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## Response to Peer Sexual Harassment of LGBT Youth in Schools: Advocacy, Legislation and Litigation

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quite a long-term practice they offer to the kids.

Sixth, parents need to be involved both through open community forums, as well as in private discussion, particularly if their child is involved in those incidents. One technique that I have seen used with parent groups is to run it like a classroom, and run the lessons on the kids and make parents do the activities. You have the parents do the assignments and do the kids' work. This is my list of what needs to be done in order to achieve a safe learning environment.

Let's spend some time now talking about some of the ideas that I have raised in my talk about the victory of the *Davis* case being appropriated by the "law and order" folks and about us being used or perceived as allies of the zero tolerance crowd. I believe we need to distinguish and distance ourselves from them and those purposes. In a few weeks I am going to have the chance to give a version of this talk to a lot of principals in both public and private schools, and I thought I would start by raising these ideas first with you all.

## RESPONSE TO PEER SEXUAL HARASSMENT OF LGBT YOUTH IN SCHOOLS: ADVOCACY, LEGISLATION AND LITIGATION

*Christine Hwang\**

### I. INTRODUCTION

Good afternoon. Thank you all for coming and thanks to the [Hastings] Women's Law Journal for inviting me to participate in this symposium. I know a lot of hard work went into its organization and I appreciate the attention given to this important subject.

I'm a staff attorney with the National Center for Lesbian Rights (NCLR), the only national public interest law center dedicated to achieving full civil and human rights for all lesbians. In 1993, the NCLR began its Youth Project to address the needs of children and teens who failed to conform to gender norms or gender-variant youth, the great majority of whom turn out to be LGBT<sup>15</sup> adults. Since then, our program has evolved as the needs of our constituents have changed. While, unfortunately, the need to continue advocacy in this area of psychiatric and parental abuse of gender-variant youth persists, the NCLR's Youth Project has expanded to include litigation and advocacy to ensure that schools are safe and supportive environments for LGBT and questioning youth.

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15. I use the term LGBT to mean lesbian, gay, bisexual and transgender. Although not included, the acronym also includes "questioning." I may also interchange that term with "queer youth."

Today, I will provide a national context and overview to describe the problem of peer harassment and violence affecting LGBT youth in schools and efforts made in response by lawyers and advocates, legislators, school district officials and community organizations to address the specific needs of these youth.

In the last decade, the LGBT movement has made great strides in projecting positive images of our communities in the media. We've demanded equal treatment under the law with some success and continue to apply pressure to have our voices and issues addressed in the political arena on national, state and local levels.

With the increasing visibility of the LGBT community, we have seen a cultural shift in attitudes about homosexuality. To the dismay of social conservatives, we are moving away from societal disapprobation of homosexuality towards tolerance and even acceptance of lesbians, gay men, bisexual and transgender people primarily in highly populated urban areas of this country. Given this backdrop, greater numbers of young LGBT individuals are coming out in their families and at their schools, often at their own peril.

## II. SAME-SEX HARASSMENT AND SCHOOL VIOLENCE

As we all know, in the last five years, our country has also seen an alarming upsurge of violence on school campuses that has resulted in tragic fatalities. This unfortunate trend has generated a new level of public debate on gun control, parental responsibility and the cultural development of boys. Some commentators on the subject have honed in on the fact that boys, in order to conform to societal and cultural constructions of gender norms of masculinity, may have been taught to constrain or limit their expression of emotionality to displays or outbursts of anger and violence. To do otherwise would inevitably be to relinquish the privilege of being male and to subject oneself to being called misogynistic terms like "sissy," "faggot," "effeminate" or "queer."<sup>16</sup> We witnessed this particular form of gender enforcement in a number of the schoolground shooting cases in the last six years.<sup>17</sup> In fact, it has been alleged that Barry Loukaitis of Moses Lake, Washington;<sup>18</sup> Michael Carneal of Paducah, Kentucky;<sup>19</sup> Luke

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16. See generally SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* (1999) (describing a masculinity crisis in which men are at the mercy of cultural forces that erode traditional masculinity).

17. See Gordon Witkin et al., *Another Public-School Shooting, Warning Signs Ignored Again*, U.S. NEWS & WORLD REPORT, June 1, 1998, available at <<http://www.usnews.com/usnews/issue/980601/1shoo.htm>> ("Many of the reputed [shooting] perpetrators apparently felt like outsiders. They were not star athletes or school leaders but kids who were out of the mainstream—unhappy, searching for their place, and suffering ridicule.").

18. Loukaitis was convicted of killing a teacher and two students and wounding one other student in 1996. See *Life Sentence for Loukaitis: Two Full Terms and 205 Years for Junior*

Woodham of Pearl, Mississippi;<sup>20</sup> and Eric Harris and Dylan Klebold of Littleton, Colorado<sup>21</sup> all suffered some form of homophobia and were subjected to anti-gay epithets at school like “faggot.” One was rumored to be gay in a school newspaper.<sup>22</sup> That common factor alone, in four out of the seven major schoolground shooting cases, should give educators some pause as it is truly a wake-up call that something needs to change.

It has taken a string of violent rampages by suburban white schoolboys to propel into the national discourse the question of whether our society is perpetuating and prescribing overly restrictive notions of masculinity and maleness, specifically, and gender generally. But the conflation of sexuality and compulsory gender normativity has not been lost on the lives of LGBT youth in schools whose daily reality is to suffer harassment and violence at the expense of their physical and emotional well-being and their education.

Acts of hate, violence and bias-related incidents are occurring at an increasing rate throughout the country’s public schools. Here are some statistics.

In the most recent national survey on school climate in 1999 by the Gay Lesbian and Straight Education Network (GLSEN), it was revealed that more than ninety percent of gay and lesbian youth regularly hear homophobic remarks in their schools—words such as “faggot,” “dyke” or “queer”—with nearly forty percent of the youth surveyed reporting that no one ever intervened in these circumstances. Sixty-nine percent of gay, lesbian, bisexual and transgender youth reported experiencing some form of harassment or violence at school because of their sexual orientation and gender identity.

A 1997 survey found that twenty-two percent of gay and lesbian youth skip school each month because they fear for their safety on school grounds. This is five times more than their heterosexual counterparts, who skip school due to feeling unsafe at, or en route to, school.

In 1998, a national survey found that there had been a thirty-four percent increase in anti-gay violence at public schools and colleges. Attacks against heterosexual youth perceived to be gay also increased by thirty-six percent.

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*High School Killings*, THE SPOKESMAN-REVIEW (Spokane), Oct. 11, 1997, at B1.

19. Carneal is suspected of killing three students and wounding five others at his high school. See Witkin et al., *supra* note 17.

20. Woodham allegedly killed two students and wounded seven at his high school; he left a note that read, “I am not insane. I am angry. . . . I killed because people like me are mistreated every day.” *Id.* (quoting Luke Woodham).

21. In 1999, Harris and Klebold killed thirteen people and wounded twenty-eight at their high school before committing suicide. See Associated Press, *Report: 12 Killed At Columbine In First 16 Minutes* (visited Jan. 11, 2001) <<http://www.cnn.com/2000/US/05/15/columbine.report.04/index.html>>.

22. See Jonah Blank, *The Kid No One Noticed*, U.S. NEWS & WORLD REPORT, October 12, 1998, available at <<http://www.usnews.com/usnews/issue/981012/12padu.html>>.

Lastly, a 1997 survey done by the Massachusetts State Department of Education found that forty-six percent of gay, lesbian or bisexual students attempted suicide in 1997. Compare that with 8.8 percent of other students having attempted suicide. A different study done by the Massachusetts Department of Education and the Centers for Disease Control and Prevention recently found that LGBT students are more than seven times as likely than their heterosexual classmates to be threatened with a weapon at school.<sup>23</sup>

### III. ADVOCACY: ALTERNATIVES TO LITIGATION

So we obviously have a problem—a problem that has been ongoing for years, but has only of recent years come to the fore. The media has been an important public education vehicle in its widespread coverage of successful lawsuits on behalf of queer youth. For example, one federal lawsuit in Utah involved a school district's decision to ban all non-curricular clubs rather than allow a Gay-Straight Alliance to meet.<sup>24</sup>

Though NCLR has been co-counsel in many of these cases, before I discuss litigation efforts, I want to point out that we as lawyers can be advocates to push for social justice perhaps more expeditiously outside the courtroom. We can do this by raising the consciousness of and educating affected communities in numerous public fora.

One way we can work to effect change is to help students form Gay-Straight Alliances (GSAs). These are student clubs that are formed on campus by students with the support of faculty, and sometimes with the support of outside organizations like GLSEN, Parents and Friends of Lesbians and Gays (PFLAG) and Safe Schools coalitions. GSAs are student groups that are permitted to form as long as there are other non-curricular school clubs also allowed to form, like an Asian Pacific Islander group, for support in talking about identity issues. Under the Equal Access Act,<sup>25</sup> once a public school permits any non-curricular clubs to form at, or meet at, school, it must allow students to also form a GSA and meet on campus. GSAs can provide a place for students to talk about issues like harassment, intolerance and violence, to find support among each other to reduce their feelings of isolation, and even a place where they learn how to be activists, if they'd like, to change the policy at their schools, or even to change legislation at the state or national level. This is one way we can work together with youth and other community groups to help the school understand their legal obligations, before turning the situation into a legal battleground.

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23. See Roxanne Clair, *Making School Safe for Queer Kids*, CURVE MAGAZINE, Feb. 1-4, 2001, available at <<http://www.curvemag.com/stories/alanaflores.html>>.

24. See *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City*, 81 F. Supp. 2d 1166, 1168 (D. Utah 1999).

25. See 20 U.S.C. § 4071 (2000).

Another vehicle for change is through advocacy to school boards. Boards of education have an important role, obviously. They have the power and authority to create new policies that cover sexual orientation-based harassment and harassment based on gender expression. They can expand policies specifically to reach LGBT/queer youth, or those perceived to be queer on campus. They have the power, authority and the moral obligation not only to write these policies, but also to implement them, to craft training guidelines, provide guidance and make sure that everyone—administrators, faculty, staff and equally importantly, students—knows exactly how to complain about these problems on campus.

Students and parents can educate school boards about the need to take proactive steps to ensure that LGBT youth are protected from anti-gay bias, sexual harassment and threats of violence. School boards may get the message that not only are protective policies morally mandated, boards are fiscally responsible given the potential for liability should they be served with a complaint. They have the authority to enact resolutions or craft new district-wide policies that can also ensure that they are written to include implementation measures. It is critical that everyone know the notice and complaint procedures and know that reports of harassment and/or violence will be investigated and addressed without threat of retaliation.

A third forum is the Office for Civil Rights of the U.S. Department of Education. With the threat of losing federal funds, schools have an incentive to comply with Title IX's mandate<sup>26</sup> to respond to peer sexual harassment, regardless of the victim's sexual orientation or perceived sexual orientation or gender identity.

The fourth forum for change through advocacy, other than the courts, is lobbying for legislation to protect students from anti-gay harassment and violence in school. As I mentioned before, queer youth are forming groups and going to their state legislators. California has recently garnered a victory on this front. After four years of well-coordinated lobbying efforts by queer youth activists, grassroots organizers and legislators, California recently amended the Education Code with the enactment of the California Students Safety and Violence Prevention Act of 2000.<sup>27</sup> This new law prohibits harassment and discrimination against students, consistent with California's hate crime law, in that it refers to California Penal Code section 422.6,<sup>28</sup> which says that California's hate crime law prohibits violent acts motivated by a person's race, color, religion, ancestry, national origin, disability, gender or sexual orientation. Although the Education Code itself doesn't actually use the words "sexual orientation," it makes reference to the hate crimes law, so it does cover LGBT, as well as

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26. See 20 U.S.C. §§ 1681 *et seq.* (2000).

27. Formerly A.B. 537, now CAL. EDUC. CODE § 200 (2001).

28. CAL. PEN. CODE § 422.6 (2001).

transgender students, because the definition of “gender” in the Penal Code is “the victim’s actual sex or the defendant’s perception of the victim’s sex,”<sup>29</sup> which then includes gender identity. The Education Code is therefore inclusive of transgendered and transsexual students, and protects them from discrimination and harassment on school campuses. To my knowledge, the regulations for this new law are still in the drafting stage.

California, with this new law, has joined at least three other states that have existing statewide protection for LGBT students—Connecticut,<sup>30</sup> Massachusetts<sup>31</sup> and Wisconsin.<sup>32</sup> There’s also been proactive legislation in about eight states throughout the country, where they are mandating that students should be protected by the school district. Those states are Colorado,<sup>33</sup> Delaware,<sup>34</sup> Hawaii,<sup>35</sup> Illinois,<sup>36</sup> Maine,<sup>37</sup> New York,<sup>38</sup> Vermont<sup>39</sup> and Washington.<sup>40</sup> A lot of them haven’t really moved very far in their legislatures, but at least we’re seeing a move towards it, because there’s obviously a clear crisis on these school campuses.

#### IV. ADVOCACY THROUGH LITIGATION

Now to the lawsuits. Though it can be a potentially effective tool to combat societal as well as legal barriers to equality for LGBT youth, litigation should be the last resort for advocacy and used only when other efforts have failed. If litigation is the tool for change, it should be used in concert with other political and/or legislative efforts, in a well-coordinated strategy, if possible.

I don’t know how many people have heard of the *Nabozny*<sup>41</sup> lawsuit. In 1996, the Seventh Circuit came down with a decision that was a huge victory for gay and lesbian students who face harassment and violence on school grounds. Jamie Nabozny was the plaintiff in that case, and he suffered from beatings from his classmates, having horrendous acts done to him; he was mock-raped by a group of boys in a classroom, he was urinated on, and all with the knowledge of the school officials.<sup>42</sup> The school district won at the trial level on summary judgment; the claims were

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29. CAL. PEN. CODE § 422.76 (2001).

30. See CONN. GEN. STAT. § 10-15c (2000).

31. See MASS. GEN. LAWS ch. 76, § 5 (2000).

32. See WIS. STAT. § 118.13 (1999).

33. See 2000 Colo. S.B. 105.

34. See 1999 Del. H.J.R. 6.

35. See 1999 Haw. H.B. 802 and 1999 Haw. S.B. 1187.

36. See 1999 Ill. H.B. 37.

37. See 1999 Me. S.B. 840. Shortly after this presentation, S.B. 840 was enacted into law on April 7, 2000. See ME. REV. STAT. tit. 5 § 4552 (2000).

38. See 1999 N.Y. A.B. 765.

39. See 1999 Vt. H.B. 473.

40. See 1999 Wash. H.B. 1765.

41. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

42. See *id.* at 451-52.

equal protection based on gender and sexual orientation and due process.<sup>43</sup> But on appeal, the case was reversed on those issues. In the end, the school district defendants ultimately settled for almost a million dollars.<sup>44</sup> That is a significant victory, and given the settlement figure, is something that makes school officials and administrators more likely to understand that LGBT students have a right to safety and an equal educational environment. It is their moral responsibility, and more importantly to some, it shows that failing to respond to known harassment and violence could bring exposure to lawsuits.

There have been a couple of other cases since *Nabozny* where the plaintiffs have been young gay male students who were subjected to all forms of harassment because they were perceived to be gay. Unlike most cases, the case that I'm working on involves six plaintiffs, five of whom are young women. We<sup>45</sup> filed a case—*Flores v. Morgan Hill Unified School District*—in spring of 1998, against the school district for its failure to take any meaningful remedial action against the student harassers and its failure to provide a safe and equitable educational environment for the student plaintiffs.<sup>46</sup> This is not only the first peer sexual harassment case on behalf of LGBT students involving multiple plaintiffs, but also the first involving girls, or young women, who were, or were perceived to be, lesbians or bisexuals.

This case is new also because the plaintiffs have sued under Title IX and equal protection liability theories. Many of the forms of the harassment that these plaintiffs suffered reflect the reality of the harassment faced by gay and lesbian or gender non-conforming and transgender students across the country. The verbal harassment was not just "You're a faggot, you're a dyke," but often included epithets of a sexual or sex-based nature, such as "You're a dyke bitch and I'm going to do all these horrible sexual things to you," or threatening notes on graphic and violent pornography. Conduct of a sexualized and intimidating nature falls within the ambit of Title IX's peer sexual harassment liability.

Let me just give you an overview of some of the main facts. Each of the plaintiffs was subjected to a barrage of daily anti-gay epithets, slurs, derogatory sexual comments, threats of physical violence and/or actual physical assaults because of their gender or perceived sexual orientation. The young male plaintiff was hospitalized after being beaten up at a school

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43. See *id.* at 453.

44. See Lambda Legal Defense and Education Fund, *Nabozny v. Podlesny: Victory!* (visited Jan. 11, 2001) <<http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=54>>.

45. The NCLR is counsel to the plaintiffs, along with the ACLU of Northern California; the ACLU Lesbian & Gay Rights Project; Leslie F. Levy, Esq. of Oakland; Diane Ritchie of Diane Ritchie & Associates in San Jose; and Kecker & Van Nest LLP in San Francisco.

46. See *Flores v. Morgan Hill Unified Sch. Dist.*, No. C-98 20358 JW (N.D. Cal., Apr. 21, 1998), *appeal docketed*, No. 00-15506 (9th Cir., March 3, 2000).

bus stop, with boys calling him “faggot” while beating him. Another plaintiff was struck in the head by a hard object hurled at her by a group of boys in the school parking lot, and the boys were yelling, “Fucking dyke, come over here and suck my dick.” She and her girlfriend, who is also another plaintiff, had pennies thrown at them when they would walk in the halls, suggesting that they would perform some sexual act. Another pair of plaintiffs were assaulted with food-throwing, accompanied by anti-gay epithets, inquiries into their sex lives, and on a couple of occasions, had penis-shaped balloons placed at their lunch table, with a taunt, “If you knew what that was, you wouldn’t be a lesbian.”

Now, these forms of harassment and discrimination unfortunately typify the experience of LGBT students in many schools across the country. What concerns us most is that school officials failed to respond in any meaningful manner to control it. Their non-response effectively denies these students the same educational opportunity as non-LGBT students. In the *Flores* case, the students either reported the incidents to school officials, or the officials themselves actually witnessed incidents on school grounds—during lunch, in the classroom or even at dance recitals where students in the audience yelled “faggot” during the performances. Despite this, school administrators, teachers and staff failed to take any meaningful measures to effectively deal with the harassment and abuse because of the students’ gender and/or sexual orientation.

The plaintiffs brought claims under Title IX, state and federal constitutional Equal Protection clauses for both gender- and sexual orientation-based discrimination, the state Education Code<sup>47</sup> and the Unruh Civil Rights Act.<sup>48</sup> The plaintiffs seek both monetary and equitable injunctive relief to ensure that the school district changes its policies and implements them in an effective manner. As for the status of the case at this time, we have survived two motions to dismiss and two motions for summary judgment. All six of the plaintiffs have claims for sexual orientation-based discrimination under the Equal Protection Clause and the Unruh Act. We’ve got one privacy claim that’s very interesting, that I won’t go into, and Alana Flores has the only remaining claim under Title IX. Given the defendants’ inaction and knowledge of their failure to control peer harassment, and given the egregious nature of the harassment Alana faced, we are confident that she will prevail under the standard set forth in *Davis*.<sup>49</sup> There have been rumors that the defendants may try to

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47. See CAL. EDUC. CODE § 200 (2000).

48. See CAL. CIV. CODE § 51 (2000). The Unruh Act prohibits all business establishments, including schools, from discriminating on the basis of gender. California courts have expanded the scope of the Unruh Act to include prohibitions on discrimination on the basis of sexual orientation. See *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal. 4th 670, 703 (1998); *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1155 (1991); *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 5 (1982).

49. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (finding Title

bring an interlocutory appeal on the issue of qualified immunity, and we're waiting to see what happens.<sup>50</sup>

It is going to be difficult for the school district to support its claim that it did not have knowledge of the hostile environment it perpetuated by knowing that their non-response was ineffective in curtailing the harassment and abuse faced by these six individual plaintiffs. We have six plaintiffs in this case, but these are not the only students from this district who were subjected to harm because of real or perceived sexual orientation or gender. Our plaintiffs are simply the ones that had the courage to come forward and be a part of this lawsuit, one that has affected their lives over the last two years, as litigation tends to do. Alana Flores has been an outstanding speaker on this issue and is motivated by her desire to make the public aware of the harmful effects of a school's indifference to anti-gay assaults on students at school. I am very proud to be representing this group of plaintiffs because they are fighting to raise the consciousness of and educate the public on this issue, despite the fact that they can't go back and undo the harm that they suffered. These are young people. We aren't doing our job if we don't work to ensure that these students have access to an equal educational opportunity by informing school districts of their duty to provide a safe school environment for all of its students.

## V. CONCLUSION

I want to emphasize that as lawyers and advocates, we can utilize more creative and effective tools to change the current hostile anti-gay climate against LGBT youth in schools before resorting to litigation. I've mentioned a number of possible avenues that have worked. But perhaps the most critical aspect of all of them is to keep in mind the necessity of providing support and resources to queer youth who have had firsthand experience in combating discrimination and violence due to gender variance or sexual orientation. Their voices and stories are often the most persuasive in bringing about change, and should be on the frontlines of the struggle. Thank you.

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IX liability where a school official is deliberately indifferent to known harassment that is so severe, pervasive and objectively offensive that it can be said to deprive the student victims access to educational opportunities and benefits provided by the school).

50. Defendants filed a Notice of Appeal on March 3, 2000, the day of this Symposium. Oral arguments before the Ninth Circuit were heard on October 5, 2000, and a decision is currently pending.

