reduce tension among staff and faculty that may transmit to students.
6. Involve parents and families.
7. Address LGBT issues in the classroom.
8. Encourage GSAs, student assemblies, peer counseling.
9. Include positive representations of LGBT people in the curriculum.

Impact of Inclusive Curriculum¹²

- LGBT students whose colleges include positive representations of LGBT people, history, and events in their curricula were about half as likely to report high levels of verbal or physical harassment and assault.

Percent of Students Victimized



12. GLSEN (2011). Teaching Respect: LGBT-Inclusive Curriculum and College Climate (Research Brief). New York: GLSEN.

Impact of Inclusive Curriculum

- LGBT students whose colleges include positive representations of LGBT people, history, and events in their curricula were almost twice as likely (61.2% versus 37.3%) to report that their classmates were accepting of LGBT people.

Impact of DOMA Decisions

The ruling is expected to have a significant impact on colleges and universities across many areas.

Questions