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Uncloseting the abused: a historical survey of American lesbian, gay, bisexual, and transgendered middle and secondary students' struggle for protection

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UNCLOSETING THE ABUSED:
A HISTORICAL SURVEY OF AMERICAN
LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED
MIDDLE AND SECONDARY STUDENTS' STRUGGLE FOR PROTECTION

DISSERTATION

SUBMITTED TO

The School of Education and Allied Professions

THE UNIVERSITY OF DAYTON

In Partial Fulfillment of the Requirements for

The Degree

Doctor of Philosophy in Educational Leadership

Mary Lou Arons, B. S. Ed., M. A.

THE UNIVERSITY OF DAYTON

DAYTON, OHIO

2005

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By

Mary Lou Arons, Ph. D.

The University of Dayton, 2005

Dr. Thomas C. Hunt, Advisor

Abstract:

For years Lesbian, Gay, Bisexual, and Transgendered (LGBT) students have suffered verbal and physical abuse in the American school system. Until recently, this abuse has not only been acceptable but also condoned by teachers, administrators, and school boards across the country. However, as more and more LGBT students reveal their sexual orientation, more of them and their parents are insisting they be accorded equal legal protection. Thus, this dissertation has sought to answer the following questions: Are LGBT students safe in America's schools? If these students are not safe,

what types of suffering have LGBT students in America's schools encountered? If these students are not safe, what actions have they taken to protect themselves? If these students are not safe, how can they legally safeguard their security?

To answer these questions, I consulted surveys with LGBT students to assess their view of their safety and their suffering. These surveys led to recent psychological and psychiatric studies to determine the effects of the abuse they suffered. Uncovering students' actions to safeguard themselves consistently led me to consult the legal cases of students whose last recourse was a court of law. This historical approach allowed me to ascertain the allegations of abuse these students underwent and to understand the existing laws they used either to protect themselves or to receive compensation for suffering.

I learned many LGBT students are not safe in school, many suffer physical and psychological wounds, and the United States has four major laws LGBT students can use for their protection: The First Amendment, The Fourteenth Amendment, Title IX, and The Equal Access Act. These laws require certain conditions exist, and different legal districts apply them in various ways. If a case was heard by the Supreme Court, its ruling takes precedence.

I concluded that LGBT students can take several steps to assure their safety beginning with forming Gay/Straight Alliances (GSAs) and ending with suing a school district and its administrators. School officials can also learn from these cases that initiating staff and student training along with a well-written anti-harassment policy can help protect all students.

“Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation. It cannot be classified as an illness. . . . It is a great injustice to persecute homosexuality as a crime, and cruelty, too.”

Sigmund Freud, 1935

I dedicate this study to my sons Jason and Grant, one gay and one not, because institutionalized homophobia hurts youth and adults alike, no matter their sexual orientation.

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Finally, and most importantly, I give my love and thanks without end to my sons, Jason and Grant, the two most important men in my life. Without your love,

encouragement and support I would be lost. You always recognized the intrinsic value and importance of my meager attempts. You never let me down; you constantly buoyed my spirits. You provided open ears and, more importantly, open hearts always when I needed them. A mother could not ask for better sons. Thank you from the bottom of my heart.

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CHAPTER I

INTRODUCTION

The year 1993; the subject, an 18-year-old male. He is beginning a new phase of his life: college. Like most college freshmen, he is excited, anxious, and apprehensive. He is quite shy, but friendly, witty, and intelligent. He does not drink, smoke, or take drugs, and he is a virgin. He and three other young men share their dormitory living space. He tries to fit in with them, but the conversations are almost always about what they did when they were falling down drunk or having sex with girls or both. The young man has no frame of reference. He is definitely different, the odd man out. Within a few weeks, the young man finds himself alone, isolated, while the other roommates have bonded. Within 2 months the young man becomes aware that something strange is happening. He learns that his roommates keep a chart of when he showers and how long he takes. He finds a note indicating that they listen at the door of his room when he is on the phone; he finds evidence that they have gone through his belongings when he is at class. Finally, one night he returns to his room and climbs into his bed to find it soaking wet, compliments of his roommates. At Winter Break he informs his mother that he wants to drop out of college.

What had this young man done to deserve such treatment? Nothing, except his roommates suspected he might be homosexual¹. Experiencing this type of treatment is not unusual for young homosexuals and those youth stereotyped as such. This treatment is, of course, mild in comparison to what happened to Matthew Shepherd, but it is still detrimental to the individual's self image (Savin-Williams, 1990). Worse yet, this situation is one that repeats itself often across the campuses of American higher education. According to Herek (1989) the "verbal and physical violence" lesbian, gay, bisexual, and transgendered (LGBT) youth suffer on America's campuses is on the rise (p. 954). This rise in violence might lead one to question how recent high school graduates and college students, all of whom society seems to regard as relatively intelligent, could treat another human being with such disrespect and with such total disregard for her/his feelings and mental and physical well being. A partial answer may be found in the manner in which American middle and secondary schools provide or fail to provide a safe, healthy, positive environment for LGBT students².

As American education crawls into the 21st century trying to find strong legs on which to stand, it is confronted with many problems and few solutions. Due to the recent spate of school shootings, educators and legislators have placed school safety at the top of the list of problems to solve: protecting students from harm during the school day. Although many people immediately think of safety in terms of protecting students from physical harm originating either inside or outside the school, the most important area of

¹ Throughout this paper, the term *homosexual* will encompass the following designations: lesbian, gay, bisexual, and transgender.

² Throughout this paper, the phrase *LGBT student(s)* will also encompass those students perceived to be LGBT but who may or may not be.

school safety is within the school, and it includes not only a student's physical safety but also a student's emotional and psychological safety. These three areas involve student-to-student violence, student-to-teacher violence, and teacher-to-student violence.

One group of students at serious risk from student-to-student and teacher-to-student violence is LGBT students. Although the specific percentage of LGBT youth in America's schools is unclear due to the "invisibility" of these students, Hillier and Rosenthal (2001) claim recent research indicates that approximately 11% of U. S. youth may be LGBT (p. 1). Consequently, in a high school population of 1,000 students, as many as 110 may be LGBT. In some of these schools these youth suffer unwarranted violence. For instance, Rivers (2000) conducted a study in which he found that teachers sometimes gave their support for detrimental attitudes toward LGBT students not only through inaction, but also by "participating in acts of physical, verbal and emotional aggression towards" LGBT students (p. 14). Thus, Little (2001) believes that before teachers step in front of their students, they need to take several steps on their own if they are going to bring an end to this violent environment. First, teachers need to examine their own attitudes toward LGBT students to discover their own prejudices; second, teachers need to learn about the diversity of the LGBT culture; third, teachers need to be the ones who instigate the change in the classroom. Only in this manner does education have a hope of stopping the detrimental environment in schools. To further emphasize the importance of the teacher, Morrison and L'Heureux (2001) claim that a failure to include information about LGBT people in the curriculum may exacerbate the suicide risk for LGBT students. This information lays the preliminary foundation for the belief that

LGBT students are not safe physically, emotionally, or psychologically in America's middle and secondary schools.

This study presents psychological studies from 1972 through 2003 indicating the effect of being LGBT on students' emotional, mental, and physical make up. This part of the study takes into account not just the fact of being LGBT in a heterosexual world, but also the effect of other students' responses to LGBT students. It will then present a detailed recounting of the struggles of these students for equal protection and equal rights beginning with the first documented court case detailing student struggle in 1980. This study will conclude with recommendations for further action on the part of students, educational organizations, school systems, and government.

Although I will not begin as far back as the Stonewall Riot, I feel the necessity of mentioning it because of its importance. The Stonewall Riot of June 28, 1969, is important because many LGBT persons consider this event to be the symbolic beginning of their struggle for equal rights ("The Stonewall Police Riot," 2001, para. 5). Although the incident began as a police raid on a local Greenwich Village pub, The Stonewall Inn, because it had no liquor license and was serving alcohol, the raid soon turned violent. Eventually, the patrons of the gay bar and their friends refused to put up with the police brutality and fought back, destroying forever the belief that "homosexuals would . . . accept prejudice and discrimination without resistance" (The Stonewall Police Riot, 2001, para. 5). Out of this situation and the press coverage it received, many of the LGBT population gained the strength to become more vocal in American society opening wide

the closet door and stepping boldly forth. As a result, the struggle for equal rights filtered down to adolescent LGBT students.

This study focuses on middle and secondary schools for three reasons. One, middle and secondary schools are of particular importance to these youth because during this time youth become aware of their sexuality (Burton, 1995, p. 20). Two, most of my own experience as a teacher has been at the secondary level. Furthermore, several recent studies indicate a relationship between LGBT youth in middle and secondary schools and the serious emotional, mental, and physical problems these youth suffer. Carlson (1997) claims that public schools continue to make LGBT people “absent, invisible, and silent” within their communities (p. 99), and “most” schools are often unsafe places for LGBT youth or those perceived as such (Batelaan, 2000, p. 158). Carlson goes on to assert that when schools do represent LGBT youth, the youth are depicted “as the deviant and pathological Other” (p. 99). These sorts of representations are violent assaults upon the emotional and psychological well-being of the LGBT school population.

Underlying Assumptions

My underlying assumptions are a result of my 20 years as a secondary school English teacher, my 7 years as a part-time college instructor, my 30 years as the mother of a homosexual young man, my relationship with friends who are gay and lesbian, my years as a co-worker with several LGBT peers, and my experience as a researcher.

First of all, I believe that all students in America’s middle and secondary schools are entitled to physical, emotional, and psychological safety while in school. After all, they spend a considerable portion of their waking hours for 9 months in a classroom

setting. LGBT youth have every right to expect that their emotional, psychological, and physical safety will be safeguarded while they are in school (Anderson, 1997; Burton, 1995; Chang & Kleiner, 2001; Hillier & Rosenthal, 2001). Second, the responsibility for this safety rests with individual classroom teachers, administrators, superintendents, and school boards. However, this safety is a general safety only; superintendents and administrators are only required to provide students a safe setting in which to be schooled; public school administrators do not have to guarantee that safety to any specific individual student or group of students. In fact, according to 7th Circuit Court Judge Eschbach (*Nabozny v. Podlesny*, 1996), students can be compelled to go to a school even when the administrators clearly “know that the student will be placed at risk of bodily harm” because these administrators “have no affirmative substantive due process duty to protect students” (p. 459). Thus, LGBT students and those stereotyped as such are denied any specific safety in the schools they attend.

Another problem is the belief by some administrators that being LGBT is a choice. The medical and psychological communities still cannot explain what determines a person’s sexual orientation. Some researchers believe in immutability, the biological determinist view, which states that one’s sexuality is a matter of biology (Hegarty, 2002). Thus, individuals cannot choose their sexual orientation. Others believe that sexuality is a matter of choice. Despite differences of opinion in the psychological community, my underlying assumption is that one’s sexual orientation is not a matter of choice but a biological reality. For instance, Savin-Williams (1990) claims that LGBT youth “have no choice” in their sexual orientation (Accumulating Pain section, para. 1). More recently,

Chernin and Holden (1995) assert that research by 1995 “strongly” suggests that homosexuality is biological (p. 90). And, 7th Circuit Court Judge Eschbach believes that because of the high level of discrimination LGBT youth face, it is “dubious to suggest that someone would choose to be homosexual” unless she or he had some intrinsic “genetic predisposition” to be so (*Nabozny*, p. 459). According to a study at the University of Texas conducted by McFadden and Neff, the brains of homosexuals respond differently to auditory stimuli than the brains of heterosexuals, suggesting that homosexuality is biologically determined (“Auditory Brains Different,” 2000, para. 1-8). Furthermore, Hegarty (2002) lists several biological studies claiming to have discovered proof of a genetic basis for sexual orientation in “genes, . . . brains, . . . genitals, . . . ears, . . . and fingers” (p. 154). Chang and Kleiner (2001) also agree that one’s sexuality is genetically based (p. 109). Finally, a study released in May 2005 provides further evidence for the biological belief. According to Witelson, an expert on brain anatomy and sexual orientation at the Michael G. DeGroote School of Medicine at McMaster University in Ontario, Canada, the results of the brain study by the Karolinska Institute in Stockholm, Sweden, “clearly show a biological involvement in sexual orientation” (as cited in Schmid, 2005, para. 1-3).

In the early part of this century, The American Psychiatric Association and the American Psychoanalytic Association both considered homosexuality an illness, but in 1973 the American Psychiatric Association declared that homosexuality was not a sociopathic personality disorder and removed it from their *Diagnostic and Statistical Manual of Psychiatric Disorders* (DSM; Bergmann, 2002; Bynum, 2002). In short order,

the American Medical Association, the American Psychological Association, the American Nurses' Association, the National Education Association, and the American Federation of Teachers followed suit (Anderson, 1994). Most of the American educational system did not and has not, nor have the Federal and state governments or school boards.

I also assume that the American educational system operates under its own assumptions, one of which is that all students are heterosexual. Nichols (1999) asserts that for the most part American school administrators, counselors, and teachers operate under the assumption that all their students share the same sexual orientation: heterosexual. Not only do teachers often fail to point out positive role models for LGBT students, but many of the rules and regulations within a school suggest a homogeneity among the students by trying to create and maintain an atmosphere viewed by the public as "normal"; consequently, the "schools communicate homophobic messages" (Nichols, p. 510). McFarland (2001), a professor in Counselor Education and College Student Personnel at Western Illinois University, found that high school counselors in training often claim that no LGBT students are enrolled in their schools. McFarland believes that public schools are among the many institutions in American society that are not only homophobic, but also heterosexist. Furthermore, some classes are taught in such a manner as to ignore homosexuality except to comment negatively about it. Carlson (1997) asserts that within the public school system the presentation of LGBT students is as "the deviant and pathological Other" (p. 99). Middle and secondary schools providing this representation allow LGBT students to be objects of verbal, physical, and

psychological abuse; many public schools in America consider this abuse acceptable because LGBT students are an invisible minority. Perhaps some administrators believe that if they see no one being harmed, no one is. As Edwards (1997) claims, LGBT people have to identify themselves; "gay and lesbian infants are not born with tiny inverted pink triangles on their foreheads" (p. 68). The invisibility of LGBT students is further asserted by Anderson (1997) who refers to them as "a hidden minority" (p. 65). Robinson (1994) claims that LGBT youth are "an isolated silent population" (para. 3). Thus, no one can tell by looking if a person is LGBT, so no one knows for sure who is being affected by these negative words and actions unless the actions are physical and the words are directed at a specific individual. Consequently, due to the erroneous assumption that people who do not identify themselves as gay are heterosexual, students and even teachers feel free to make derogatory comments and off color-jokes, automatically assuming no one is insulted, and in some cases making the subconscious assumption that the hearers somehow agree with the speaker. In my own experience, I have witnessed teachers ignore sexual slurs and negative comments about LGBT people. As the mother of a homosexual young man, I have seen first hand the effects of American education on LGBT youth. As a co-worker with LGBT professionals who need to hide their true selves, I have witnessed the detrimental effects of this negative attitude.

I also believe that boards of education, superintendents, principals, and teachers are not clearly aware of the legal and ethical responsibilities they have to protect the LGBT students in their daily care, or they would, I like to believe, make some provision for protecting these students. Thurlow (2001) claims that very few high schools have any

policy for dealing with violent, physical homophobic behavior; he places the number as low as 6% (p. 25). Some of these educators do not care, and others would if they possessed an awareness of the situation. Nichols (1999) believes that the teachers of LGBT youth are sometimes not aware that they are contributing to the negative message these students receive while at school. Furthermore, these same educators are usually not aware of the need to train themselves nor are administrators aware of the need to train their teaching staffs. Nichols concludes that in order to help solve these problems, schools should provide not only a safe room or place for LGBT students, but also provide training for the faculty and staff, and special training for a teacher who would be in charge of a safe room. Unfortunately, few school districts provide training for their staffs. In fact, Kirby (2000, para. 8) asserts that teacher training programs that offer information about LGBT students are rare; the result is that educators who wish to be supportive are on their own and struggling in the dark to offer the proper support.

Another assumption is that because homosexual students are treated as non-existent, they are at much greater risk than the average adolescent in high school for suicide, poor work, dropping out, running away, and so forth. Morrison and L'Heureux (2001) claim that a failure on the part of schools to include LGBT information in classes is one possible cause for the increased risk of suicide among LGBT youth. Uribe and Harbeck's (1991) research concludes that school-based homophobia contributes to LGBT youth's lack of self-esteem and increases the possibility of "self-destructive behavior" (p. 25). The result of low self-esteem is often truancy from school, a problem Rivers (2000) believes is a serious one among LGBT youth. The homophobic atmosphere

of schools causes self-destructive behavior in LGBT youth, and a U. S. Department of Health and Human Services study found that LGBT youth are “two to three times more likely to attempt suicide than heterosexual youth” (as cited in Mathison, 1998, p. 151). Thurlow (2001) adds that “93 per cent of [LGBT youth] who are ‘out’ at school suffer verbal abuse” (p. 25). He also believes that “the stigmatizing effects of homophobia on self-esteem are inescapable” whether young people are “out, coming out, or slowly and privately awakening to their homosexuality”; this situation presents a threat to the LGBT youth which is one of “profound social and psychological alienation, rendering the ‘invisibility’ two-fold, as these young people cease also to exist even within, and for, themselves” (Thurlow, p. 26).

Importance of this Study

This study could have ramifications in several areas. First is critical theory. Critical theorists claim that social structures, because they are humans’ creations, have “no independent objective existence”; however, the structures “maintain and inculcate historical and political power from which people seek to free themselves” (Peca, 2000, p. 30). American society and American schools are such structures. These structures are one cause, the critical theorist claims, for humans’ feeling of alienation because humans, according to Geuss, allow these institutions to become ““coercive”” because we continue to take part in those structures and accept them ““without protest”” (as cited in Peca, 2000, p. 30). Few groups are as isolated in American society and schools as LGBT youth. As LGBT students learn their rights and refuse to accept these structures, the structure or organization will change. As Americans change, the structure changes and vice versa.

Because some teachers do not realize that they are prejudiced toward LGBT youth and that as teachers their actions indicate this prejudice, teachers unknowingly pass on their prejudice to students and reinforce the coercive societal ideology that being prejudiced against LGBT youth is acceptable and right. However, knowledge of lawful protection for LGBT students and training that may come with the enforcing of the law and policies can begin to change these dynamics.

Another area of importance is the school. This study can help school boards, superintendents, administrators, and teachers become aware of their responsibilities to all students, not just some students. This knowledge may help educators decide to alter their priorities to insure the safety of the LGBT students entrusted to them. As this change occurs, students and parents could become more tolerant of differences among the student body and people in general. Uribe and Harbeck's (1991) study and development of Project 10 indicated that educational efforts can change attitudes toward LGBT youth (p. 25).

The study relates not only to education but also to society as a whole. One might view the social structure of a middle or secondary school as a microcosm of American society. Thus, LGBT students are treated in schools in much the same way that LGBT adults are treated in society. Although schools are usually on the receiving end of social change, as an educator I believe that education has the ability to institute social change; people practice what they learn. Just as segregation in America's schools helped maintain the social division of the races, so too does desegregation help hasten the decline of racial injustice on a broad scale. As educational institutions change the attitudes of their

students, a similar shift in societal attitudes could begin. According to Burbules and Rice (1991) schools can help speed the process of forming a multicultural community by providing a dialogue in which people can voice their differences and thus allow those who have been silenced and invisible to become articulate and open. Further, Judge Bunning, United States District Judge, asserts that even though children primarily learn attitudes from their parents, schools “play a vital role in fostering tolerance” (*Boyd County*, 2003, p. 692). Consequently, a change in the school atmosphere could hasten a change in society as questions of LGBT rights such as same sex marriages and equal rights in the workplace and the schoolroom continue to forge a new dynamic.

Finally, this study is important because it adds to the knowledge base of LGBT students’ rights for themselves, their parents, and their school administrators. The study is also raising awareness of the suffering of LGBT students, is raising awareness of the laws and policies that are already in place to help these students, is raising awareness of the options available to the students, is raising awareness of the individual educator’s responsibility under the law, and is raising the consciousness of the classroom teacher. America’s future educational leaders can use this knowledge to make a positive difference in America’s classrooms not only for LGBT youth but also for all youth.

Definitions

Throughout this study readers may encounter several terms they are not familiar with or terms that require a more specific understanding than the one generally accepted.

Alternative School: A public elementary/secondary school that addresses the needs of students which typically cannot be met in a regular school, provides

nontraditional education, serves as an adjunct to a regular school, and falls outside of the categories of regular, special education, or vocational education (National Center for Education Statistics, <http://nces.ed.gov/ccd/>).

Coming out: the process of “identifying and respecting one’s homosexuality and disclosing this positive identity to others” (Black & Underwood, 1998, Coming Out, para. 1).

Declaratory relief: a judge’s decision concerning the rights of the party in connection with a contract or statute. The belief is that an early “resolution of legal rights” will “resolve some or all of the other issues in the matter” (LAW.COM Dictionary).

Evidentiary hearing: a hearing is “any proceeding before a judge or other magistrate (such as a hearing officer or court commissioner) without a jury in which evidence and/or argument is presented to determine some issue of fact or both issues of fact and law. While technically a trial with a judge sitting without a jury fits the definition, a hearing usually refers to brief sessions involving a specific question at some time prior to the trial itself, or such specialized proceedings as administrative hearings (LAW.COM Dictionary). *Evidentiary* means based on evidence.

Gender expression: “external characteristics and behaviors that are socially defined as masculine or feminine” (Kosciw, 2002, p. 2).

Gender Identity: refers to a person’s internal sense of being either male or female or something other than exclusively male or female (Kosciw, 2002, p. 2).

GLSEN: Gay, Lesbian, Straight Education Network. It “strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity” (<http://www.glsen.com>).

GSA: Gay–Straight Alliance

Heterosexism: “the belief that heterosexuality is the best and only acceptable way of living” (McFarland, 2001, p. 172).

Homophobic: “any adaptation and extension of terms referring to homosexuals that can be interpreted as derogatory in the sense that the quality, action, attribute, or individual to which the term refers is being devalued” (Thurlow, 2001, p. 28).

Injunctive relief: the judge orders or prohibits a “requested” act in a “petition to the court for an injunction.” The judge’s decision is not one for money, but an exercise of court authority to deal with a problem (LAW.COM Dictionary).

Lambda Legal: a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.
(<http://www.lambdalegal.org>).

LGBTQ: Lesbian, Gay, Bisexual, Transgender, or Questioning youth

Minority group: “any group that suffers from unjustified negative action by the dominant group” (Hetrick & Martin, 1987, p. 26).

Overt Homophobia: anything from verbal to physical abuse directed toward LGBT youth (Black & Underwood, 1998).

Regular School: A public elementary/secondary school that does not focus primarily on vocational, special, or alternative education (National Center for Education Statistics, <http://nces.ed.gov/ccd/>).

Sexual harassment: the legal definition comes from the U. S. Equal Employment Opportunity Commission (USEEOC) and is defined as follows: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome (USEEOC, 2005).

Counselors and psychologists take their definition of sexual harassment from the above (Callahan, 2001).

Sexual orientation: “whom one is attracted to sexually, emotionally, and spiritually” (Macgillivray, 2004, p. 10).

Socialization: “sets of behavior demanded for the multiple social roles that each individual performs . . . , learned and enforced through a complex learning and policing process” (Hetrick & Martin, 1987, p. 29).

Special Education School: Public elementary/secondary school that focuses primarily on education of one or more of the following types of students: hard of hearing, deaf, speech-impaired, health-impaired, orthopaedically impaired, mentally retarded, seriously emotionally disturbed, multi-handicapped, visually handicapped, or deaf and blind, and adapts curriculum, materials or instructions for students served (National Center for Education Statistics, <http://nces.ed.gov/ccd/>).

Summary judgment: “a court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. A summary judgment is based upon a motion by one of the parties that contends that all necessary factual issues are settled or so one-sided they need not be tried” (LAW.COM Dictionary).

U. S. C.: United States Code

Tort claims act: “a federal or state act which, under certain conditions, waives governmental immunity and allows lawsuits by people who claim they have been

harmed by torts (wrongful acts), including negligence, by government agencies or their employees” (LAW.COM Dictionary).

Violence: “rough or injurious physical force, action, or treatment; . . . an unjust or unwarranted exertion of force or power, as against rights or laws; . . . desecration; profanation . . .; sexual molestation; [and] a distortion of meaning or fact” according to *Webster’s New Universal Unabridged Dictionary* (p. 2124).

Vocational School: Public elementary/secondary school that focuses primarily on vocational education, and provides education in one or more semi-skilled technical operations (National Center for Education Statistics, <http://nces.ed.gov/ccd/>).

Summary

School violence and its prevention are serious issues facing America's educators; insuring the safety of students is imperative. At more risk than the average student are the LGBT students who risk their physical, emotional, and psychological safety on a daily basis at schools across the nation whose personnel may be unaware of or unwilling to enforce the laws and policies that protect these pupils. Beginning with the Stonewall Riot of 1969, LGBT persons have begun to open the door to the closet. They are doing more than peeking out; today's youth are "coming out" earlier than ever before. Jones (1999) claims that the average age for "coming out" was 20 in 1979; however, R. C. Savin-Williams (personal communication, June 3, 2005) says that by 1998, LGBT youth were "coming-out" "as early as 13." These studies suggest, then, that students in America's middle and secondary schools are coming out in larger numbers than ever before in the history of the United States. These young people expect to be protected and nurtured in their schools. Therefore, looking at the psychological aspects of LGBT students' lives and examining the results of LGBT cases in this country are worthwhile and productive endeavors.

CHAPTER II

RESEARCH QUESTIONS AND METHODOLOGY

This is a historical study to determine the current level of safety for LGBT students in America's middle and secondary schools. The following questions guided my research: Are LGBT students safe in America's schools? If these students are not safe, what types of suffering have LGBT students in America's schools encountered? If these students are not safe, what actions have they taken to protect themselves? If these students are not safe, how can they legally safeguard their security?

According to Barzun and Graff (1992) "it is from professional historical study that writers at large have learned to sift evidence, balance testimony, and demand verification" (p. 5). Furthermore, they believe that only by looking at what has happened in the past can one understand and become aware of present situations (p. 5). This dissertation attempts to chart the history of LGBT students and their struggle for safety in America's middle and secondary schools from 1996 through 2004. Consequently, a historical investigation is a justifiable and valid method of investigating and presenting this information. In order to answer these questions, I will "sift evidence" from several areas: scholarly journals, government documents, court transcripts, magazines, and some newspapers.

One area of study is the psychological to determine the necessity of providing safe schools for LGBT students, not only physically but also mentally and emotionally.

Thus, such scholarly journals as *The Journal of Homosexuality*, *Journal of Adolescence*, and *Health Education* form the basis of this section.

Another area of research involves determining the struggles LGBT students have faced over the years. The most reliable record of these struggles is available through legal transcripts. In conjunction with determining the struggles, I will also simultaneously discover which laws provide for the physical safety of all students and LGBT students by extension. Consequently, published and unpublished court cases and legal briefs form the foundation of this section of the study. This method of study will allow for “balance[d] testimony,” as all participants will clearly have their say, some within a court of law and others in briefs.

I have attempted to make an exhaustive study of all court cases concerning LGBT students and their struggles. In this attempt I not only consulted journals, court transcripts, magazines, and newspapers, but I also contacted several organizations (NCLR, GLSEN, LAMBDA LEGAL, and the APA), via e-mail and the telephone, in an attempt to be as inclusive as possible. However, because not all cases went to court or were even covered by the media, I cannot guarantee that this study is an exhaustive one. I believe, though, that the following study is as complete as possible given the available resources.

Taken together, these various methods of gathering information provide “verification” of the state of safety for LGBT middle and secondary school students in America and their available options if deprived of that safety.

Voices of LGBT Youth

Members of the Hetrick–Martin Institute’s

Harvey Milk School, Youth Initiatives Program

“Since infancy, homophobic rhetoric gets drilled in your head. . . . Society has conditioned us to feel so inferior that we actually start to believe it. We’re always comparing ourselves to so-called ‘normal’ people and left feeling completely inadequate.” Jeremy, bisexual

“When I was 14, my family kicked me out of my house for being gay. I was homeless and just trying to survive and stay in school. I was forced to leave two different schools because they found out I was gay.” Charlie, homosexual

“Gay rights mean not being discriminated against and not being put into an uncomfortable or dangerous situation because you’re gay.” Arturo, homosexual

“Sadly, many gay youth get beaten and terrorized in school for just being who they are. . . . They don’t get the protection they deserve from adults in their schools and are afraid to go to their parents due to shame and fear. . . . I know of friends who have come out to their parents and have been tossed into the streets, sometimes forced into prostitution just to survive.” Jeremy, bisexual

CHAPTER III

PSYCHOLOGY AND THE IMPORTANCE OF PROTECTING LGBT STUDENTS

A Brief History of Homosexuality

Basic to an understanding and acceptance of this study is knowledge of the background of homosexuality. Homosexuality, historically, has been viewed in both a positive and negative light. For instance, in ancient Greece, males regularly practiced what today's society terms homosexuality "as part of the normal life cycle," and young men were often the partners of older men before they married and began a family. The cycle of an older man having a sexual relationship with a young man continued for many centuries (Bynum, 2002, p. 2284). Many Native American tribes considered homosexuals to be sent specially by God or the gods for the good of the tribe. In fact, many were considered holy men and some seers; these tribes called homosexuals "Two Spirit" and viewed them with respect (Quittner, 2001, para. 5). In contrast, many Church clergy considered homosexuality a "sin, crime or moral failing of the worst sort" (Bynum, p. 2284). In 21st century United States, the dichotomy of opinions continues. However, the citizens of Massachusetts are some of the most accepting in the country and display this fact to the country through their innovative educational programs for LGBT students and the state's recent law allowing gay marriage. In contrast to this view, the United States has a president who has been seeking, since 2004, to pass a constitutional amendment

that would limit individual rights by banning gay marriage throughout the country.

President Bush's first attempt was "soundly rejected" by the senate in 2004 by a vote that fell 49 votes short of the 67 needed (Bluey, 2005, p. 5). Despite this loss, the president resubmitted the amendment in 2005, and some conservatives feel that as many as 60 of the necessary 67 senators are ready to vote in favor of the amendment (Bluey, p. 5).

Within the country the battle rages on; people on both sides of the issue press the public to accept their view. Many citizens consider homosexuality to be simply a sexual activity and have no conception that a homosexual culture exists or that many homosexuals over the centuries were great contributors to civilization.

Despite the heterosexist attitude within the United States of America, the fact is that many important and famous people were and are homosexual: Aristotle, Socrates, Plato, Leonardo da Vinci, Michelangelo, Herman Melville, Tennessee Williams, Willa Cather, Walt Whitman, Gertrude Stein, James Baldwin, Adrienne Rich, Langston Hughes, Yosana Akiko, Rita Mae Brown, Tchaikovsky, Bessie Smith, Sir Elton John, Leonard Bernstein, Oscar Hammerstein, and Cole Porter to name a very few (Bynum, 2002; Freud, 1935; Mathison, 1998; Rofes, 1989). Although society in the infancy of the 21st century is more aware of LGBT people than previously, the reason is not that more LGBT people exist (the percentage of people in any given society at any given time who are homosexual remains relatively constant, somewhere between 3% and 15%, depending on the source (Anderson, 1994; Batelaan, 2000; Deisher, 1989; Frean, 2004; McNicoll, 2001; Meder, 2005), but that more and more LGBT persons are refusing to stay closeted, second-class citizens denied their rights as human beings; they refuse to remain silent out

of fear. Since 1972 this relatively new strength has found a strong voice in the LGBT youth of America who are coming out more often and in larger numbers than ever before (Jones, 1999; Marinoble, 1998; Martin & Hetrick, 1988; McFarland, 2001).

But the question is, what is the result of LGBT youth revealing themselves to their peers, their parents, and their schools? This question is a difficult but important one to answer because the result, especially in public schools in the United States, is often negative, and the consequence is that many of the LGBT youth in this nation suffer untoward aggression simply because of who they are. In order to understand the need for protecting LGBT students in America's middle and secondary schools, one must first become aware of the problem, the psychological history of homosexuality, and the psychological studies that indicate the impact of prejudice on these students.

LGBT Students and Their Treatment in the School Setting

Obtaining valid quantitative or qualitative information about the LGBT students in America's schools and their experiences is a difficult task at best. The problem is exacerbated by the fact that most LGBT students do not self-identify for a variety of reasons (Little, 2001, pp. 100–101). Another problem is that undertaking a nationwide study is usually beyond the scope and budget of most research projects. However, one group in the country has undertaken this project: Gay, Lesbian, Straight Education Network (GLSEN). In 1999 GLSEN performed its first nationwide survey of LGBT students in America's schools to discover how these students were faring. GLSEN surveys America's LGBT students every 2 years, and now has data for 1999, 2001, and 2003. Each year the study is more sophisticated and more in depth.

In 1999 GLSEN surveyed 496 LGBT youth, ranging in age from under 16 to 19, from 32 states (p. 3). Many of these students did not feel safe in their schools because of their sexual orientation: 41.7%. The reasons were varied, from hearing homophobic remarks to being verbally and physically harassed and assaulted. The results indicated that 91.4% "sometimes or frequently" heard homophobic remarks in their schools; 36.6% of these youth heard faculty or staff make homophobic remarks. A full 69% of the youth experienced some form of verbal and/or sexual harassment or violence in school. Of those LGBT youth who were verbally harassed, 45% claimed they experienced it daily (GLSEN, 1999, p. 2).

In 2001, GLSEN's survey grew to include 904 LGBT youth, in Grades 6 through 12, from 48 states and the District of Columbia. The majority of youth taking part in this survey attended a traditional public high school in a suburban community (Kosciw, 2002, pp. 4–5). This survey indicated that 68.6% of LGBT youth did not feel safe in their schools because of their sexual orientation, a significant increase over the 1999 survey, and 45.7% felt unsafe due to their gender expression (p. 12). Once again an overwhelming 84.6% of students reported hearing homophobic comments either often or frequently (p. 6). Of these youth, 23.6% heard derogatory comments from faculty and staff with the same frequency. Although these percentages are somewhat lower than indicated in the 1999 survey, they remain high, particularly when compared to the frequency of racist remarks: only 37% heard those often or frequently, and racist comments from teachers were heard often or frequently by only 3.8% of respondents. Furthermore, the 2001 survey also asked about sexist remarks, which 81.7% of the

respondents said they heard often or frequently (Kosciw, 2002, pp. 6–10). Worth noting is that lesbians and LGBT students of color often suffer additionally from negative comments because of racist and sexist remarks.

A comparison of the 1999 survey with the 2001 survey shows that LGBT youth report an increase in faculty intervention when faculty were present during homophobic remarks, a positive finding. In 1999 only 39.6% of the youth surveyed reported intervention by faculty, but in 2001, that figure rose to 53.9%, a significant increase (Kosciw, 2002, p. 29). In contrast, verbal and physical harassment in response to sexual orientation and gender expression increased: verbal harassment by 27.1%, physical harassment by 17.8%, physical assaults by 8.3%, and sexual harassment by 18.9% (Kosciw, 2002, p. 28). This increase in verbal and physical harassment, as will be seen, is very troubling for LGBT youth.

The most recent GLSEN survey, 2003, was completed by 887 LGBT youth in 48 states and the District of Columbia (Kosciw, 2004 p. ix). Once again the survey involved LGBT students in Grades 6–12 in America's public schools with the majority attending a traditional high school in the suburbs (Kosciw, 2004, p. 4). The only significant decrease between the 2001 and 2003 surveys is the fact that the percentage of LGBT youth who felt unsafe in their schools because of their sexual orientation dropped from 68.6% to 64.3% (Kosciw, 2004, p. 12). Despite the drop, the percentage of LGBT students feeling fearful because of their sexual orientation is still quite high. (Interestingly enough, LGBT youth in the 1999 survey reported less fear than those taking part in the 2001 and 2003 surveys. Any number of reasons may exist for this difference, but it may be due to the

fact that currently more and more youth are coming out at school.) Also of importance is the incidence of homophobic remarks. In the 2003 survey 88.1% of the respondents said they heard homophobic comments frequently or often. This percentage has decreased slightly from 91.4% in 1999 but increased from 84.6% in 2001. However, one aspect of the study indicates that the number of faculty and staff making homophobic comments has dropped. The percentage of LGBT students hearing negative comments from faculty and staff often or frequently dropped to 2.5% and those hearing comments from this group rarely or never rose to 81.2%. However, when a faculty or staff member was present during homophobic remarks, only 17.1% of respondents report that the adult intervened most of the time or always, and 37.4% say faculty or staff never intervened (Kosciw, 2004, p. 6).

Interesting to note is that the number one homophobic comment heard by LGBT youth across the nation in their schools is "That's so gay" or "You're so gay." Only 1.7% of respondents claim never to have heard these statements in their schools (Kosciw, 2004, p. 5). These statements seem to be the ones non-LGBT students and faculty consider harmless (Kosciw, 2004, p. 5). However, students use the term *gay* in these phrases to mean something bad or negative. For instance, if one student wears a shirt someone else does not like, the likely comment is "that's [the shirt] so gay." The meaning and intent are clear; the comment is homophobic.

Not only did these LGBT youth hear homophobic comments, but they also experienced verbal and physical harassment. Forty percent of the respondents claimed that they were verbally harassed frequently or often in school due to their sexual

orientation; 10.5% were physically harassed for the same reason. A lower percentage suffered physical assault frequently or often: 3.8% (Kosciw, 2004, pp. 14-16). Fear for one's safety has negative ramifications as 30.6% of LGBT youth missed one class in the previous month because of their fear, and 28.6% missed an entire day of school for the same reason (Kosciw, 2004, p. 13).

This information by itself is interesting, but what does it mean for the well-being of the LGBT student in America's middle and secondary schools? To better understand the ramifications of the negative atmosphere in a large number of America's middle and secondary schools one needs a basic grasp of the psychological background of homosexuality and a clear look at psychiatric and psychological studies concerning LGBT youth.

Psychological History

The word *homosexual* is not particularly old; in fact, according to the *OED*, the terms *homosexual* and *homosexuality* first appeared in 1892 in a work by Richard von Krafft-Ebing entitled *Psychopathia Sexualis*, translated by C. G. Chaddock (Burchfield, 1987, p. 136). Krafft-Ebing (1892/1893) defined the terms "homo-sexual" and "homo-sexuality" as "great diminution or complete absence of sexual feeling for the opposite sex, with substitution of sexual feeling and instinct for the same sex" (p. 185). This reference appears to be the first time someone in the field of psychology actually labeled homosexuality a pathological disease.

This belief became official medical policy in the United States with the first publication of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* in 1952

(Bynam, 2002, p. 2284). Homosexuality continued to be listed as a mental disorder for the next 20 years. However, when the American Psychiatric Association, due in part, but not solely, to pressure from members of both the gay liberation movement and gays in general, within and without its membership (Bergmann, 2002), took up the question of deleting *homosexuality* from the *DSM-II*, they appointed several committees to study the question. One important committee was the Nomenclature Committee headed by Robert L. Spitzer. According to Spitzer (1973) the purpose of the *DSM-II* was to list and define mental disorders; the criteria required that a disorder cause "subjective distress" or that on a regular basis it cause social "impairment" or a loss of social function (p. 2). He clearly states that homosexuality does not cause any of these dysfunctions. In explaining the committee's thinking, Spitzer clarified that homosexuality could only be considered a psychiatric disorder if the criteria were "failure to function heterosexually." He goes on to state that

if failure to function optimally in some important area of life as judged by either society or the profession is sufficient to indicate the presence of a psychiatric disorder, then we will have to add to our nomenclature the following conditions: celibacy (failure to function optimally sexually), revolutionary behavior (irrational defiance of social norms), religious fanatics (dogmatic and rigid adherence to religious doctrine), racism (irrational hatred of certain groups), vegetarianism (unnatural avoidance of carnivorous behavior), and male chauvinism (irrational belief in the inferiority of women). (p. 2)

In keeping with these criteria, on December 15, 1973, members of the American Psychiatric Association, a professional association of physicians, agreed to declassify homosexuality as a mental illness (Bergmann, 2002, p. 39; Bynum, 2002, p. 2284). Other important researchers who pressed the American Psychiatric Association to remove *homosexuality* from the *DSM-II* were Kinsey, Ford, Beach, Green, Loney, Hoffman, Evans, Weinberg, and Halleck (Chernin & Holden, 1995, p. 94). Some critics of this change suggest that the decision was not reached according to required American Psychiatric Association protocol (Chernin & Holden, 1995, p. 93). However, such changes require strict adherence by the American Psychiatric Association to its prescribed rules and regulations. Chernin and Holden point out that several committees within the organization, in particular the Council of Research and Development, the Committee on Nomenclature, and the Board of Trustees, made presentations and recommendations to the organization, and the committees “unanimously supported” deleting *homosexuality* from the *DSM-II* (p. 93).

Although the Psychiatric Association followed its own stringent rules, in 1974 a group of members within the Association who opposed the change obtained the required number of signatures and brought the issue to the membership for a vote. However, the membership-at-large upheld the Association’s decision (Chernin & Holden, 1995, p. 93). This member-wide support not only reinforced the Association’s original decision but also strengthened the argument for the removal of *homosexuality* from the list of pathologies; furthermore, the procedure and the vote indicated that no one group and no

one person could have had the power to force its or her will in order to delete *homosexuality* from the *DSM's* list of mental illnesses.

To make its decision public, the American Psychiatric Association (1973) presented an official position paper stating its decision, its reasons, and its recommendations. What the association had to say in 1973 is worth noting:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons. Further, the American Psychiatric Association supports and urges the enactment of civil rights legislation at the local, state, and federal level that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychiatric Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private.

(This resolution singles out discrimination against homosexuals only because of the pervasive discriminatory acts directed against this group and the arbitrary and discriminatory laws directed against homosexual behavior; p. 1).

In June of 1975 the American Psychological Association followed suit by declaring its support for the decision of the Psychiatric Association in almost identical

terminology. And the Psychological association went a step further by asking all mental health professionals to be leaders in removing the “stigma of mental illness” that has been associated with the homosexual orientation (Conger, 1975, p. 633).

These public statements are important for the strong stand they take and show that as early as 1973 a major mental and emotional health care organization called for equality for homosexuals, which they have yet to attain in America. Yet, the American Psychiatric Association and the American Psychological Association took this step forward. However, another professional organization, the American Psychoanalytic Association, psychoanalysts who follow Freud’s methods and who are closely associated with the Psychiatric Association, did not make a change in their view of homosexuality until 1991 (Bergmann, 2002). The reason for the time lag is somewhat unclear, but Bergmann suggests that the delay may have been due to the fact that psychiatrists are more interested in expediency while psychoanalysts find themselves bound to the psychoanalytic method and Freud’s criteria for working with patients (p. 39). The failure to change for psychoanalysts is somewhat ironic as Freud (1935), himself, did not consider homosexuality to be an illness and did not feel that psychoanalysis would be successful in the majority of cases in attempting to change the homosexual orientation.

The Need to Protect LGBT Students

Despite the fact that homosexuality has not been considered a mental illness since 1973, that the psychiatric, psychologic, and psychoanalytic branches of medicine consider it to be simply a variation of human sexuality, one might think that the attitude in America would change. However, the United States government and its many

institutions have not experienced a major paradigm shift in this respect. In fact, in America's middle and secondary schools, many administrators and teachers continue to teach as if all students are heterosexual. Chang and Kleiner (2001) claim that no harassment as severe as homophobia exists in America's public schools (p. 110). Consequently, the majority of LGBT youth in America's public schools suffer some type of prejudice, as evidenced through the GLSEN surveys; this prejudice is expressed in three main ways: through language, through discrimination, and through violence (Hetrick & Martin, 1987, p. 27). Whatever the manner of the prejudice, it takes a toll on LGBT youth and those perceived as such that other youth usually do not suffer (Hetrick & Martin, 1987; Little, 2001; Martin & Hetrick, 1988, Thurlow, 2001).

All adolescents face the same challenge, to become independent both internally and externally; however, LGBT youth face an additional challenge: they must learn to adjust to a "socially stigmatized role" (Hetrick & Martin, 1987, p. 25). Little (2001) agrees with this assessment. These youth, like other minority youth, become socialized through their experience of prejudice, and for LGBT youth the prejudice is a reaction against their sexual orientation and/or their gender expression. Interestingly enough, other minority groups do not face the same detrimental problems as LGBT youth. For instance, a Black, Hispanic, or Jewish youth will not usually find her/himself thrust out of the home because of being Black, Hispanic, or Jewish, but an LGBT youth faces a high possibility of being rejected by family because of sexual orientation (Hetrick & Martin, 1987, pp. 29-30). Such a youth has few role models to help in the socialization process, making the process more difficult for LGBT youth than heterosexual youth (Fontaine &

Hammond, 1996, p. 818). Despite these problems, LGBT persons as a group are no “less well-adjusted than their heterosexual counterparts” (Hetrick & Martin, 1987, p. 40).

However, this adjustment takes longer for persons of LGBT sexual orientation than it does for heterosexuals and can negatively impact LGBT adolescents in three main areas: their mental, their social, and their physical lives.

The responses of LGBT youth to their “socially stigmatized role” is complex, and the research detailed and complicated; this information extends beyond the scope of this work, which will present the problem in a more generalized manner. Those wishing more information about the socialization process of LGBT youth and the results of social stigmatization should see Appendix A.

Mental Suffering of LGBT Students

Many psychologists and psychiatrists have evidenced an interest in the well-being of LGBT students in America’s middle and secondary schools and have gathered information regarding these students’ mental health. Schneider and Owens (2000) believe that the American educational system has a major effect upon its students, both in and out of the classroom, especially helping them to build a foundation on which to understand themselves and their world (p. 349). Taylor (1994) posits that a person’s identity takes its shape from what she observes around herself. If a person constantly encounters negative, demeaning images of self, that person’s view of self will be distorted; she will receive a false view of self that can result in “self hatred” (pp. 25–26). Uribe and Harbeck (1991) concur and add that American schools clearly accept homophobia throughout their systems (p. 18), thus providing a negative framework for their LGBT students. Herr

(1997) strongly believes that one of the implicit roles of America's public schools is "to promote the pervasive ideology of heterosexism and thereby perpetuate clear constructs of maleness and femaleness" (p. 52). Rofes (1989) believes that adolescence is a time of life that should be filled with one's discovery of self, a personal identity, and that for this identity to develop properly, one must experience a positive and growth-filled environment; however, he posits that LGBT youth experience this discovery in an atmosphere that makes them feel "shame, denial, and self-hatred" (p. 452). Daily encounters with this sanctioned homophobia in schools can easily lead an LGBT youth to view him or herself in a negative light, as an unacceptable, and unworthwhile individual (Little, 2001, p. 101). Consequently, this youth receives a distorted view of self as the "other"; she or he becomes marginalized within the school and lacks positive reinforcement for who she or he is and who she or he will become. America's LGBT youth face this situation on a daily basis in schools throughout the country by attacks on their mental, social, and physical make up which begin as early as kindergarten (Henning-Stout, James, & Macintosh, 2000, para. 2).

School sanctioned homophobia can have many consequences. Price and Telljohann (1991) claim one result of this daily prejudice is that LGBT youth can begin to see themselves as inferior and may even develop a form of homophobia themselves. This self-loathing can result in many detrimental practices such as sexual promiscuity, drugs, and suicide (p. 433). Little (2001) agrees that LGBT youth "internalize" society's message of hate, and the youth begin to loathe and even harm themselves (p. 101). Uribe and Harbeck (1991) claim that homophobia in the school has an adverse effect upon

homosexual students that lowers their self-esteem and makes them more susceptible to hurting themselves both physically and emotionally (p. 25). Reynolds and Koski found that LGBT teens often suffer feelings of emotional isolation because they are aware that society expects them to be heterosexual (as cited in Batelaan, 2000, p. 158).

As a result of this homophobic treatment, LGBT students not only feel isolated, but also develop poor self-images and try to hide their sexual orientation even as they try to discover who they are and how they fit into the world (Callahan, 2001, sect. "The counselor's role with gay and lesbian teens," para 1). In fact, Martin and Hetrick (1988) claim that because of this limiting atmosphere, LGBT youth are not provided strong opportunities to understand what their sexual orientation means. Often, they cannot plan for the future because they see no future for themselves (p. 167). Failure to envision one's future can be devastating and demoralizing.

Before LGBT adolescents can come out to others, they must first come out to themselves; little wonder, then, that coming out to oneself can be a traumatic experience and a difficult task in the homophobic atmosphere of today's public schools. For instance, Uribe and Harbeck (1991) learned from the LGBT youth they interviewed that the students suffered considerable emotional pain even in admitting to themselves their sexual orientation. They described this event as "'a time when I wanted to die,' 'a period where I just wanted to blot out all my feelings,' or 'a time when I felt like I was suffocating.'" Others said "'I feel like an oddball, not like anyone else'; 'If I told any of my friends, they probably wouldn't have anything to do with me'; 'There probably isn't anyone else like me'" (pp. 22-24). In their own words these youth make clear the

loneliness and terror of acknowledging their sexual orientation. Heterosexual youth do not experience this pain and suffering in accepting their sexual orientation as society and schools make quite clear that being heterosexual is good and normal (Fontaine & Hammond, 1996, p. 818). Heterosexual youth find no dearth of role models both in and out of school in contrast to the LGBT youth.

Once one admits to oneself her minority sexual orientation, she must decide how to behave in school and social settings. The feeling of isolation coupled with the fear of discovery leads many LGBT youth to live a lie by pretending to be heterosexual in an ironic attempt to lessen the isolation. The consequences can be devastating. Martin (1982) says that this deception can consume the adolescent, and the maintenance of this false identity becomes important to the exclusion of all else; it pervades the individual's entire life (p. 59). One outcome of this behavior is self-hatred and hatred of one's group (Martin, 1982, pp. 60-61; Martin & Hetrick, 1988, p. 164). Martin also explains that many social situations occur in which LGBT youth can be exposed, so the youth must be on guard constantly watching what she wears and how she walks and talks. Any of these aspects of personality can expose the pretend heterosexual, the LGBT youth believes. For instance, two females greeting each other might hug and kiss, but the pretend heterosexual feels afraid to engage in this type of activity because in her mind, others will see her as homosexual. Consequently, the LGBT youth may find developing close, non-sexual friendships difficult because of the constant need to lie to protect self (Martin, 1982, p. 59). The LGBT youth in this situation can never get too close to anyone because her true identity may be discovered or her actions misunderstood (Hetrick & Martin,

1987, p. 31). The result of the need to hide one's true self from others deepens the sense of isolation, just the opposite of what the youth may have desired

The desire to hide one's true sexual orientation can also lead to sexual promiscuity for both sexes and unwanted pregnancies for the young women, yet another way to prove one's heterosexuality (Martin & Hetrick, 1988, p. 171). Due to this constant denial, LGBT youth may feel erased or non-existent, and this feeling prevents the LGBT youth from seeing herself in a positive light and from integrating a positive self-identity (Herr, 1997, p. 55). Because many LGBT youth feel the need to hide their true selves through an expression of heterosexual sex, they end up disliking themselves even more (Black & Underwood, 1998, Isolation and passing section, para. 2). Consequently, in an attempt to lessen the isolation, the LGBT youth trying to pass for heterosexual only increases her mental isolation; she has no one to talk with and no one in whom to confide.

The low self-esteem, the isolation, and constant hiding of one's true self takes so much energy that not much is left over for school work. McNaught (1995), who works with corporate America to eliminate homophobia in the work place, claims that gay and lesbian adults who feel they have to hide their identities in the workplace in order to protect their jobs are less productive than other workers (pp. 6-7). Extrapolating this information, one can see that teenagers who are still trying to figure out their identities and their places in the world and who feel the need to hide their true sexual orientation might suffer this same loss of production. This situation may result in poor grades and an inability to pay close attention in class. These students spend so much time and energy hiding who they are hoping to gain peer acceptance, that they often do not have the time

or energy for much else. In fact, studies indicate that many LGBT youth have lower grades than their heterosexual counterparts (Jordan, Vaughan, & Woodworth, 1997, p. 28; Russell, Seif, & Truong, 2001, pp. 118-120).

But schoolwork is not the only mental area of these youths' lives that is affected negatively. This sense of isolation, this self-denial, this low self-esteem, and this self-hatred can also lead the LGBT youth to experiment with drugs. Uribe and Harbeck's (1991) study discovered that 86% of LGBT students, considered sexual minority students, they interviewed (43 of 50) reported having a problem with substance abuse (pp. 22-23). Jordan et al. (1997) discovered that 47.1% of the youth they interviewed (16 of 34) used drugs to escape unpleasant feelings (p. 28). According to Little (2001) LGBT youth are 1.6 times more likely to abuse drugs and alcohol than their non-LGBT peers. Hetrick and Martin (1987) found depression and heightened anxiety to be a problem for LGBT youth, possibly related to the isolation they suffer. These same LGBT youth were also at a high risk for drug use, especially alcohol, and those who abused alcohol were more likely to attempt suicide (Hetrick & Martin, p. 34).

Suicide, in fact, is a major risk for LGBT teens. A study by Garofalo, Wolf, Wissow, Woods, and Goodman (1999) indicates that minority sexual orientation is a predictor of suicide attempts (p. 491). In a sample of 37 LGB high school students, 47.1% considered suicide and 35.3% actually attempted it (Jordan et al., 1997, p. 28). Martin and Hetrick (1988) claim that a large percentage of these adolescents attempt suicide because they feel absolutely alone with no one to talk to (p. 172), and Remafedi, Farrow, and Deisher (1991) found that 30% of the males in their study of 137

homosexual and bisexual males between the ages of 14 and 21 had attempted suicide at least once, and 50% of those had attempted it multiple times (pp. 869–870). They also found that many of those attempting suicide did so because of turmoil about homosexuality (p. 873). Uribe and Harbeck (1991) discovered in their study of 50 homosexual high school students, that 44% (22 of 50) had attempted suicide (p. 22). Little (2001) claims that LGBT youth attempt suicide six times more often than other teens and are more likely to succeed (p. 102). This number is double what the U. S. Department of Health and Human Services found in their 1998 study. In a study supporting Little's findings, Morrison and L'Heureux (2001) concluded that LGBT youth "make up a disproportionate number of 'successful'" youth suicides (p. 40), and that one of the prime causes of their suicide attempts is the isolation they feel (p. 42). Furthermore, the "high rigidity and inflexibility" of high schools may also increase the risk for LGBT youth suicides (Morrison & L'Heureux, p. 44).

The variety of surveys and studies clearly indicates that many LGBT youth in America's schools suffer mental anguish as a result of the schools' hidden heterosexual agenda and take detrimental steps in an attempt to assuage their isolation.

Social Suffering of LGBT Students

Socializing is a very important aspect of high school for most students. Being on the outside looking in is never comfortable and often depresses the observer. Thus, LGBT students who fear discovery, and thus ostracization, often attempt to fit in with the crowd by hiding their true sexual orientation because, as Pilkington and D'Augelli (1995) point out, many LGBT youth feel overwhelmingly uncomfortable revealing their sexual

orientation in a school setting; in fact, their study of 194 LGBT high school students found that 58% hid their sexual orientation at school. One main reason for hiding sexual orientation at school was fear of losing friends (p. 44). Unfortunately, according to Martin (1982) this attempt to fit in socially becomes a living lie for the adolescent, and the ability to maintain this façade becomes all-important to the LGBT youth involved. The consequence is that this façade “distorts” most of the youth’s relationships and simultaneously convinces the student she is not a true member of the group, while she seemingly maintains her membership within the group (pp. 58–59). This situation sets up an internal paradox for the student causing more emotional turmoil and more social suffering.

Social isolation can have other negative consequences. Hetrick and Martin (1987) assert that the effect may be that GBT males become more promiscuous sexually with both sexes and that LBT females may be so desperate to form a strong social relationship that they become involved exclusively in a relationship with the first interested female and close themselves off to other relationships. Other females purposely get pregnant because they think that their peers can accept an unwed pregnancy more easily than the homosexual orientation (pp. 32–33). These coping strategies, according to Hetrick and Martin, may impede the development of positive adult functioning because these youth feel little to no self-worth or self-confidence. Hence, they can begin to feel that they are not worthy of love or affection (p. 32). And yet another problem with social isolation at its root, according to Uribe and Harbeck (1991), is dropping out of school (p. 25).

Clearly, acceptance by peers is important for all adolescents. However, a survey of high school counselors led Price and Telljohann (1991) to conclude that known homosexual students are more often the recipients of degrading treatment than acceptance; the result is feelings of isolation and rejection, both of which contribute to drug abuse and suicide for the socially isolated LGBT youth (p. 437).

Physical Suffering of LGBT Students

Intimidation: it can be verbal; it can be physical, but no matter which form it takes, it exacts a serious toll on the well-being of LGBT youth in America's middle and secondary schools. Uribe and Harbeck (1991) claim that school-sanctioned homophobia is throughout American schools and leads to medical problems for LGBT youth (p. 18). Because schools accept homophobic behavior, other students feel free to harass and victimize LGBT students and those they perceive as such. Telljohann and Price (1993) believe that the biggest problems LGBT adolescents face in school are verbal putdowns, discrimination, comments written on lockers, violence, and feeling alone and scared (p. 49). And, Savin-Williams (1990) claims almost all LGBT students who are out at school experience some level of harassment from their fellow students (para. 8). The result of verbal harassment is "detrimental behavior" such as suicide attempts, drug abuse, self-isolation, and unsafe sexual practices (Savin-Williams, 1990, section "Accumulating pain" paras. 1-2). In fact, Pilkington and D'Augelli (1995), who questioned 194 LGB youth ages 15 to 21, found that 80% of these youth had experienced verbal victimization, 44% had been threatened with violence one or more times, 33% of these youth had had objects hurled at them two or more times, 13% had been spat upon, 31% had been chased

or followed, more than 19% had been physically assaulted, and 22% had been sexually assaulted (p. 40). Much of this victimization took place at school, and Pilkington and D'Augelli found a positive correlation between the frequency of intimidation and a victim's fear level; the more an individual was victimized, the more she or he was fearful at school, at home, and in the community. The study also revealed that these different types of victimization resulted in negative personality changes (pp. 49–50).

Other studies involving the victimization of LGBT students provide an equally bleak outlook for the victims. Coleman and Remafedi (1989) claim that teens who are suspected of being LGBT or are “out” often suffer abuse from their peers at schools (p. 37), and Hillier and Rosenthal (2001) believe that LGBT students suffer abuse in schools to a high degree (p. 2). Bontempo and D'Augelli (2002) conducted their research using questionnaires with teens attending middle and secondary schools in Massachusetts, 3,324 youth, and in Vermont, 5,864 youth, to determine the effects of school-based victimization. Their findings indicate that LGBT youth who had suffered a high level of victimization engaged in more activities that were risky to their health than non-victimized youth. The result was that more LGBT youth were prone to stay home from school, be truant, take drugs, and attempt suicide than those LGBT youth who suffered a lower level of victimization comparable to what heterosexual students encountered (p. 371).

Coleman and Remafedi (1989) concur with these findings. In their interviews with LGBT adolescent students, the researchers found that hostility and rejection directed toward LGBT teens because of their sexual orientation caused these teens to perform

poorly in school, to attempt suicide more often than heterosexuals, to become involved with drugs, and to engage in risky sexual behaviors. (p. 37). Clearly this population of America's adolescents suffers a disproportionate amount in comparison to the non-LGBT American adolescent.

Actual physical violence directed against LGBT youth at school also has detrimental effects on the victims. For instance, Martin and Hetrick's (1988) study indicates that often the LGBT victims drop out of school because they feel they have no choice. Martin and Hetrick believe the cause is that "most" schools fail to acknowledge the violence directed against LGBT students and do not provide any type of discussions about homosexuality for their students (p. 176). This lack of acknowledgement contributes to LGBT students feeling invisible and unimportant in their school settings.

Hostility against LGBT youth in school can take many forms and is not limited to punching, kicking, and beating, but in some cases takes the form of sexual abuse. In fact, Little (2001) claims that sexual abuse and physical abuse often go together (p. 103), and Hetrick and Martin (1987) claim many LGBT youth are at risk for sexual abuse from their peers (pp. 30-31). Also, Remafedi, Farrow, and Deisher (1991) found that those who attempted suicide were more likely to have been sexually abused (p. 873). One sad aspect of this abuse is that oftentimes, LGBT youth do not recognize that they are being sexually abused, as they assume "it is not abuse when it happens to one who is homosexual" (Hetrick & Martin, 1987, pp. 34-35). Clearly, the results of sexual abuse are severely destructive.

All types of abuse from verbal to physical to sexual against LGBT students in the school setting can have negative effects. The more often one is harassed, in whatever manner, because of sexual orientation the less likely that LGBT youth is to continue her education beyond high school (Kosciw, 2004, p. 23). The GLSEN findings support earlier studies such as those by Jordan et al. (1997) who found that 17.6% of LGBT youth drop out of school (p. 28). Thus, many LGBT youth find they cannot live life to its fullest; their lives are compromised because often they suffer the hostility of their peers and their teachers; they feel invisible to and alienated from those around them (Hillier & Rosenthal, 2001, p. 3). If American society and American education truly believe that all youth are entitled to a quality education, then both must begin to recognize the detrimental treatment and effects that LGBT youth suffer in America's middle and secondary schools and take steps to assure the continued safety and educational progress of these young minds. Only by changing their atmosphere can America's public schools provide safety and education for their LGBT students. In fact, Rosario, Hunter, Maguen, Gwadz, and Smith (2001) concluded that LGBT youth need an atmosphere in which they can not only gain knowledge about their sexuality, but also learn to accept it; this atmosphere would allow them to discuss their feelings and attitudes with other LGBT youth, and the result would be higher self-esteem (p. 153). Such a positive change would not only benefit LGBT youth but society as well (Rosario et al., p. 153).

Summary

That these students suffer emotionally, socially, and physically because of their gender expression and gender identity cannot be denied by those who consider the numerous studies, surveys, and results reported by professionals in the psychiatric, psychoanalytic, and psychologic fields. Walters and Hayes (1998) concluded from their studies that "ample evidence exists that gay, lesbian, and bisexual students are denied the educational opportunities accorded to their straight peers" (p. 14). Furthermore, based on the opinions of the major mental health organizations in this country, these students suffer no mental illness because of their sexual orientation, but they may suffer mental health problems due to the treatment they receive at the hands of their peers and teachers in the school setting where they have the right to feel safe and secure.

CHAPTER IV

LGBT ABUSE IN AMERICA'S MIDDLE AND SECONDARY SCHOOLS

Studies in the preceding chapter indicate that LGBT students in American schools have lower grade point averages, higher drop-out rates, and higher suicide rates than non-LGBT students. The studies indicate that LGBT youth not only suffer greatly due to their sexual orientation, but many times they are denied their right to an adequate education and often do not receive adequate care in the schools to enable them to complete their education. Furthermore, former Secretary of Education Richard W. Riley believes that America's schools "owe" their students a "safe environment that is conducive to learning and that affords all students an equal opportunity to achieve high educational standards" (U. S. Dept. of Education, 1999, p. v).

What, then, are these students' struggles and how can they protect themselves? No specific laws exist to protect LGBT youth in schools, and although the United States Department of Education publishes guidelines for schools, no schools are bound to abide by them. However, these students are not without recourse as a discussion of their struggles will show. In their attempts to protect themselves at the middle and secondary levels, some of America's LGBT students have utilized several existing laws and statutes. Important to note is that not all students turn to the law. As Chapter III makes clear, some accept daily abuse, some try to deny who they are to fit in, some drop out of school in

order to avoid abuse, and some commit suicide. This chapter attempts to present LGBT students' struggles as documented in court transcripts, trial briefs, and the print media. However, more abuse of LGBT students exists than the following documentation would suggest. Not all harassed or abused LGBT youth take their struggles to court. Also, many of those who do, sometimes settle out of court before the proceedings begin.

Before turning to the documentation of the struggles of LGBT youth, the reader may better understand the summaries of the struggles and the application of the laws through a brief introduction to the following federal laws.

Federal Laws

Title IX of the 1972 Federal Education Amendments, an important document for LGBT students and their lawyers, states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (see appendix B for complete document). Many people think immediately of female equality in sports when Title IX is the subject, but sports are only a small segment. Although Title IX does not allow one to sue based on sexual orientation, it does allow for a suit based on gender. Further, Title IX allows a plaintiff to sue for peer sexual harassment that takes place on school grounds during the school day and requires a school board to make reasonable attempts to stop the sexual harassment. Title IX also allows a plaintiff to sue school administrators in their individual capacities if they have been "deliberately indifferent" to a student's harassment that is found to cause a student to be deprived of educational opportunities (*Doe v. Perry Community School District*,

2004, p. 833). Finally, under Title IX a student may sue for monetary damages by claiming that a school district “intentionally failed to intervene to end the sexual harassment of a student” (*Doe v. Perry Community School District*, 2004, p. 832).

In addition to Title IX, LGBT students have also used the Equal Protection clause of the Fourteenth Amendment (U. S. Const. amend. XIV, § 1; see appendix B) in their struggle. It states, in part, that no state may “deny to any person within its jurisdiction the equal protection of the laws.” This clause requires school systems to protect students from sexual harassment. School administrators must attempt to protect all their students in the same manner; they cannot apply one rule in protecting girls and another in protecting boys. Such a claim under this clause would only be successful if the student or students could prove the administrators or district had been intentionally indifferent to the plight of the victim(s).

The Fourteenth Amendment also guarantees citizens that no state may “deprive any person of life, liberty, or property, without due process of the law.” Due process involves two areas: substantive and procedural. Procedural due process controls the state and requires that it adhere to certain rules before it can take a person’s freedom, property, or life. Citizens must have a chance to object to the state’s actions. Substantive due process, on the other hand, protects basic rights such as freedom of speech and religion; it also requires that all laws are reasonable and that if the state takes a citizen’s rights away, the state’s actions must be based on a legitimate government interest.

Another problem LGBT youth have encountered is administrators forbidding the students to discuss their sexual orientation; this situation brings the First Amendment (U.

S. Const.) into play. The First Amendment (see appendix B), which states “Congress shall make no law. . . abridging the freedom of speech,” is also support for LGBT students. Schools may not silence students just because what they say *might* cause violence or a disruption in the school day. Nor may a school administrator silence a student because the student may say something that others may not agree with. On the other hand, school officials can stop a student’s speech if it *will* cause a “substantial disruption” of school activities. Dr. David Alexander also mentions the importance of the “forecast rule” which states that schools can “silence” students if they have a “reasonable forecast [of] disruption” (personal communication, July, 2005)

The First Amendment also includes an establishment and a free exercise clause, which states that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” According to Judge Rosen (*Hansen v. Ann Arbor Board of Education*, 2003), “neutrality is the fundamental requirement of the Establishment Clause, which prohibits the government from either endorsing a particular religion or promoting religion generally” (p. 804). Judge Rosen also asserts that “free exercise” means that the government cannot regulate one’s religious belief (*Hansen*, 2003, p. 806).

Next, U. S. C. 42, §1983 (1982) (see appendix B) in the Civil Rights Act of 1871 grants citizens their constitutional rights and states that anyone who denies those rights is liable under the law. This section helps citizens secure their Fourteenth Amendment rights. To prove liability, one must show that the violator was a government official acting in an official capacity and the specific right being violated. Once proven, the

injured party may seek redress under federal law. Thus, section 1983 may allow victimized LGBT students to sue for violation of their right to equal protection (Bedell, 2003, p. 833).

Last, Bedell (2003) makes the point that state officials, which public school administrators are, can be sued in both their official and individual capacities according to several Supreme Court rulings (p. 849). This type of suit would be dependent on the concept of qualified immunity, which the United States Supreme Court, *Anderson v. Creighton* (1987), clarified. Qualified immunity protects government officials from being sued as individuals in civil cases when they are acting in an official capacity and using their discretion to decide on a course of action when that action violates another's right(s). This law protects "all but the plainly incompetent or those who knowingly violate the law" (*Anderson v. Creighton*, p. 638). In determining qualified immunity, the court asks several questions. First, was the official acting in an official governmental capacity? Second, was the violation of the right obvious in terms of pre-existing law? Third, would a "reasonable official" know that this action was a violation of that right? (*Anderson v. Creighton*, pp. 638-639). If the answer to all three questions is "yes," the official may be sued in a civil suit in an individual capacity (*Anderson v. Creighton*, p. 640).

LGBT Struggles

As I researched the struggles of LGBT students and those perceived to be, the material consistently led me to the following court cases for a detailed, accurate, and verifiable description of each student's struggle. In some instances, however, additional

information was available in periodicals summarizing the struggles. In a very few instances, periodicals and/or court briefs provided the only information about a struggle as it never got to court. Therefore, the following is a historical survey of LGBT middle and secondary students' struggles as delineated in court transcripts, legal briefs, and in some instances media interviews and summaries. These students struggled to secure their guaranteed rights and looked to the courts to provide relief when those rights were violated. For each student, I present a brief summary of school demographics at the time of the struggles, where available, a detailed discussion of the alleged abuse the student underwent, and a summary of the court's decision. Where applicable, I present the ramifications of the decisions for administrators, faculty, and students. The struggles are arranged chronologically based on the date of the final court decision or settlement between the parties involved; consequently, although some students filed their grievances earlier than others, the courts may still have been deliberating while other students filed and had their conflicts resolved.

Two types of cases exist: published and unpublished. A case is published if it appears in print, but unpublished if it is not in print or only available on line. The notation system for unpublished court cases available only on line uses asterisks before a page number to make finding the information easier (e.g., **7).

Fricke v. Lynch, 1980.

Aaron Fricke's struggle is one of the earliest documented in court records. The information in this case comes from the transcript of the court proceedings, which took place in the United States District Court for the District of Rhode Island. At the time,

1979–80, Aaron was a senior at Cumberland High School in Cumberland, Rhode Island. No specific demographics are available for school year 1979–1980³, but Cumberland High School is located on the fringe of a mid-sized city. In the mid 1980s the student population was 1,450 with a student to teacher ratio of 12.3:1. The school was considered a regular high school and offered Grades 9–12.

In April of 1980, Aaron Fricke requested permission to bring a male date with him to the Cumberland High School senior prom. Principal Richard B. Lynch denied Aaron's request both verbally and in a personally delivered letter to Aaron's home. The principal stated four reasons: (1) he feared that Aaron and/or his date would be physically harmed; (2) he feared an "adverse effect" among Aaron's classmates, the Cumberland student body, and the people of the town; (3) he feared his inability to protect everyone at the dance because it was being held out of state in Sutton, Massachusetts; and (4) he stated school policy forbidding anyone to attend the dance without an escort (*Frick*, 1980, p. 384).

Aaron filed suit against his principal for violation of his First Amendment right to free association, his First Amendment right to free speech, and his Fourteenth Amendment right to equal protection. Furthermore, Aaron asserted that taking a male date to his prom was a "political statement" (*Fricke*, 1980, p. 385). Local papers published an account of his filing; the next day, Aaron was physically assaulted. Lynch suspended the person responsible and provided Aaron with protection. In countering the

³ All demographic information in this chapter and the next comes from the National Center for Education Statistics, <http://nces.ed.gov>

lawsuit, Lynch claimed that he was truly fearful for Aaron's safety and did not believe he could take enough precautions to keep Aaron safe.

Judge Pettine ruled in favor of Aaron for several reasons. First, Pettine stated that the state cannot suppress free speech because of a possible action in response to that speech. Second, Pettine found that the security usually provided at the prom seemed sufficient to control any type of "disturbance" (*Fricke*, 1980, p. 385). In addition, Pettine also felt that Lynch had not indicated that he had made any attempt to determine if more security were needed. Finally, the judge felt that Lynch had not sufficiently shown that Aaron's conduct would "'materially and substantially interfere' with school discipline" (*Fricke*, p. 387). Pettine felt that even though Lynch may have had a "legitimate" concern about maintaining school discipline, that concern could not be more important than Aaron's right "to peacefully express his views in an appropriate time, place, and manner" (*Fricke v. Richard B. Lynch*, p. 387).

Harper v. Edgewood Board of Education, 1987

This next struggle from the 1980s also involves a prom, but this time it is concerned with clothing and occurred at the Edgewood High School senior prom in Oxford, Ohio, held at Miami University. The exact location of Edgewood High School in Ohio is unclear as several Edgewood High Schools exist and none appear to be near Oxford. All information comes from the published court transcript from the Southern District of Ohio, Western Division.

Warren and Florence Harper, brother and sister, decided to attend his senior prom dressed in clothes of the opposite sex. Thus, Warren dressed as a woman, high heels,

dress, fur cape, black stockings; Florence dressed in a tuxedo. Upon their arrival at the prom, the school principal and superintendent asked Warren to change his clothes. He declined and entered the dance. Shortly thereafter, a Miami University police officer led Warren and Florence from the dance at the request of the principal and the superintendent.

Warren and Florence filed suit March 18, 1987, claiming a violation of United States' Code 42, sections 1981, 1983, and 1985. Judge Rubin found against the Harpers in all instances. Judge Rubin could find no "specific violation" of section 1981 stated, so he dismissed that claim (*Harper v. Edgewood*, 1987, p. 1355). He pointed out that since section 1981 provides the same rights to all citizens "as is enjoyed by whites," (*Harper v. Edgewood*, 1987, p. 1355) that the Harpers had no complaint since they were White.

Second, the judge ruled concerning section 1983, a violation of rights under the First Amendment and a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Warren and Florence claimed that the district dress code violated their rights. Rubin declared that the school's dress code related to community values; therefore, the district had not violated the Harpers' rights by not allowing them to dress for the prom in opposite sex clothing. Consequently, Rubin concluded that no violation of First Amendment rights had taken place. Next the judge addressed the due process violation. Warren and Florence believed they had suffered a violation of their due process rights because they were "falsely arrested and imprisoned" (*Harper v. Edgewood*, 1987, p. 1355). Again, Rubin found that since Ohio had a process in place to deal with false arrest and false imprisonment, the Harpers had no valid claim for violation of due

process. Next the Harpers claimed a violation of the Equal Protection Clause because the school district allowed females to wear dresses and males to wear tuxedos to the prom, but prohibited the Harpers from cross dressing. Judge Rubin found for the school district, stating that the school district's dress code followed community standards (*Harper v. Edgewood*, 1987, p. 1355).

Third, Judge Rubin addressed section 1985. The Harpers claimed that the police officer and Miami University conspired against them. However, Rubin declared against the Harpers in this instance, also.

Doe v. Riverside-Brookfield, 1995

This next struggle involves M. Mario Doe and his attempt to hold his school district and its administrators responsible for verbal and physical abuse he suffered while attending Riverside-Brookfield Township High School, Illinois. During the 1993-94 school year, the high school was classified as a regular school and contained Grades 9-12. An urban school located on the fringe of a large city, Riverside-Brookfield Township High School had 837 students, 92% White, 5.8% Hispanic, .8% Black, and 1% Asian/Pacific Islander. The school employed 55.1 full-time teachers for student-to-teacher ratio of 15.2:1. The specifics of the young man's suffering are documented in the unpublished case.

M. Mario alleges that he suffered verbal and physical threats at his high school beginning in February 1993 because of his perceived homosexuality. Other students had pushed him down, spit on him, called him "fucking fag" and "fag," threw ice, rocks, and pens at him, threatened to kill him, and grabbed his genitals. He said the result of this

treatment was poor grades (*Doe v. Riverside-Brookfield*, 1995, *3). He eventually withdrew from the school and then returned in the fall of 1994 when the offensive behavior against him resumed. M. Mario claims to have reported all these incidents and more to several different school authorities: teachers, the Dean, the school psychologist, and school counselors. The only actions authorities took were to talk to those belligerent students. M. Mario claims these students received no disciplinary action.

M. Mario filed suit against his school district and its administrators claiming violation of his Fifth and Fourteenth Amendment rights and violation of the Illinois School Code. He also attempted to sue the administrators as individuals.

United States District Judge George M. Marovich concluded that the court had jurisdiction only in two areas: violation of substantive due process and violation of equal protection. Before deciding the complaint, Marovich ruled that the administrators could not be sued individually. In ruling on the first violation, Judge Marovich determined that M. Mario had not clearly shown that the school district or its employees had violated M. Mario's substantive due process rights. Marovich also decided that M. Mario had not shown that the school district or its administrators had denied him equal protection. Thus the judge dismissed those two complaints. He concluded that the Circuit Court of Cook County would have to deal with the other two alleged violations of M. Mario's rights (*Doe v. Riverside-Brookfield*, 1995, *10-*22).

Whether M. Mario Doe ever took his case to the Circuit Court of Cook County is not clear.

Nabozny v. Podlesny, 1996

Nabozny v. Podlesny, Davis, Blauert, et al. is the landmark LGBT case to date (Logue, 1996; "Q & A," n.d.). From 1988–1993 Jamie Nabozny attended Ashland public schools: Ashland Middle School and Ashland High School. Ashland schools are considered small town schools. Ashland Middle School, during Jamie's attendance, averaged 377 students. The student body was composed of 74.5 Native American Indian/Alaskan Native, 1 Asian/Pacific Islander, and 301.5 White. Of these students, approximately 27.4% were eligible for a free lunch. The student-to-teacher ratio was 12.8:1, and the middle school employed 29.5 full-time teachers. The middle school encompassed Grades 6–8 and was classified as a regular school. Ashland High School averaged 619.3 students from 1990–1993. The student body was composed of approximately 96.3 Native American Indian/Alaskan Native, 4.3 Asian/Pacific Islander, 0.66 Black, 1.66 Hispanic, and 516.33 White. Of these students, approximately 25% were eligible for a free lunch. The student-to-teacher ratio was 13.4:1, Grades 9–12 and was classified as a regular school.

For a period of 5 years, Jamie Nabozny allegedly suffered abuse not only from his fellow students but also from the teachers and administrators who should have protected him. The abuse was extreme and the administrators' response minimal. The following summary of Jamie's situation presents Jamie's allegations as detailed in the court records *Nabozny v. Podlesny* (1996).

Jamie Nabozny, a native of Ashland, Wisconsin, attended the public elementary school in his district; he achieved good grades and liked school. However, when he

entered Middle School in 1988 to begin seventh grade, Jamie realized that he was homosexual; many of his classmates also recognized his homosexuality, and Jamie decided not to hide his sexual orientation. The mental and physical abuse began immediately and continued through his 11th grade year at Ashland High School. Jamie's peers began to call him "faggot" on a regular basis and hit and spit upon him constantly. He reported this abuse and the two perpetrators to his guidance counselor who spoke to the students involved; they stopped their abusive behavior briefly. However, the guidance counselor was replaced and the abuse soon resumed. Jamie then went to the principal and new guidance counselor, revealed his sexual orientation, and requested that something be done about the abuse. His principal promised to "protect" Jamie (*Nabozny*, 1996, p. 451), but she never took action on his behalf, and the harassment increased. Jamie spoke with his guidance counselor again, and this time the school administrators spoke with the two boys responsible. However, rather than abate, the abuse continued and worsened. During a science class, while the teacher had stepped out, the two boys mock raped Jamie as the other students merely watched and laughed.

Upon escaping from the boys, Jamie went directly to the principal's office to report the incident. Her response was "'boys will be boys'" and that Jamie should expect to be treated in such a manner if he was "'going to be so openly gay'" (*Nabozny*, 1996, p. 451). Jamie left the building and returned home. The next day, he had to speak with a counselor because he left the school without permission; he was provided no counseling from the school to deal with the physical attack. The instigators of the attack were not

disciplined, and Jamie was forced to return to his regular schedule of classes. He continued to be the object of unabated abuse, and his abusers were not reprimanded.

Hoping that the situation might improve after summer vacation, Jamie returned to his middle school in 1989 for eighth grade to find a repeat performance of the harassment. This time, several boys attacked him in the restroom; they pushed his books from his arms and hit him. This time his parents met with the principal, who called in the boys in question who denied the incident occurred. Once again, the abusers were not disciplined, and once again, the principal told Jamie and his parents that the young man should expect such incidents to happen because he was so “openly” gay. Many more incidents occurred and many more meetings between parents and principal took place. The principal promised protection and action, yet she did nothing. Toward the end of the school year, Jamie was so distraught, that he attempted suicide. After his recovery and release from the hospital, his parents promised to send him to the local Catholic school to finish his eighth grade year.

Unfortunately, the Catholic school system did not have a high school, so Jamie was forced to return to his district high school, Ashland High School, in 1990 for ninth grade. Shortly after the school year began, Jamie was once again attacked in the restroom. One boy hit him in the back of his knees forcing him to fall into the urinal; a second boy urinated on him. Jamie went to the principal's office to report the incident, and the principal sent him home to change clothes. Once again a meeting ensued involving Jamie, his parents, the principal, and the assistant principal. Instead of reprimanding and punishing the boys responsible for the restroom attack, the

administrators had Jamie's schedule changed, and he was placed in a special education class, which included the two boys who had attacked him in the first place. Jamie's parents continued to meet with the administrators in attempts to secure some safety for their son; once again, no action was taken. Jamie once again tried suicide.

After his release from the hospital, Jamie eventually ran away to Minneapolis. His parents convinced him to return to Ashland by promising he would not have to attend Ashland High School. However, the Department of Social Services required him to return to Ashland High School because his parents could not afford a private education.

By the time Jamie was ready to enter 10th grade, his parents had moved, but stayed within the Ashland School District. The move required Jamie to take the bus to school; during his ride to and from school he was harassed, being called "fag" and "queer" (*Nabozny*, 1996, p. 452). At times students on the bus threw steel nuts and bolts at him. When Jamie's parents complained again, his seat on the bus was changed; his new seat was in the front, but the abuse did not stop. However, Jamie did find a friend in Ms. Hanson, one of the school's guidance counselors. She attempted to get the administrators to take stronger action against the bullies and harassers, but to no avail.

In fact, one morning Jamie got to school early in an attempt to use the library, which was not yet open. While he sat on the floor waiting for it to be opened, eight boys, led by the boy who had knocked him into the urinal in ninth grade, approached him. The boy began kicking Jamie in the stomach. The kicking continued for 5 – 10 minutes as the other students stood around watching and laughing. Jamie reported the abuse to the school's police liaison officer who talked Jamie out of pressing charges. The officer

spoke only with the boy who instigated the attack. Next, Jamie reported the attack to the assistant principal, who was in charge of discipline. He laughed at Jamie and told him that he deserved what happened to him because he was gay. Several weeks later, as a result of the beating and kicking, Jamie collapsed due to internal bleeding. Despite his own reports, his parents' protests, and the urging of the guidance counselor, the administrators, who promised to protect Jamie, once again, did absolutely nothing.

Sometime during 11th grade, the 1992-93 school year, Jamie withdrew from Ashland High School and moved to Minneapolis. Once there, Jamie sought medical help; he was diagnosed with Post Traumatic Stress Disorder. He also sought legal aid and filed his first case February 6, 1995, claiming a violation of his Fourteenth Amendment right to equal protection and due process (*Nabozny*, 1996, pp. 451-453).

Jamie filed a suit against the district and the individual administrators in 1995 claiming that the defendants violated his Fourteenth Amendment right to equal protection by discriminating against him based on his gender; violated his Fourteenth Amendment right to equal protection by discriminating against him based on his sexual orientation; violated his Fourteenth Amendment right to due process by exacerbating the risk that he would be harmed by fellow students; and violated his Fourteenth Amendment right to due process by encouraging an environment in which he would be harmed. The defendants argued that they could not be sued based on the concept known as qualified immunity. The court accepted the defendants' argument and dismissed Jamie's claims based on gender and sexual orientation (*Nabozny*, 1996, p. 449).

However, Jamie Nabozny was not finished fighting for his rights. He contacted Lambda Legal, a law organization specializing in LGBT law. They appealed his case to the 7th Circuit.

Gender and Equal Protection

The 7th Circuit agreed with Jamie's claim that his Fourteenth Amendment right to equal protection had been violated because of his gender. The Circuit Court asserted that the record clearly showed that Jamie had been treated differently than other students, citing the response of the middle school's principal in regard to the mock rape Jamie endured, "boys will be boys," as a clear indication that he was being treated differently because of his gender. The Court stated that the judges found "it impossible to believe that a female lodging a similar complaint would have received the same response" (*Nabozny*, 1996, pp. 454–455). Further, the defendants admitted that they severely punished those who engaged in physical and verbal harassment; however, the defendants found Jamie's pleas laughable. The justices found this behavior "indefensible" (*Nabozny*, 1996, p. 455) and a departure from established practices.

Next, the 7th Circuit allowed Jamie to sue the administrators individually, thus stripping them of their qualified immunity based on the Equal Protection Clause of the Fourteenth Amendment and several Supreme Court rulings. The justices found that the administrators were required to provide an equal level of protection for both male and female students, and the administrators failed in this regard in Jamie's case (*Nabozny*, 1996, p. 456).

Sexual Orientation and Equal Protection

The 7th Circuit justices also determined that Jamie provided enough evidence to show he was treated differently because of his sexual orientation, and that the treatment he received at the hands of his administrators was based on his homosexuality.

The justices next considered Jamie's equal protection claim because of his homosexuality. According to the Constitution, one cannot discriminate against a person based on her "membership in a definable minority" without a reasonable basis for the discrimination. The 7th Circuit stated "homosexuals are an identifiable minority subjected to discrimination in [American] society" (*Nabozny*, 1996, p. 457). As proof, the justices offered the existence of U. S. laws both giving and taking away rights based on one's homosexual orientation and the situation with the military. And, they added the fact that Wisconsin clearly states in its anti-discrimination policy a prohibition against sexual orientation discrimination in Wisconsin schools. The justices concluded that the law would not have been violated if the defendants could have provided a "rational basis" for their conduct, but the justices asserted that they were unable to determine "any rational basis for permitting one student to assault another based on the victim's sexual orientation" (*Nabozny*, 1996, p. 458). Thus, the justices granted Jamie his claim of discrimination based on his sexual orientation.

Finally, the justices determined that "under the Fourteenth Amendment a state can force a student to attend a school when school officials know that the student will be placed at risk of bodily harm [because] . . . local school administrations have no affirmative substantive due process duty to protect students" (*Nabozny*, 1996, pp. 458–

459). Jamie's claim that he was denied due process was denied. And, Jamie's claim that the administrators were responsible for creating an environment that caused Jamie more harm was also rejected (*Nabozny*, 1996, p. 459).

Jamie Nabozny's case, according to David Buckel (1996), one of Jamie's attorneys, has many ramifications. First of all, it attempted to bring into the open the failure of public schools to adequately protect their gay students. The case also showed that some public schools attempted to ignore the problem of anti-gay abuse and tried to "sweep . . . [it] under the rug" (Buckel, para. 2). Second, Buckel claimed, the case set a precedent in that the justices allowed school officials in their personal capacity to be sued for monetary damages if those officials did not address anti-gay abuse perpetrated by one student upon another. Third, this case, although it was only binding on courts in the 7th Circuit, provided grounds on which other circuit courts could build. Fourth, it allowed Jamie to have a court trial in which gender discrimination and sexual orientation discrimination would be considered. Fifth, this appeal showed that LGBT youth could use the Equal Protection Clause of the Fourteenth Amendment to protect themselves. Sixth, the Circuit Court made clear that homosexuals are "an identifiable minority" who are the objects of illegal discrimination in the United States. Seventh, it clarified that school districts and school principals must treat discrimination directed at LGBT youth in the same way they would treat discrimination against any other student in that school system or possibly face a lawsuit demanding monetary recompense; indifference and treating the abused as the problem are no longer acceptable responses to pleas for help (Buckel, 1996).

Jamie Nabozny did indeed have his day in court in November of 1996, in front of a Federal Court Jury. He sued the school district and administrators both as the district and as individuals. The jury found unanimously in favor of Jamie Nabozny. However, before the jury could decide on the monetary award, both sides settled on a figure of \$900,000 to Jamie plus \$62,000 to cover medical expenses incurred as a result of the abuse, and an unnamed amount to Jamie's lawyers (Sanders, 1997). An interesting side note to this case is that Jamie testified for over 90 minutes, and his mother corroborated his story of abuse and the meetings she and her husband had had with the administrators and their comments. The administrators, however, claimed they knew nothing about Jamie's problems and nothing about any meetings (Logue, 1996).

Jamie Nabozny's case, according to Logue (1996) was the first of its kind in the United States finding that Jamie's administrators in both middle and secondary school were guilty, not only officially but individually, of "violating his constitutional right to equal protection" because they failed to help him when he was beaten for being gay (para. 2-10). This case may have been a wake up call for America's public school districts. Superintendent for the Ashland Public School District, Steve Kelly, warned other administrators not to think the same situation could not happen to them; "'it's . . . naïve'" ("District to Pay," 1997). Eugene Volokh, professor of constitutional law at UCLA, claimed that schools should have "policies in place to deal with peer harassment" ("District to Pay," 1997). Bob Shoop, professor of educational law at Kansas State University did not believe that policies were enough; he emphasized the necessity for "comprehensive training efforts" for both students and staff ("District to Pay," 1997).

Finally, attorney Katine voiced the opinion that school officials must treat “all harassment complaints seriously and . . . equally” (“District to Pay,” 1997).

Dyson (2004), Assistant Professor of Law at Southern Methodist University, believes that *Nabozny* is important for another reason. Besides being the first suit to use the Equal Protection clause to challenge anti-gay violence, the decision “meant that the Constitution requires schools to offer gay students the same protections and safety given to other students” (Dyson, p. 196). Second, Dyson also believes that no guarantee exists that other circuit courts will follow the lead of the 7th Circuit; the 7th Circuit applied a “true rational basis review in placing the burden on the state actor to justify its action” (p. 197).

William Wagner: 1998

William Wagner’s case may not have had a hearing, as no court records exist, only William’s lawyer’s brief that was filed with the court. William’s filing against the Fayetteville Public Schools was the first one concerning Title IX that dealt with discrimination against a gay student (“Complaint by Gay Student,” 1998). William attended Fayetteville High School in Fayetteville, Arkansas, and was harassed during all of 1995 and 1996. The high school, located in a mid-sized city, was considered a regular high school, encompassing Grades 10–12. While William was in attendance, the school population increased from 1,481 students in 1995 to 1,717 students in 1995-96 for an average of 1,599 students. The average student body for the 2 years was composed of 11.5 Native American Indian/Alaskan Native, 21 Asian/Pacific Islander, 63 Black, 25 Hispanic, and 1,478.5 White. Of these students, approximately 6.8% were eligible for a

free lunch. The student-to-teacher ratio was 28.45:1, and the school employed 94.95 full-time teachers.

The following summary of William's allegations derives from information released by Lambda Legal, *Out* magazine, and the *Advocate*. William allegedly suffered harassment for 2 years and was eventually beaten by a gang of students who broke William's nose and bruised one of his kidneys ("High School Low," 1997; Lambda Legal, 1998). Although the students involved were brought up on criminal charges and suspended from school, other students continued William's harassment. When William's parents first complained about the abuse he was suffering, the vice principal told them that William should "ignore" the verbal abuse and it would go away (Signorile, 1997, para. 4). Another time the vice principal proclaimed that William "had made his choice" (Signorile, para. 4). In January 1997 William's parents filed a suit with the OCR and removed William from school because they feared for his life. Lambda Legal represented William and his parents in the suit (Lambda, 1998).

William's situation is different than that of many other LGBT students. First of all, William did not request a monetary settlement, nor did he receive one; however, he wanted his school district to make changes in its anti-discrimination policy and obtained an injunction against them. The OCR required four main steps from the Arkansas school district: (1) training for all school staff to implement the District's anti-discrimination policy, (2) formal notification to students that sexual harassment is forbidden, (3) training for all students concerning sexual harassment and other student issues, and (4) review, revise, and distribute the District's policy (Lambda, 1998). According to Lambda

attorney Buckel, this decision was a “big lesson” for school administrators who were unsure of LGBT rights in connection with sexual harassment (Lambda Legal, 1998).

Vance v. Spencer County Public School District, 2000

Alma McGowen, *Vance v. Spencer County Public School District* (2000), began her life as a student in the Spencer County Elementary School, Kentucky, as a sixth grader in November of 1992. The alleged harassment began in 1992 and continued through 1996, by which time Alma was attending Spencer County High School. The elementary school, classified as rural and regular, contained Grades K–6. The student body of 822 students, 1993–94, was predominantly White, 814, 2 Asian/Pacific islanders, and 6 Blacks. The student-to-teacher ratio was 15.6:1, and the school employed 52.8 full-time teachers. Spencer County High School, Grades 7–12, averaged the following numbers from school year 1993-94 through 1995-96. The total student body averaged 734.66 with 1.33 Asian/Pacific Islanders, 5.66 Blacks, .33 Hispanics, and 700.33 Whites. The student /teacher ratio averaged 17.66:1, and the high school employed an average of 41.8 full-time teachers.

The following summary of Alma’s allegations was taken from the published court documents *Vance v. Spencer County Public School District* (2000).

Almost immediately upon Alma’s arrival in sixth grade the harassment began. Students called her ““that German gay girl.”” Alma related the event to one of her counselors. Later while riding to school on the district bus, a high school student asked Alma to describe oral sex. Again Alma reported the behavior to her counselor and this time to her mother. The counselor spoke to the first set of students about accepting those

who are different, and the high school student was removed from the bus for a few days; however, upon his return he was more abusive than before and began to swear at Alma (*Vance*, 2000, pp. 255–256).

During the next school year, 1993-94, the high school principal's nephew asked Alma, in front of a group of students, if she were gay. Alma reported this incident to the assistant principal, Mr. Shelburne, who told her that the boys found her attractive and were "flirting with her." He recommended that she "be friendly." Throughout the remainder of that school year, Alma was regularly shoved into the lockers and walls and had her books and homework stolen or destroyed by her fellow students. One young man, who addressed the young women in his gym class as "whores" and "motherfuckers" touched Alma inappropriately, took her book bag, stole items from it, and, when she tried to stop him, stabbed Alma in the hand with her own pen. Although Alma reported the incident immediately, she was merely sent to the office to have her hand cared for. The principal chose not to involve himself. Later, the boy told Alma he had been spoken to, but he did not care; he would not get into any trouble because he was a school board member's son (*Vance*, 2000, p. 256).

During the same school year Alma was accosted in her science class. While her teacher was out of the room, Alma was called rude names, and two boys held her while other students attempted to rip her clothes off as another boy prepared to take his pants down to rape her. Only the intervention of another student saved her. In separate letters, Alma's mother wrote the principal and the science teacher concerning the incident. In response, the science teacher put Alma on the spot by asking her to tell the boys, whom

she was made to sit between, how she had viewed the incident. Neither Alma nor her mother received any indication that the boys involved were ever punished (*Vance*, 2000, pp. 256–57).

During her eighth grade year, 1994-95, the harassment continued despite the efforts of Alma and her mother. Alma spoke with the youth advocate about her situation; he spoke to the boys involved in the harassment. The result was that one of the boys, in front of the entire class, told Alma that he had a crush on her and he could touch her anytime he wanted to and no one could do anything about it. Later, the boy touched her breasts and her buttocks and requested sexual acts of Alma. School administrators took no action against this boy. Later Alma spoke with Assistant Principal Shelburne to inform him that the harassment had not ceased and that one of the boys from her science class of the previous year was still harassing her. Although Shelburne “spoke” to the boy, the boy informed Alma that he did not ““give a damn about it and he would do whatever he wanted to.”” From this point on Alma experienced increased harassment in almost every class. She felt that the more she complained, the more the discrimination increased (*Vance*, 2000, p. 257).

In May of 1995 Spencer instituted a Harassment Policy. Alma quickly took advantage of it to file a complaint stating a violation of her Title IX rights. She listed the sexual harassment she had suffered. For some reason, Alma was sent home to complete the remaining weeks of the school year. And, Spencer had still taken no action, despite Alma’s official complaint, by the beginning of the 1995-96 school year. In fact, a new Superintendent was hired in July of 1995, and the complaint was never presented to him.

Further, the school district claimed it did not have enough information to investigate Alma's complaint (*Vance*, 2000, p. 257).

At the beginning of her ninth grade year, 1995-96, Alma found herself in the same old position. Students were constantly touching her inappropriately, asking for sexual favors, and hitting her with books. Alma was diagnosed as suffering from depression, and she only stayed in school until August 31st at which time she withdrew. Several weeks later the Spencer Board of Education finally had the complaint that Alma filed in May 1995, and they invited Alma and her mother to meet with them. Her counsel advised against such a meeting (*Vance*, 2000, p. 257).

Alma's mother filed suit on July 1, 1996, asserting that Spencer had violated Title IX and the Kentucky Civil Rights Act in addition to discriminating against Alma on the basis of her national origin. The original case, filed in the District Court for the Western District of Kentucky by Steven Vance and Alma McGowen was decided by a jury. The jury found that the school district had violated Title IX and 20 U. S. C. sections 1681-1788 and 42 U. S. C. section 2000 by discriminating against Alma; the jury awarded Alma \$220,000.

Spencer appealed the District Court's decision, but the Sixth Circuit upheld the jury verdict. The case dealt with a number of familiar issues and served to strengthen the foundation of previous legal decisions. In this instance, the Sixth Circuit determined that Alma's harassment was "so severe, pervasive, and objectively offensive that it . . . deprive[d] the plaintiff of access to the educational opportunities . . . provided by the school" (*Vance*, 2000, pp. 258-259); the district knew about the sexual harassment; and

the district was deliberately indifferent to the harassment (*Vance*, 2000, pp. 259–260). This last point bears some elucidation because the administrators did take some action, but the court clarified the type of action that is acceptable. Judge Keith, writing the opinion, noted that Spencer claimed that as long as the district did “something” in response to the harassment, it was safe from prosecution. But, citing the Supreme Court in *Davis* (1999), Keith pointed out that a “minimalist response” was not acceptable. If that were the case, a boy could rape a girl and all the school officials would have to do is investigate the incident. He goes on to state that, based on *Davis*, the “school district must respond and must do so reasonably in light of the known circumstances” (*Vance*, 2000, p. 261). Thus, he concluded that in all instances since all the district did was talk to the harassers and that the talking did not eliminate the harassment, the school was bound to take further action because the administrators could clearly discern that their efforts to “remediate [were] ineffective” (*Vance*, 2000, pp. 258–260). Judge Keith pointed out one glaring example of the school officials’ indifference when he related the episode where the boy stabbed Alma in the hand; except for talking to the boy, Spencer failed to offer evidence that other steps were taken against the offender (*Vance*, 2000, p. 262).

Thus, Alma’s award of \$220,000 was upheld.

O. H. v. Oakland Unified School District, 2000

O. H., a young man in the Oakland Unified School District (OUSD) in California during the 1998-99 school year claimed he was verbally abused constantly within the school. O. H. attended one of the district’s 14 middle schools. Because only his initials are used in the court records and no school is mentioned, O. H. remains anonymous. In

this instance, only school district information is available. The Oakland Unified School District is in Alameda County, California. The total student population for school year 1998–99 was 54,256 in Grades K–12. Student population breaks down in the following manner: 27,366 male; 26,588 female; 289 American Indian/Alaskan Native; 10,229 Asian/Pacific Islander; 26,868 Black; 13,402 Hispanic; 285 migrant students; and 3,166 White. Beginning with ninth grade, the number of students who progress to 12th grade slowly decreases. For instance, for school year 1998-99, only 3,983 students are enrolled in ninth grade, 3,216 in 10th, 2,739 in 11th, and only 1,962 in 12th. Of the 1,962 students in 12th grade, only 1,633 earned a diploma. Of the total number of students, 30,014 were eligible for free lunch and 2,937 for reduced lunch. Throughout the district, 5,557 students were on an IEP and 17,737 were Limited-English Proficient, which means they required language assistance. Finally, the district employed 2,723.3 full-time teachers for a student-to-teacher ratio of 20.5:1.

Documentation of his allegations is taken from his unpublished court case, *O. H. v. Oakland Unified School District*. According to O. H. he was almost daily called such names as “queer,” “faggot,” “gay-faggot,” and “fag.” His abuse eventually turned physical, and during the school year he was beaten six or seven times because he was perceived to be gay. Furthermore, one of his attackers threatened him at knife-point and forced him to leave the school grounds. Once off school property, O. H. was raped by his attacker on three separate occasions. The attacker was eventually convicted of “several felonies” in addition to rape (*O. H.*, 2000, *39-*40). Despite O. H.’s reporting the many instances of abuse, his school administrators told him to “be a man and just deal with it”

(*O. H.*, 2000, *35–*36). Eventually, O. H. was “forced” to leave his school before the end of the school year (*O. H.*, 2000, *40). Consequently, O. H. was denied the right to the education other students in the district were receiving.

In all, O. H. filed 13 complaints against the school district and/or the individual administrators. He sued the superintendent, principal, vice-principal, and assistant principal as individuals and in their official capacities. The claims were the following: (1) failure to provide equal protection under the Fourteenth Amendment based on sex; (2) failure to provide equal protection under the Fourteenth Amendment based on sexual orientation; (3) denial of due process based on the Fourteenth Amendment; (4) conspiracy according to United States Code 42, section 1985; (5) violation of Title IX; (6) violation of O. H.’s civil rights; (7) conspiracy according to United States Code 42, section 1986; (8) violation of the California Constitution, denial of equal protection on the basis of sex; (9) violation of the California Constitution, denial of equal protection on the basis of sexual orientation; (10) violation of the California Civil Code, deprivation of civil rights; (11) violation of the California Civil Code, freedom from violence; (12) violation of the Education Code, sexual discrimination; and (13) declaratory relief.

The court dismissed several of the claims but determined that O. H. did have a right to be free from harassment or discrimination based on his perceived sexual orientation; he could sue for violation of due process. The court cited *Nabozny* (1996), among other cases, in support of O. H. The court also allowed all defendants to be sued for failing to safeguard O. H.’s civil rights and allowed those claims to be brought under the California Civil Code.

According to the National Center for Lesbian Rights (NCLR) (2004) this case resulted in a confidential, undisclosed monetary settlement for O. H. (p. 5).

Ray v. Antioch Unified School District, 2000

Daniel Ray v. Antioch Unified School District (2000) follows closely on the heels of O.H.'s case and is a Title IX case. Daniel Ray attended Antioch Middle School in Antioch, California, a regular urban school on the fringe of a large city. The school contained Grades 6–8 and 1,332 students. Of these students, 702 were male, 630 were female, 18 were American Indian/Alaskan Native, 45 were Asian/Pacific Islander, 136 were Black, 430 were Hispanic, and 703 were White. The middle school employed 60 full-time teachers for a student/teacher ratio of 22.2:1.

The following summary of Daniel's allegations comes from his published court case, *Ray v. Antioch Unified School District*.

Daniel Ray was an eighth grader at Antioch Middle School in January of 1999. Daniel's mother is a transgendered female, and many students' perception of Daniel was that he was homosexual; in fact, that perception seems to have been widespread in the school at the time. Daniel reported being "repeatedly threatened, insulted, taunted, and abused . . . during the school day and during school activities" because of this perception (*Ray*, 2000, p. 1167). Although many different students took part in this harassment, one student was particularly vicious, Jonathon Carr. Daniel reported this treatment to school officials who took no action to protect him. One day on his way home from school, Daniel was beaten by Carr. This beating resulted in a concussion, a hearing impairment, severe and permanent headaches, and severe psychological injury. Further, Daniel was

fearful of attending school because he felt unsafe. He believed that the beating he sustained and his fear barred his "access to an educational opportunity" (*Ray*, 2000, p. 1167).

The defendants asked for judgment in their favor, but the court denied the defendants' motion. The eventual outcome was an undisclosed financial settlement (NCLR, 2004, p. 5).

Lovins v. Pleasant Hill Public School District, 2000

Jeremy Lovins' situation, *Lovins v. Pleasant Hill Public School District, R-III*, is the first LGBT discrimination case to involve the United States of America as Plaintiff-Intervenor. The case was certified as a case of general public importance for purposes of seeking intervention under Title IX of the Civil Rights Act of 1964, 42 U. S. C. 1983 by then Attorney General Janet Reno. Jeremy originally filed in June 1999, was joined by the United States in May 2000, and eventually settled, outside of court, with Pleasant Hill Public School District (PHPSD) in July 2000. The information in this struggle comes from two documents, the complaint and consent order: *Lovins v. Pleasant Hill Public School District, R-III*. No. 99-0550-CV-W-2. Complaint in intervention. 2000 U. S. Dist (W. D. Mo. May 19, 2000); *Lovins v. Pleasant Hill Public School District, R-III*. No. 99-0550-CV-W-2. Consent Order. 2000 U. S. Dist (W. D. Mo. July 20, 2000). The parties, in an attempt to hold down costs, agreed to settle the complaint without an evidentiary hearing but with a Consent Order. Agreement to this order was not an admission of guilt on the part of PHPSD, but did require them to pay Jeremy \$72,500 as well as overhaul

the District policy and plan for preventing, identifying, and remediating harassment and discrimination on the basis of sex or sexual orientation.

Jeremy attended Pleasant Hill Middle School during the 1993-94 school year and Pleasant Hill High School from 1994-1998. The middle school, located in Pleasant Hill, Missouri, encompassed Grades 5-8, and was considered a regular school in a small town. During the 1994-95 school year, the middle school had 442 total students: 1 Asian/Pacific Islander, 3 Blacks, and 438 Whites. The school employed 25.5 full-time teachers for a student-teacher ratio of 17.3:1. Pleasant Hill High School, Grades 9-12, was also a regular school but was considered urban and located on the fringe of a large city. Jeremy spent 4 years at the high school. The following is the average of statistics during those 4 years: 465.75 students, 2.5 Asian/Pacific Islanders, 4 Blacks, 6.75 Hispanics, and 452.25 Whites. The high school employed 27.025 full-time teachers for an average student-teacher ratio of 17.25:1. On an average, 25.33 students were eligible for a free lunch.

The following summary of Jeremy's allegations comes from the published court case *Lovins v. Pleasant Hill Public School District, R-III*. (2000), Consent Order.

Specific details about Jeremy's harassment are unavailable. However, the court records indicate that he charged school officials for failing to intervene with student harassment based on Jeremy's sexual orientation or perceived sexual orientation. Furthermore, Jeremy charged that the school officials were informed about the on-going abuse over a period of 5 years, were deliberately indifferent to his pleas, and treated his harassment differently than other sexual harassment complaints. Jeremy originally filed suit in June 1999, based on the above allegations. Further, he contended that the

harassment had accelerated to such a degree that he could no longer attend school, and he completed his education at home through a District program. Consequently, Jeremy and the United States wanted PHPSD found guilty of failing to take “immediate and appropriate action” when Jeremy informed officials about the sexual harassment he was experiencing. Finally, Jeremy and the United States claimed that PHPSD violated Jeremy’s Title IX rights and the Equal Protection Clause of the Fourteenth Amendment (*Lovins*, July, 2000, I. Factual Background, B).

The United States Complaint in Intervention laid a clear foundation for Jeremy’s complaint by showing that PHPSD was liable under the Fourteenth Amendment and Title IX. The United States felt that PHPSD needed to be “enjoined” by the court or the District would “continue to violate the Fourteenth Amendment and Title IX” with other students (*Lovins*, May, 2000, Complaint in Intervention). The U. S. made seven requests of the Missouri court: find PHPSD guilty of denying Jeremy his Fourteenth Amendment rights; find PHPSD guilty of violating Title IX, section 1681; keep PHPSD from discriminating against other students on the basis of sex; develop, adopt, and implement a policy to assure a “harassment-free educational environment”; require PHPSD to report to the court annually for 3 years concerning “implementation of its plan”; and require PHPSD to compensate Jeremy (*Lovins*, July, 2000, Requests 1-7).

Putman v. Board of Education of Somerset Independent Schools, 2000

Bradley Putman attended Somerset High School in Pulaski County, Kentucky, during the 1997-98 school. The high school, Grades 9-12, was considered a regular school located in a small town. The student population of the school was 521 with the

following make up: 9 Asian/Pacific Islanders, 34 Blacks, 4 Hispanics, and 471 Whites. In all, 121 students were eligible for a free lunch. The school employed 36.5 full-time teachers for a student-teacher ratio of 14.3:1.

Bradley Putman's allegations come from the government documents *Bradley Putman v. Board of Education of Somerset Independent Schools* (2000) and *Putman v. Somerset Independent Schools*. Bradley's situation was not drastically different from those of other gay teens suffering harassment and discrimination at school. However, the United States Department of Justice, Civil Rights Division got involved as a "friend of the court." In this capacity, the Department of Justice (DOJ) provided information to the court in favor of Bradley Putman even though it was not taking part in the actual lawsuit. The DOJ participated because its members felt the department played a major role in enforcing the Civil Rights Act of 1964 and had an "interest in the orderly development of the law regarding" Title IX and the Equal Protection Clause of the Fourteenth Amendment (*Putman v. Board of Ed.*, 2000, Introduction, par. 4).

During the 1997-98 school year and part of the 1998-99 year, Bradley was allegedly the object of repeated discrimination. He was humiliated daily as his fellow students harassed him in the halls, calling him derogatory and demeaning names, asking if he were gay, and throwing things at him. On some occasions, other young males would grab his genitals, would make lewd sexual suggestions, or might throw their arms around him to see if he would "hug back." On one occasion, some boys made a Christmas card, supposedly from Bradley to another male student, with "sexually explicit language" which they distributed about the school. Another time, someone spray painted male stick

figures engaged in sexual activity on the school parking lot and labeled the figures with Bradley's name. On at least three occasions, Bradley received written death threats (*Putman v. Board of Ed.*, 2000, Introduction, Factual Background).

In an attempt to stop the harassment and discrimination, Bradley, sometimes with his parents and other times without, met with administrators of Somerset High School nine different times. The response he received was indicative of administrators lacking an understanding of Bradley's suffering and fear. He was told that although the administrators recognized that Bradley was the victim of sexual harassment, they could not really help him because the school's policy "did not cover same-sex harassment." Instead, they told him "'not to pay attention to these students,' 'boys will be boys,' 'hold his head high,'" and to alter his routine and walking habits in order to avoid those harassing him (*Putman v. Board of Ed.*, 2000, Factual Background).

The Putmans did not remain inactive. First, Bradley's parents filed a complaint with the OCR in May of 1998. Second, in order to protect their son, the Putmans sold their home and were able to move to another school district during the early part of the 1998-99 school year. In April of 2000, Bradley filed suit against his former school district for monetary damages. He claimed the school officials violated his Title IX right to freedom from sexual discrimination and that they violated his Fourteenth Amendment rights under the Equal Protection Clause (*Putman v. Board of Ed.*, 2000, Introduction).

After Bradley's lawyers filed the brief, both sides agreed to mediation in order to settle the case. Somerset Independent Schools agreed to alter its sexual harassment policies and added information forbidding discrimination "based on actual or perceived

sexual orientation.” Further, the new policy spelled out the District’s responsibilities and available student recourse (*Putman v. Somerset Independent Schools*, para. 4). In addition, Bradley was awarded \$135,000 (NCLR, 2004, p. 5).

Montgomery v. Independent School District No. 709, 2000

Jesse Montgomery attended school in the Minnesota Independent School District No. 709. He alleged he suffered sexual harassment from grade school through high school. He attended Lakewood Elementary, Ordean Middle School, and East High School. However, information about the school district and the schools was unavailable.

Jesse Montgomery, *Jesse Montgomery v. Independent School District No. 709* (2000), allegedly suffered verbal abuse from his peers from the time he was in kindergarten until he transferred from his original school district at the end of 10th grade. The following pages summarize his allegations as described in the published court proceedings.

During his school years, Jesse was called names based on his perceived sexual orientation: “faggott,” “fag,” “gay,” “Jessica,” “girl,” “princess,” “fairy,” “homo,” “freak,” “lesbian,” “femme boy,” “gay boy,” “bitch,” “queer,” “pansy,” and “queen” (*Montgomery v. Independent School District No. 709, 2000*, pp. 1083–1084). By the time Jesse was in sixth grade, the harassment had escalated to physical violence; he was kicked, hit, tripped, knocked down, super-glued to his seat, and threatened by his fellow students. He had his backpack opened, books thrown out, his calculator shattered. During gym class other students hit him hard enough to send him airborne and during hockey drills deliberately knocked him down. However, worse than

these incidents were the times he was sexually assaulted. During choir his ninth grade year, a fellow student grabbed Jesse's legs, thighs, chest, crotch, and buttocks. Another time in choir, the same student grabbed Jesse's buttocks while standing behind him and ground "his penis" into Jesse (*Montgomery v. Independent School District No. 709*, 2000, 1084). This student also threw Jesse to the ground and perpetrated a mock rape on Jesse from the rear and then again from the front as the rest of Jesse's peers stood watching and laughing. Yet another student asked to see him naked after gym class.

Jesse claimed that these incidents from sixth grade on caused him to exclude himself from "significant portions of the educational environment" (*Montgomery*, 2000, 1084). He would stay home on occasion in order to avoid the physical and verbal harassment; he failed to participate in intramural sports because his harassers were involved; he was afraid to go to the cafeteria for lunch, and he even avoided the school lavatories unless an emergency arose. By the time he entered 10th grade, Jesse had stopped using the bus to get to school because of the harassment he experienced on the rides to and from school. His parents then had to undertake driving him to and from school to protect him.

Not only did Jesse report all these incidents to his teachers, school administrators, and others involved in monitoring student behavior, but his parents did as well. The outcome was verbal rebukes to the offending students, often inconsistent, and an assigned seating policy on the bus that was not enforced. On the other hand, Jesse, the victim, was forced to attend group sessions with others about how to protect himself from harassment. Jesse was also removed, against his will, from several of his favorite classes

in order to attend these sessions. Not until the principal finally sent Jesse to see the school district's Human Resource Department was anything of substance done. One harasser was suspended for 5 days, another for 1 day. Other harassers received lectures about the school's sexual harassment policy. Two students who harassed Jesse on the bus had their busing privileges taken away. However, the worst offender's parents complained that having to drive him to school was a hardship, so he was allowed back on the bus within 1 week of the suspension. Jesse then stopped riding the bus, forcing his parents to drive him to school every day.

Jesse's mother eventually filed charges with the Minnesota Department of Human Rights against the school district for its "inadequate response" to Jesse and his parents' "formal harassment complaint." Jesse's parents then filed the lawsuit (*Montgomery*, 2000, pp. 1083–1086). Jesse's lawsuit alleged violation of several federal and state laws: due process, equal protection, Title IX, and the Minnesota Human Rights Act (MHRA).

Judge John R. Tunheim writing for the United States District Court, District of Minnesota, found in favor of Jesse in several areas. First, he reiterated 7th Circuit Judge Eschbach's observation that the 7th Circuit was "'unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation'" (*Montgomery*, 2000, p. 1089; *Nabozny*, 1996, p. 458). Consequently, just as the 7th Circuit Court decided in the *Nabozny* case, so too did the district court in Minnesota decide in the *Montgomery* case, that a school district had violated a student's right to due process and equal protection by responding differently to complaints based on the victim's sex. Tunheim also clarified that Jesse's claim not only rested on sexual

orientation but also on gender discrimination. Tunheim pointed out that the MHRA forbade discrimination based on sex prior to 1993 (*Montgomery*, 2000, p. 1087). Judge Tunheim also concluded that the conduct of the harassers surpassed “ordinary childish behavior,” finding it “much more egregious.” Citing the physical sexual harassment that Jesse had survived, Tunheim found the actions to be “disturbing” and that they created an “‘intimidating hostile, or offensive’ educational environment” that clearly adhered to the meaning of the MHRA of 1993. The judge also determined that these actions did interfere with Jesse’s education (*Montgomery*, 2000, pp. 1093–1095).

Judge Tunheim noted that the defendants had allowed this discrimination to continue for 10 years and had not put an end to it. Further, he noted that the defendants had produced no records as evidence that they had taken any type of disciplinary action, other than verbal, against the sexual harassment Jesse suffered (*Montgomery*, 2000, pp. 1094–1095).

Tunheim also determined that the defendants clearly responded differently to female students’ complaints of sexual harassment than they did to Jesse’s complaints. In fact, Tunheim noted that in other cases, “no matter how small the offense, the school district notified the alleged harasser’s parents, . . . any disciplinary action taken, and its intent to refer any future complaints to the city of Duluth Police” (*Montgomery*, 2003, p. 1097). He continued that except for the response to Jesse’s complaint in the 10th grade, “there is absolutely no evidence . . . it ever responded to his complaints” in the same manner (*Montgomery*, 2003, p. 1097).

The outcome of the case was a financial settlement of an undisclosed amount (NCLR, 2004, p. 5). Jesse's case is important because it makes clear two points. One, verbal reprimands are not enough in the face of overwhelming sexual orientation discrimination. Two, school administrators must treat all cases of sexual harassment and discrimination with equal concern.

Saxe v. State College Area School District, 2001

While individual students were struggling to secure their rights, David Warren Saxe was contesting one school district's attempt to provide safety for its students. On December 17, 1999, Saxe and two unnamed students, for whom he was the legal guardian, filed suit against the State College Area School District (SCASD) charging that the district's new anti-harassment policy violated their right to free speech. The background of this case comes from two published court proceedings: *Saxe v. State College Area School District*, 77 F. Supp. 2d 621 (M.D. Penn. 1999); *Saxe v. State College Area School District*, reversed by 240 F. 3d 200 (Third Cir. 2001).

SCASD was composed of 12 schools with a total student count of 7,369 in Grades K-12. Of these students 16 were American Indian/Alaskan Native, 456 were Asian/Pacific Islander, 274 were Black, 122 were Hispanic, and 6,501 were White. Within the entire district, 691 students were eligible for free school lunch, 355 were eligible for a reduced-price lunch, and 615 were on IEPs. The student to faculty ratio was 15.5:1; the district employed 498.4 full-time teachers. SCASD was considered an urban district on the fringe of a mid-sized city.

Saxe asserted that because of his and his two wards' religion, which was unnamed in the lawsuit, they felt duty bound to speak against homosexuality and other moral issues. They contended that the new anti-harassment policy, unanimously accepted by the school board on August 9, 1999, limited their right to free speech because they feared punishment for expressing their religious beliefs.

SCASD's policy, delineated in six, single spaced pages, defines harassment as verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidation, hostile or offensive environment. (*Saxe*, 2001, p. 202)

The court found that SCASD had clearly defined harassment in the policy and that the policy did not prohibit "anything that [was] not already prohibited by law" (*Saxe*, 1999, p. 626). Thus, the court declared that the policy was "constitutionally sound" (*Saxe*, 1999, p. 627) and dismissed Saxe's complaints. However, the court did find that SCASD left out one important piece of information: the policy needed to state that the harassing behavior "must be part of a 'course of conduct'" (*Saxe*, 1999, n7, p. 626).

Mr. Saxe and the two students, unsatisfied with the court's ruling, took their case to the United States Court of Appeals for the Third Circuit in February of 2001. In the appeal Saxe sought two outcomes: to have the policy declared "unconstitutionally vague and overbroad," and to have it struck down (*Saxe*, 2001, p. 201). He was successful. The justices found the policy to be "overbroad" because the policy tried to cover too many

areas. For instance, a simple negative comment about someone could be construed as harassment according to the policy. In support of this finding, the Court noted that SCASD claimed that harassment could be

any unwelcome verbal, written or physical conduct which offends, denigrates, or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to unsolicited derogatory remarks, jokes, demeaning comments or behavior, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written materials or pictures. (*Saxe*, 2001, pp. 202–203)

Although the district court allowed the policy based on what it saw as an exception for harassment contained in the First Amendment, the Circuit Court found no such exception. The justices agreed that “non-expressive, physically harassing conduct” is clearly not acceptable under the First Amendment, but a law against harassment cannot come into play when someone simply utters a discriminatory epithet. Harassment, especially in schools, as defined by various cases, is clearly that which is “so severe, pervasive, and objectively offensive” that it keeps a student from obtaining her rightful education (*Saxe*, 2001, p. 205). The language in the SCASD policy attempted to regulate students’ speech, which clearly violates the First Amendment. The justices asserted that one cannot claim harassment based solely on insulting language or pictures (*Saxe*, 2001, p. 205). Further, the justices cited the Supreme Court ruling in *Texas v. Johnson* (1989) that the basis of the First Amendment is that the government cannot lawfully keep

someone from expressing an idea just because society may find that idea “offensive or disagreeable” (Saxe, 2001, p. 210). Thus, SCASD’s assertion that it needed the anti-harassment policy to prevent situations that the language might lead to is unacceptable and makes their policy too broad. According to *Tinker v. Des Moines* (1969), a school can only seek to limit students’ verbal expression when such expression would “substantially disrupt or interfere with the work of the school or the rights of other students” (Saxe, 2001, p. 211). The fear of disruption or the fear of upsetting someone does not allow a school to limit its students’ speech.

This case presents an interesting challenge for those interested in protecting the rights of all students, not only the right to free speech but also the right to safety and freedom from harassment. According to Calvert and Richards (2002) respectively an associate professor of communications and law and co-director of the Pennsylvania Center for the First Amendment at Pennsylvania State University, and a professor of journalism and law and founding co-director of the Pennsylvania Center for the First Amendment, the *Saxe* decision “safeguarded the ability of students in public schools to engage in discourse about religious and moral values that other students might find offensive” (p. 715). The article “Recent Cases: Constitutional Law—First Amendment” (2002a) states that the *Saxe* 2001 decision should be applauded because it reminded people that before one’s speech can be abridged, that speech has to provide a “concrete threat” that disruption will occur (p. 907). Further, the 3rd Circuit was correct to “criticize” some of the lower court’s pronouncements.

However, the same article, "Recent Cases: Constitutional Law--First Amendment" (2002a), goes on to state that the 3rd Circuit made mistakes of its own. Specifically, the article claims that the court exaggerated its "analysis" of the school's anti-harassment policy (p. 912). Second, the author believes the court, by leaving out information, did not clearly present the view of the Supreme Court concerning anti-harassment laws and free speech by making it seem the Supreme Court addressed the First Amendment in such cases when, according to the article, the Supreme Court "has consistently ignored" First Amendment defenses in these cases (p. 914).

According to the unsigned article "Recent Cases: Constitutional Law--Regulatory Takings" (2002b), appearing in the *Harvard Law Review*, the decision of the 3rd Circuit Court in deciding in favor of Saxe is "misguided" (p. 907). The article states that the Court did not view the scope of SCASD's policy in a clear manner, but accepted a "distorted" view of its possible ramifications (p. 907). Furthermore, the author accuses the Court of putting too much attention on the word *offensive* in the policy rather than the phrase *offensive environment*. Had the Court paid attention to the phrase rather than the single word, the author believes, it would have seen that the policy did clearly define its anti-harassment policy and was not overbroad in its implications (pp. 911-914). Another observation concerning the 3rd Circuit's decision came from Lynn Mostoller (2003), a law student attending New Mexico School of Law. Mostoller claimed that the Third Circuit did not reject, question, or mention the fact that SCASD attempted to protect students from harassment based on their sexual orientation. She found this omission odd

because she saw the main “thrust” of Saxe’s challenge to be this type of protection (pp. 553-554).

Finally, McCarthy (2002), a Chancellor’s Professor at Indiana University specializing in education law and policy, finds the Saxe decision “surprising” because it “departs” from what she sees as the “prevailing trend” in First Amendment cases that determine public school students’ free speech rights (p. 53). She also concludes that the 3rd Circuit Court reached a “wrong conclusion” because it relied on cases that were “not relevant to anti-harassment policies in public schools” (McCarthy, p. 63). Another “flaw” in reaching the decision, McCarthy claims, is that the court claimed SCASD’s policy “abridged students’ First Amendment rights,” but she goes on to point out that students’ free speech rights in schools are not the same as an adult’s free speech rights in society (p. 64). Furthermore, she says that the Supreme Court and other circuit courts allow restrictions on students’ speech and cited several cases as proof: *Tinker* (1969); *Bethel School District v. Fraser* (1986); *West v. Derby* (2000). McCarthy also points out that the Supreme Court has stated that courts should only use the “overbreadth doctrine” as a “last resort” (p. 69). McCarthy also states in her analysis of the Saxe case that the 3rd Circuit should have upheld the lower court’s decision in favor of SCASD’s policy (p. 70). A final criticism of the 3rd Circuit’s decision, she asserts, is that the court offered no “clear guidance” for writing a policy that may be upheld by the court (p. 71). McCarthy fears that if the 3rd Circuit’s opinion becomes a precedent for other courts, a change for the worse in the protection of students will occur. For instance, she states that many public schools have similar anti-harassment policies they may have to change. In point of

fact, she refers to Traverse City, Michigan, where the American Family Association of Michigan, because of the Saxe decision, “gave” the school district 6 months to review its anti-harassment policy which does not allow students to criticize “homosexual behavior” (pp. 70-71).

One lesson to be garnered from this case is that schools in an attempt to head off problems of student-to-student discrimination can be over zealous. Zirkel (2001) believes the language of such policies must not encroach on students’ first amendment rights (p. 176). Further, the language must also adhere to state laws; the policy should not try to define every single instance of harassment or discrimination. School districts and their supporters should not give up but be more circumspect and careful with policy language and development. As Zirkel points out, schools should not give up developing anti-harassment policies; the anti-discrimination laws require such policies (p. 176). Kevin Jennings, the executive director of GLSEN, points out that ““freedom of speech does not equal the freedom to harass, which is why anti-harassment policies remain a necessary and appropriate tool to ensure equal educational access for all”” (as cited in Fine, 2001, “Going too far?” par. 5).

Gay–Straight Alliance v. Visalia Unified School District, 2001

George Loomis’, *Gay–Straight Alliance v. Visalia Unified School Dist.* (2001), accusations provide an interesting look at teachers and administrators and their alleged failure not only to protect the students, but also their alleged part in the harassment. George attended Golden West High School, Grades 9–12, in Visalia, California. The following information describes the school during the 1998–99 school year. Golden West

was designated an urban, regular school situated on the fringe of a mid-sized city. The student body of 2,304 was composed of 1,173 male; 1,131 female; 26 American Indian/Alaskan Native; 152 Asian/Pacific Islander; 26 Black; 933 Hispanic; and 1,167 White students; 126 students in the school were designated migrant students. Six hundred fifty-eight students were eligible for a free lunch and 77 were eligible for a reduced-price lunch. The student/teacher ratio was 26.5:1 with a total of 86.8 full-time teachers.

The following summary of George's allegations comes from the published court proceedings *Gay-Straight Alliance v. Visalia Unified School Dist. et al.* and the National Center for Lesbian Rights (NCLR). George, in conjunction with the Gay-Straight Alliance Network, main offices in San Francisco with another office in Fresno, California, sued the Visalia Unified School District (VUSD) of Visalia, California, for monetary damages and changes in the District's policies regarding LGBT youth.

The suit alleged several violations on the part of the school district and its employees, and George sued the Board of Education, the superintendent, the assistant superintendent, the principal, the assistant principal, and a teacher individually as well as in their professional capacities.

George Loomis was a senior when the suit finally went to court. However, George was a student at Golden West High School in the Visalia district from 1996 until January 2000. During his junior year, 1998-99, students began to harass him because of his perceived homosexuality. He was called "faggot," "fag," "queer," "homo," and "joto" (Spanish for "homo") in front of his classmates and teachers (*Gay-Straight Alliance*, 2001, p. 1095). Often the teachers laughed along with the students and failed to

reprimand them for their behavior. One male student tormented George by rubbing George's leg in a sexually suggestive manner. Other students discussed George's perceived homosexuality out loud in science and English classes; the teachers failed to take any action to stop the inappropriate discussions. Further, the Spanish teacher, upon seeing George's earring, commented to the class that "there are only two types of guys who wear ear rings [sic] — pirates and faggots — and there isn't any water around here" (*Gay-Straight Alliance*, 2001, p. 1095). The harassment increased after this comment, and George approached the principal to tell him what the teacher had said. The principal told George he was being "inappropriate" by going over the teacher's head and that George should talk with that teacher. George did so, and asked the teacher not to repeat the comment. However, the very next week that same teacher referred to George as a "pirate" in front of the entire class and repeated the remark about the earring. Another time a teacher called George a "faggot" and as he was confronting her about a comment she had made, the Assistant Principal appeared and said "This is George Loomis and he is gay." The assistant principal continued in a mocking, high pitched voice "Well George, why didn't you say that. Why didn't you say 'My name is George and I am gay?'" (*Gay-Straight Alliance*, 2001, p. 1097).

At this point, George decided to see the school psychologist to discuss the effect of the harassment. He felt his ability to learn was being impaired. The psychologist suggested that George remove himself from full time attendance at Golden West and enroll in the Independent Study Program (ISP). Unfortunately, no one informed George, who was involved in many extracurricular activities (track, cross country, choir, student

leadership), that once he switched to the ISP he would no longer be eligible to participate in any of the extracurricular activities at Golden West. Furthermore, the ISP was meant for students in financial need and was structured so they could work 40 hours a week. George was told the school would waive the financial requirement. George also planned to attend college at the University of California, Berkeley, but when officials there learned of his move to the ISP, they refused to interview him.

After some time at the ISP, which was conducted at Golden West, George told his Principal and Assistant Principal that he no longer felt safe at Golden West and that students in the ISP called him “fag” and “faggot” and spit on him (*Gay–Straight Alliance*, 2001, p. 1097). The response was that if George did not feel safe, he ought to consider the adult school. By this time George was so worried about student and teacher abuse that he would not go to the Golden West campus and asked the principal and assistant principal to guarantee his safety or he would not come to school. Their response was that they could promise him nothing. He next attempted to meet with the superintendent, but she did not return his phone calls, and when he went to her office, he was told that she was not in but that she would get his message; she never contacted him.

By January 2000, George was diagnosed as suffering from chronic stress–related illnesses and hypoglycemia. When a story about his harassment appeared in the local paper, teachers “photocopied the article and distributed it to students” and one teacher commented “Well, we can’t talk about religion, but we can talk about this faggot boy” (*Gay–Straight Alliance*, 2001, p. 1098). George eventually stopped attending Golden West.

George filed the following five complaints: Equal Protection violations, Procedural Due Process, Substantive Due Process violations of the Fourteenth Amendment, California Education Code violations, and Unruh Civil Rights Act violations. Both parties sued for declaratory relief, injunctive relief, compensatory damages, and punitive damages.

When the case was finally resolved, George Loomis won \$130,000 and many concessions from VUSD that would benefit LGBT students in the future. According to the National Center for Lesbian Rights (NCLR) (2004), the court injunction required VUSD to perform the following:

- training for school staff, including a one-time 3 hour program, and 30 minute annual training
- training for students, including a mandatory 50 minute training
- integrating peer-to-peer education and counseling into existing programs
- revising anti-harassment policy to include real or perceived sexual orientation and gender
- providing two compliance coordinators at each school, one male and one female (although only one required for elementary schools)
- submitting an annual report
- keeping and submitting incident records. (NCLR, p. 4)

Henkle v. Gregory, 2001

Derek Henkle, *Henkle v. Gregory*, (2001), is a very bright young man, so bright, in fact, that he skipped eighth grade and moved to ninth grade at Galena High School in 1994. During Derek's time in the Washoe School District, Nevada, Derek attended three different high schools: Galena High School, Washoe High School, and Wooster High School. Galena High School, Grades 9–12, a regular school in a mid-sized city, had 981 students in 1994–95: 14 American Indian/Alaskan Native, 41 Asian/Pacific Islander, 9 Black, 118 Hispanic, and 1,199 White. Of these students, 92 were eligible for a free lunch. The student/teacher ratio was 17.4:1, and the school employed 56.5 full-time teachers. Washoe High School, 1995–96, listed as a regular school but in reality an alternative school, in a mid-sized city, encompassed Grades 7–12 and had 543 students: 17 American Indian/Alaskan Native, 15 Asian/Pacific Islander, 42 Black, 79 Hispanic, and 1,199 White. The student/teacher ratio was 12.3:1, and the school employed 44 full-time teachers. Derek also attended Wooster High School, a regular school in a mid-sized city with 1,234 students in 1996–96: 49 American Indian/Alaskan Native, 72 Asian/Pacific Islander, 43 Black, 277 Hispanic, and 793 White. Of these students, 179 were eligible for a free lunch. The student/teacher ratio was 21.6:1, and the school employed 57 full-time teachers.

Derek's allegations come from the published court proceedings, *Henkle v. Gregory* and CNN.

In the fall of 1994 Derek took part in a cable program about the experience of gay students in the local high schools. Shortly after this program aired on a local access

channel, Derek's problems began. During school hours and on school property, Derek was constantly harassed, assaulted, and intimidated because of his sexual orientation. In one incident several other males at the school called him derogatory names and then lassoed him around the neck and discussed dragging him behind one of their trucks. Derek managed to escape to a classroom where he called the assistant vice principal on a school phone. The vice principal took almost 2 hours to get to Derek. When he arrived, he "responded with laughter." Neither the vice principal nor the principal, who was also informed of the incident, took any action against the harassers (Henkle, 2001, p. 1069). On other occasions, students spit food at Derek in the school cafeteria and pushed lunch carts into his side (Hinjosa, 1999, para. 2). One time Derek was beaten so badly he bled "profusely" from his mouth, nose, and a "gouge" behind his ear; he had hoped that the school police officers would help him, but "they turned around and walked in the other direction" (Hinjosa, 1999, paras. 4-5).

At another time, during an English class, fellow students wrote the word *fag* on the whiteboard and drew "sexually explicit pictures," making sure that Derek saw them. Although the English teacher was aware of the harassment and discrimination, her only response was to tell Derek that he should keep his sexual orientation to himself. Again, despite knowledge of the incident neither the principal nor the vice principal took action against the perpetrators. In fact, even as Derek reported incidents of harassment to the principal in the main office, students ran by yelling sexual slurs and even threw a metal object at Derek, which missed him but embedded itself in the wall. And, once again,

administrators did nothing. Eventually, Derek suffered an emotional breakdown due to the stress of contending with the harassment (*Henkle, 2001, p. 1070*).

By the end of the fall of 1995, fearing further assaults, Derek requested permission to leave Galena High School. The superintendent sent Derek to Washoe High School, an alternative high school; further, the superintendent told Derek that the transfer was contingent on Derek's keeping his homosexuality secret (*Henkle, 2001, p. 1070*). This transfer, by itself, is rather strange, especially in Derek's case. Considering his intelligence, as indicated by his skipping a grade, the alternative school, usually reserved for academically low achieving and/or problem students who are having difficulty in the regular school setting, hardly seemed an acceptable place to send him. Indeed, it was not. Not only did the principal of the alternative school tell Derek on several occasions to keep secret his sexual orientation, he also told Derek to "stop acting like a fag" (*Henkle, 2001, p. 1070*). Eventually Derek requested another transfer due to the lack of educational opportunities. Washoe's principal told Derek, in response to the request, that he could not go to a traditional high school because Derek's attendance would be "inappropriate" due to his homosexuality (*Henkle, 2001, p. 1070*). However, Derek was transferred to Wooster High School, but not before being told, once again, to keep his homosexuality secret. Derek was at Wooster only a short time before his peers learned of his homosexuality, and the harassment began. Once again, he reported the incidents, and once again, nothing was done. In fact, in one incident school policemen witnessed Derek being punched and bloodied, yet they stood by doing nothing. After the attack, one of the

policemen tried to dissuade Derek from reporting the beating and from referring to it as a hate crime (*Henkle*, 2001, p. 1070).

The situation only grew worse for Derek. The superintendent and the principal of Washoe decided Derek should be sent back to Washoe, but then the principal decided he did not have room for Derek. The administrators placed Derek, then only 16, at the local community college (*Henkle*, 2001, p. 1071). At first glance this move might appear positive, but the result was that Derek could not earn a high school diploma because he was no longer enrolled in a public high school. Several years later, in 2000, Derek filed a lawsuit against the administrators both individually and in their official capacities as administrators.

In all, Derek filed 12 claims against the defendants: (1) violation of the Equal Protection Clause based on sexual orientation, (2) violation of the Equal Protection Clause based on sex, (3) violation of the First Amendment based on suppressing free speech (against individual defendants), (4) violation of the First Amendment for retaliation for engaging in protected speech (against individual defendants), (5) violation of Title IX for deprivation of educational benefits on the basis of sex (against the school district), (6) violation of Title IX for allowing peer harassment on the basis of sex (against the school district), (7) violation by Washoe County School District for violation of Title IX for deprivation of educational benefits on the basis of sex, (8) violation by Washoe County School District for violation of Title IX for allowing peer harassment on the basis of sex, (9) violation of state law tort claims for negligence, (10) negligent training and supervision, (11) intentional infliction of emotional distress, and (12)

negligent infliction of emotional distress. Derek asked for “compensatory and punitive damages from the Defendants in their individual capacities and the . . . School District, and injunctive relief from” the principal as an individual and in his official capacity (*Henkle*, 2001, p. 1071).

Judge Robert A. McQuaid, Jr., writing the opinion for the District Court, dismissed four of Derek’s claims: (1) violation of the Equal Protection Clause based on sexual orientation; (2) violation of the Equal Protection Clause based on sex; (3) violation of Title IX for deprivation of educational benefits on the basis of sex against Washoe County School District; and (4) violation of Title IX for allowing peer harassment on the basis of sex against Washoe County School District.

Next, Judge McQuaid pointed out that students are allowed to express themselves in a school setting. A school may inhibit a student’s speech if that speech will cause “substantial disruption of or . . . interference with school activities” (*Henkle*, 2001, p. 1075). Judge McQuaid found that Derek’s self-identification as a homosexual did not “substantially or materially” interfere with school activities (*Henkle*, 2001, p. 1075). Judge McQuaid also declared that Derek’s speech was protected under the constitution and that the administrators did retaliate against Derek for his speech. Not only did the administrators tell Derek to “keep quiet” about his homosexuality, but they treated Derek as the problem rather than discipline the harassers. Further, the administrators punished Derek by sending him to an alternative school and refusing his request to transfer elsewhere due to lack of educational opportunity “because he was openly gay.” The administrators also refused Derek’s request to return to Washoe High School because he

refused to hide his homosexuality (*Henkle*, 2001, p. 1075). Judge McQuaid determined that the administrators would not have treated Derek in the manner they did had he not revealed his homosexuality. Judge McQuaid further demonstrated that the Supreme Court allowed students to express their sexuality; school administrators should have known that telling Derek to keep his sexual orientation to himself was a violation of his First Amendment rights. Finally, Judge McQuaid ruled against qualified immunity for the administrators and concluded that Derek could sue for damages against the individual administrators.

However, rather than proceed to trial, the Washoe County School District in Reno, Nevada, opted for a settlement with Derek Henkle. Before he would sign the settlement, Derek demanded that the school district revise several of its policies to correct the abuse he underwent. Further, he received \$451,000, the largest pre-trial settlement "of its kind in the nation" (Lambda Legal, 2002a, para. 1).

In all, Derek brought about 18 important changes in the Washoe County School District's policies that affected students, teachers, administrators, and school police. Responding to First Amendment issues, the school district amended its rules regarding freedom of student expression; explicitly, students may reveal their sexual orientation at school and discuss issues related to it. This change and the ruling associated with it will be a vital precedent for students in gaining freedom and protection at their schools (Lambda Legal, 2002b, p. 1).

The district also improved its policy on discrimination, harassment, and sexual harassment. In all, the district made 15 changes. Not only does the policy require regular

student training about harassment and sexual harassment, but it also provides for faculty training every 2 years to help teachers not only prevent harassment and intimidation of students, but also to respond in an effective manner. The district also clarified that its ban on sex discrimination and harassment extended to students who do not meet their peers' preconceived stereotypes of gender behavior. Although the district had a policy prohibiting discrimination based on sexual orientation, it added the words "actual or perceived" (Lambda Legal, 2002b, p. 1).

Furthermore, the district improved its intervention and reporting requirements. The new requirements demand that any staff members who witness a violation of the new policy must report it immediately and take immediate steps to stop the harassment. In addition, the incident must be reported to the district's Legal Division, and if the behavior is "violent or criminal," it must also be reported to local law enforcers (Lambda Legal, 2002b, p. 2).

Also changed were the requirements for students wishing to file grievances; four changes were made in this area. Students must be told how long the grievance might take and the options available to them. Second, students must be allowed and "encouraged" to have an adult present during any part of the grievance procedure for moral support. Third, the district cannot use a student's "reluctance" to file a grievance as an excuse for inaction or for lessening the penalty. Finally, the district cannot retaliate in any way against students who file grievances or those members of the school community who support them (Lambda Legal, 2002b, p. 2).

In addition, the district made three changes to its response to harassment policy. Administrators in the Washoe School District must now take several important steps when harassment or discrimination occurs. Some of these steps involve adding more supervisors to an activity, regular observation of the victim's and the harasser's classes, regular contact with a school counselor for the victim, removal of the violator from extracurricular activities, increased parent involvement, and increased security for the victim. Second, the administrators can no longer change the victim's class schedule unless the victim specifically requests such a change in writing. Third, if the perpetrator continues to harass or discriminate, the disciplinary measures to deal with that individual must escalate (Lambda Legal, 2002b, p. 2).

Other changes concerned the school police. First, in enforcing district policies, the school police cannot discriminate based on "actual or perceived race, color, national origin, sex (including non-conformity to gender stereotypes), sexual orientation, age, disability, and religious preference" (Lambda Legal, 2002b, p. 3). Second, officers are prohibited from trying to deter someone from filing a complaint.

In reaching his settlement, Derek and his counsel made sure to remedy all the issues his original suit addressed. Interestingly enough, the school district, although paying nearly half a million dollars to keep the case out of court, admitted no wrong doing. In fact, the district spokesman claimed the district's "position is pretty clear: Any kid that walks on to one of our campuses . . . deserves to be treated with respect, free of harassment, threats, and intimidation" ("Nevada gay student," 2002, p. 11).

According to Adriano (2000), Derek Henkle's case is important for a number of reasons. The *Nabozny* (1996) case, although it set several precedents, did not deal directly with school officials' failure to act based solely on sexual orientation but failing to act based on the victim's sex. The *Henkle* (2001) case deals directly with failure to act based on sexual orientation. Further, *Henkle* (2001) is the first LGBT case to concern itself with the First Amendment; it also invoked state tort law, and demanded monetary damages (Adriano, paras. 5-8).

The two previous cases, *Saxe* (2001) and *Henkle* (2001), raise a question about the relationship between free speech and sexual harassment standards in public schools. How does a school walk that fine line of stopping harassment without violating a student's right to free speech? Can a school suppress a student's speech without violating the First Amendment? Mostoller (2003) concluded that the two standards do not overlap, but rather that a "gap" exists between them. Consequently, school administrators, in some cases, may suppress a student's speech without violating the First Amendment based on *Tinker* and other cases (Mostoller, pp. 556-558).

Snelling v. Fall Mountain, 2001

Derek and Joel Snelling, *Snelling v. Fall Mountain Regional School District* (2001), attended high school and played basketball in the Fall Mountain Regional School District (FMRSD) in New Hampshire. Both young men attended Fall Mountain Regional High School. The school changed during the Snellings' attendance from one classified as "other,"

a public elementary/secondary school that addresses the needs of students which typically cannot be met in a regular school, provides nontraditional education, serves as an adjunct to a regular school, and falls outside of the categories of regular, special education, or vocational education. (National Center for Education Statistics, 2005)

to one classified as a high school. From 1994–1996 the school included Grades prekindergarten through 12. The number of students increased each year, but the following figures are averages of 1994–95 and 1995–96 school years. The average number of students served was 566: 2 Asian/Pacific Islander students, 1.5 Black students, and 562.5 White students. Of the students, 34.5 were eligible for free lunch. The student/teacher ratio was 11.9:1 with a total of 47.5 full-time teachers. The school changed designation beginning with the 1996–97 school year to high school, housing Grades 9–12. The following numbers are averages for the latter two school years. The school served 643 students: 1 American Indian/Alaskan Native, 2 Asian/Pacific Islander students, 2.5 Black students, and 637.5 White students. Of the students, 40 were eligible for free lunch. The student/teacher ratio was 12.85:1 with 50 full-time teachers.

The following presentation of the Snellings' allegations comes from the unpublished court records. Derek entered Fall Mountain Regional High School in September 1994 and joined the basketball program. During his first year, he was teased and called names in a harsh and hateful manner by other players in front of the coaches who did nothing to stop the harassment. He was called “stiffy” because he was the only young man to take a shower after practice. He was also called “fag,” “homo,” and

“‘jew boy.’” By the time his younger brother, Joel, entered the same high school, Derek’s abusers included not only his teammates and coaches but also other students (*Snelling*, 2001, *3-*5).

By his sophomore year, Joel began to experience harassment also. He was called “‘Little Stiffy’” and “‘fag boy’” among other epithets. The name-calling and abusive behavior occurred in front of coaches who did nothing. Finally, Derek sought out the principal who told him that “‘Stiffy’ was just his nickname, which he should accept and move on” (*Snelling*, 2001, *5). In December of 1996, after the coach had made derogatory remarks to Derek and Joel, Derek approached the assistant principal who suggested Derek fill out a sexual harassment form. Derek declined citing his fear that such a move would increase the abuse he and his brother were suffering. The assistant principal met with the coach who denied making any comments, and three of the abusive students supported the coach. Nothing further was done.

However, this report incited an escalation of Derek’s abuse; during practice, in front of the coach and athletic director, another player continually bounced a basketball off Derek’s head while asking him if he were “‘sorry now.’” Neither coach nor athletic director did anything to stop the offending player, and Derek was eventually treated at a local hospital for “‘dizziness, blurred vision, and headache” (*Snelling*, 2001, *5-*7).

In March of 1997, Derek and Joel’s parents met with the superintendent who contacted the high school principal and his assistant requiring them to take the necessary steps to protect the two boys in conjunction with the law. The principal was to respond to

the superintendent in writing when he had finished. The principal did not respond to the superintendent; the superintendent did not follow up his initial memo.

In January 1998, Derek witnessed the captain of the basketball team assault another team member. At that time, another team member threatened Derek's life if he informed anyone about the incident. Derek, however, did report the incident and threat. No action was taken against the threatening player.

These types of harassment continued for both boys throughout their high school careers. Their suit alleged that they suffered lower grades due to their emotional and physical distress, injuries, and abuse. The boys also provided corroboration from friends and a parent, all of whom substantiated the boys' allegations.

The boys' suit charged that school officials and personnel violated the boys' rights under Title IX, under the Fourteenth Amendment right to due process and equal protection (U. S. C. 42, section 1983), and under a state law.

Judge Joseph A. DiClerico, Jr., did not allow the individual defendants to be sued because the harassment came from students who were not acting as officials of the state (*Snelling*, 2001, n. 6, *22). But, DiClerico found in favor of the Snellings based on the type of discrimination alleged, harassment based on the sexual orientation or perceived sexual orientation. Judge DiClerico also concluded that the harassment exceeded "mere teasing" and that a jury might find the harassment "severe, pervasive, and objectively offensive." Further, DiClerico concluded that the principal did not look into Derek's complaints and did nothing to stop the harassment, and the superintendent never followed up on his note to the principal. Thus, DiClerico ruled that school officials demonstrated

“deliberate indifference” (*Snelling*, 2001, *10–*19). Finally, Judge DiClerico dismissed the Snellings’ claim that they were denied equal protection (*Snelling*, 2001, *21–*28).

If this case resulted in any type of monetary reward or change in District policy, no mention is made. However, Judge DiClerico’s decision had several ramifications in the New England area. According to the New England Equity Assistance Center (NEEAC; 2003), the decision requires that schools safeguard their students from sexual harassment under Title IX. The Assistance Center further asserts that districts in the New England area must report any sexual harassment, student-to-student or teacher-to-student, to the appropriate state authorities. And, schools must provide the same consequences for same-sex sexual harassment as heterosexual harassment (NEEAC, Court Decisions and Legislation, para. 7).

Chambers v. Babbitt, 2001

Although this particular instance does not involve any LGBT students, it is connected to LGBT students’ struggles in middle and secondary schools because it is concerned with the rights of those students who oppose homosexuality. This particular struggle took place at Woodbury High School, an urban school located on the fringe of a large city and part of Independent School District 833 in Minnesota during 2000–01. Woodbury Senior High School, a regular school, Grades 10–12 in Woodbury, Minnesota, served 1,582 students during the 2000–01 school year: 775 male; 807 female; 8 American Indian/Alaskan Native; 92 Asian/Pacific Islander; 56 Black; 32 Hispanic; and 1,394 White. Forty-two members of the student body were eligible for free lunch and 29 for

reduced-price lunch. The student/teacher ratio was 19:1 with a total of 83.3 fulltime teachers.

The details are from the published court transcript, *Chambers v. Babbitt* (2001).

In January of 2001, Elliott Chambers wore a hand-lettered t-shirt to school which read "Straight Pride" on the front with a picture of a heterosexual couple holding hands on the back. Some students complained to the assistant principal who told Elliott he could not wear the t-shirt to school because it violated the school's dress code, which stated that "students may not wear items with unacceptable writing or graphic depictions which offend anyone or distract from the educational experience" (*Chambers*, 2001, p. 1069). The assistant principal was supported in this decision by the principal. Elliott decided to pursue legal channels to secure what he saw as his First Amendment rights. Thus, he filed a complaint against principal Dana Babbitt and the school district claiming a violation of his First Amendment right to express his religious beliefs. He wanted the court to order the principal and the district to allow him to wear his shirt to school (*Chambers*, 2001, pp. 1070-1071).

An interesting aspect of the school was its diversity policy. According to the transcript, the school had posters in the halls promoting tolerance in terms of sexuality, race, gender, and disability. In addition, teachers who felt comfortable discussing the issues had their names listed "around the school" so students might know who they could talk to if a need arose or if students wanted more information; the list began with the statement "'One goal of our school is to have a safe and respectful environment for ALL [emphasis in original] students'" (*Chambers*, 2001, p. 1070).

Judge Donovan W. Frank ruled in favor of Elliott forcing the school to allow Elliott to wear his shirt. Judge Frank asserted that Elliott had a "strong likelihood" of proving that the principal's decision to ban his shirt was "unreasonable" (*Chambers*, 2001, p. 1072). Frank further based his decision on the fact that because Elliott had been forbidden to wear his shirt for over 3 months, Elliott's First Amendment rights had been violated; principal Babbitt's decision was unconstitutional. Judge Frank concluded his decision by lauding Woodbury High School and its principal for their stand on diversity and with a warning to all:

By displaying posters and lists of staff members who are willing to talk about issues of sexuality and now race, disability, gender, and religion, the school has made a conscious and commendable effort at creating an environment of tolerance and respect for diversity. . . . Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by "Straight Pride." While the sentiment behind the "Straight Pride" message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own. (*Chambers*, 2001, p. 1073)

Finally, Judge Frank encouraged the community to resolve its issues within the community rather than let a court decide for them.

Dahle v. Titusville School Board, 2002

As Jesse Montgomery's case was proceeding in Minnesota, Timothy Dahle, was filing his own federal civil rights lawsuit in the Erie, Pennsylvania, U. S. District Court,

against the Titusville Area School District (TASD) in June of 2000. Timothy claimed his harassment began when he entered ninth grade at Titusville Junior High School in Titusville, Pennsylvania, and continued through his 10th grade year in the senior high school. The junior high school served students in Grades 6 through 9 during the school years 1994–1998. Titusville Junior High School was a regular school in a small town. The following is the 4 year average of students and faculty. The school served an average of 765.5 students: 2.25 Asian/Pacific Islander students, 2 Black students, 1 Hispanic student, and 760.5 White students. The school employed an average of 43.575 full-time teachers for a student/teacher ratio of 17.625:1. In the fall of 1998, Timothy entered Titusville Senior High School, a regular school in a small town, Titusville, Pennsylvania. The high school had 715 students enrolled: 2 Asian/Pacific Islander, 3 Black, 4 Hispanic, and 706 White. The student/teacher ratio was 16.8:1 with 42.6 full-time teachers.

Timothy and the school district settled out of court just 1 week before the trial was to begin; thus, no court records exist. As in *Lovins* (2000), not many details are available, but those that follow come from the *Erie Times–News*. Timothy alleged that from his sixth grade through his 10th grade years, 1994–1999, he suffered verbal and physical harassment due to his homosexuality: homosexual slurs, being hit, and being pushed down a flight of school stairs (Weiss, 2002, paras. 22-23). He and his parents “repeatedly complained” to school officials to no avail. Timothy claimed the school district failed to take action to halt the peer harassment. By 10th grade, Timothy was having trouble getting ready for school; he would vomit and experience physical shaking (Palattella, 2001, para. 25), and he attempted suicide (Weiss, 2002, para. 23).

The school system, on the other hand, claimed Timothy filed no complaints and, in court papers, denied the allegations. Despite their stance, the TASD agreed to settle the case out of court and pay Timothy \$312,000. According to Timothy's attorney, David Long, "nobody pays out \$312,00 unless they got caught doing something very wrong" (Weiss, 2002, para. 6).

At the time, Long believed the case would cause a "ripple effect" throughout the state's middle and secondary schools and would send the message that schools that ignore sexual orientation harassment will learn an "expensive lesson" (Weiss, 2002, paras. 7-8). This settlement is the largest published amount after *Nabozny* (1996).

Massey v. Banning Unified School District, 2003

During the 2002–03 school year, Ashley Massey was an eighth grader at Coombs Middle School, a regular, urban school on the fringe of a large city, encompassing Grades 6–8. The school served 572 students: 296 male; 268 female; 12 American Indian/Native Alaskan; 47 Asian/Pacific Islander; 73 Black; 274 Hispanic; and 146 White. The student body had 346 students eligible for free lunch and another 98 eligible for a reduced-price lunch. The student/teacher ratio was 23.8:1 with 24 full-time teachers.

Ashley's mother filed a complaint on behalf of Ashley in December 2002, against the Banning Unified School District (BUSD), *Massey v. Banning Unified School District* (2002). The following information comes from the Massey Complaint and published court records. The Massey Complaint claimed violation of Ashley's rights in three main areas: her Fourteenth Amendment right to equal access to her school classes; discrimination on the basis of sexual orientation, a violation of the California Education

Code, section 200; and her civil rights under the California Unruh Civil Rights Act. The latter act requires that anyone who violates the Unruh section must make monetary amends of not less than \$4,000 and not more than three times the actual damage. In addition, the court determines the attorney fees and adds them to the amount awarded the plaintiff. Ashley sued the school district and its administrators in their capacity as administrators and individually (Massey Complaint, 2002, pp. 1-8).

Ashley not only wanted the defendants declared guilty of violating her Fourteenth Amendment rights, but she also wanted the defendants to stop discriminating against students based on real or perceived sexual orientation. She wanted BUSD to amend its policies in the following ways: to develop new guidelines and policies for its employees for addressing sexual orientation and gender discrimination; to "require . . . annual trainings" for BUSD employees to inform them of their students' legal rights to be treated equally despite their real or perceived sexual orientation and gender, and prevention of harassment and discrimination based on real or perceived sexual orientation and gender; to require all students to attend "age-appropriate anti-bias education programs" that address the issues of diversity, homophobia, and tolerance; to instruct students about laws which prohibit harassment and discrimination based on real or perceived sexual orientation. Finally, Ashley requested a monetary award for lawyer fees, for interest, and for other relief as the court saw fit (Massey Complaint, 2002, pp. 9-10), all of which she was entitled to under California law if the court found in her favor.

The alleged violation of Ashley's rights occurred when she was an eighth grade student at Coombs Middle School in the BUSD. One day as the girls were changing after

gym class, one of Ashley's friends asked if Ashley were lesbian. Ashley replied in the affirmative. That evening, Mrs. Massey received a call from Ashley's gym teacher informing her that the gym teacher was not comfortable with Ashley in the locker room and that other girls were "uncomfortable" around Ashley (Massey Complaint, 2002, p. 4).

Mrs. Massey checked to make sure that Ashley was behaving, was using no "inappropriate" language or conduct, was doing well in gym class, and was doing what she was told. The gym teacher assured Mrs. Massey that Ashley was behaving verbally as well as physically, doing well in class, and doing what she was told. The teacher then told Mrs. Massey she would call again if any problems occurred in the future. Mrs. Massey never heard from the physical education teacher again. Yet, the next day Ashley's gym teacher told Ashley to report to the principal's office; Ashley was no longer allowed to attend gym class. This situation continued every day for a week and a half, and none of the school administrators met with Ashley or her mother to discuss the situation. Ashley was seated in full view of the student population as it passed the principal's office, and many of her friends thought that Ashley was being punished (Massey Complaint, 2002, pp. 4-5). This situation humiliated and denigrated Ashley making her feel as if she were being punished for her sexual orientation (Massey Complaint, 2002, p. 6). When Mrs. Massey inquired about Ashley's removal from gym class, she was told that the Principal had decided to keep Ashley from attending the class (Massey Complaint, 2002, p. 5). As a result, Mrs. Massey filed suit against the school and its administrators in December 2002.

U. S. District Judge Audrey B. Collins ruled against qualified immunity for the administrators. She also made clear that taking Ashley out of the class was a violation of her rights (*Massey v. Banning*, 2003, pp. 1093–94). When this case was settled, Ashley was awarded \$45,000. Further, the BUSD had to agree to amend its nondiscrimination policy to include sexual orientation and gender, and it had to provide training for its employees concerning anti-discrimination and diversity (National Center for Lesbian Rights, 2004, Resolved Cases).

Flores v. Morgan Hill Unified, 2003

The students in this case attended two different schools between 1991 and 1998: Murphy Middle School and Live Oak High School in the Morgan Hill Unified School District in California. The dates of attendance at a specific school are unrecorded. Therefore, basic demographic information for Murphy Middle School is for the 1991–92 school year and for Live Oak High School for the 1997–98 school year. Murphy Middle School had a student population of 1,005: 2 American Indian/Native Alaskan; 74 Asian/Pacific Islander; 22 Black; 277 Hispanic; and 630 White. Students eligible for a free lunch equaled 119. The student/teacher ratio was 25.1:1 with a total of 40.1 full-time teachers. The school encompassed Grades 7 through 9. Live Oak High School's student population was 1,920: 8 American Indian/Native Alaskan; 148 Asian/Pacific Islander; 55 Black; 556 Hispanic; and 1,153 White. The total number of students eligible for free lunch was 253. The student/teacher ratio was 26.1:1 with 73.5 full-time teachers. Both schools were considered regular schools. The middle school was located in a large city, and the high school was an urban school on the fringe of a large city.

Alana Flores and six unnamed youth brought suit against Morgan Hill Unified School District in 1999, *Flores v. Morgan Hill* (1999), due to events that they allege took place between 1991 and 1998 in the school district. The following allegations are taken from the court proceedings of all three *Flores v. Morgan Hill* cases (the 1999 and 2001 cases are unpublished). Three of the plaintiffs were lesbian, but whether or not the rest of the plaintiffs were LGBT or were merely perceived to be LGBT is not clear.

Nevertheless, these youth brought a sexual harassment case against their school district for failing to protect them. In all, the youth made 13 charges against the school district and its administrators for violating many areas of law: equal protection based on gender, equal protection based on sexual orientation, due process, right of privacy, conspiracy, Title IX based on sexual harassment, Title IX based on sexual orientation, California Constitution equal protection based on sexual orientation, California Constitution based on right to privacy, California Civil Code based on civil rights, California Civil Code based on freedom from violence, and Education Code based on sex discrimination.

The students claimed to have experienced verbal harassment on a daily basis, being called "faggot," "queer," "homo," "dyke," "fucking faggot," and/or "fucking dyke" in addition to verbal threats of sexual and physical violence. The youth claimed that the school officials knew of the harassment and failed "repeatedly and intentionally" (*Flores*, 2003, p. 1133) to take the proper steps to curb this harassment.

Alana alleged harassment began when she objected to a student in her high school class calling other students "faggots" (Penn, 2000). From that point on, she found herself the object of prejudice. Alana found notes in her locker, on her locker, and etched into the

outside locker door saying such things as "Die, dyke bitch" (*Flores*, 2003, p. 1133). She also found obscene and violent pictures in her locker: "a picture of a bound and gagged woman with her legs spread and her throat slashed" (Penn, 2000, para. 2). When she took these notes and pictures to her assistant principal in order to get her locker changed and repaired, the assistant principal replied "'Yes, sure, sure, later. You need to go back to class. Don't bring me this trash any more. This is disgusting'" (*Flores*, 2003, p. 1133).

One of the six unnamed youth filing suit with Flores, a young man, claimed that during middle school, while waiting for the bus, six other boys hit and kicked him while telling him "'Faggot, you don't belong here'" (*Flores*, 2003, p. 1133). The bus driver allowed the attackers on the bus and left the beaten boy at the stop ("District settles," 2004, p. 6). The young man ended up in the hospital. Following a report to his principal, only one of the six boys was reprimanded, and the injured party was transferred to another school (*Flores*, 2003, pp. 1135-1136), a punishment of the victim rather than the perpetrator. Later, when the same young man was in high school, a student in his drafting class threatened him, saying "'I want to beat you up after class, but I need a baseball bat to hit you with so I won't get AIDS'" (Penn, 2000, para. 10). The teacher did nothing, and the victim felt forced to drop the drafting class rather than suffer the threats and possible physical abuse. When two of the girls began dating, they had items thrown at them, anti-gay slurs yelled at them, and obscene things said about them. The teacher they told did nothing and suggested that the girls should change clothes some place other than the locker room so that their "'classmates would not feel uncomfortable'" (*Flores*, 2003, p. 1133). When these girls were walking in the school parking lot, boys yelled obscene

comments and threw cups filled with liquid at them. The girls reported the incident to the campus police officer who responded that such incidents were ““inevitable”” and did nothing (Penn, 2000, para. 8). The next student, a female, endured being called “dyke” and “queer” on a daily basis, having fruit thrown at her, having false sexual stories spread about her, and receiving obscene items and solicitations. The third and fourth students filed together. They were called “faggots” and “dykes,” had objects thrown at them, and received unwanted and vulgar solicitations by males.

The Court dismissed the first suit, brought in 1999, against the school board because the youth gave no convincing evidence that members of the school board knew about the ongoing harassment. The Court also rejected several of the charges, specifically the following: violation of equal protection based on sexual orientation, violation of the right to due process, violation of the right to privacy, conspiracy, violation of Title IX, and violation of the Education Code barring sex discrimination. The latter was dismissed against the individual administrators only.

The only claim on which the 1999 Court found for the plaintiffs was sexual orientation discrimination. The Court felt that the young men and women bringing the suit had provided strong enough evidence that would enable a jury to find the defendants guilty of failing to take quick and effective action to stop the harassment and discrimination, leaving the administrators open to a charge of discrimination based on sexual orientation (*Flores*, 1999, *22-*23). Thus, on these charges the defendants did not receive a summary judgment in their favor.

The Court recognized the claim on the part of one of the plaintiffs for violation of the right to privacy. Because one of the administrators asked unnecessary questions, such as was the young lady a virgin, had she ever had sex with a girl or a boy, with whom had she had sex, and was she "tired of being with girls," the Court found that a jury might hold the administrator in question liable (*Flores*, 1999, *25).

In October of 2000, the defendants in the case filed with the United States Court of Appeals for the 9th Circuit, *Flores v. Morgan Hill Unified* (2001). They asked for judgment in their favor in connection with the charge of failure to provide equal protection for the plaintiffs and also because they should have been granted qualified immunity. The Appeals Court responded that a recent U.S. Supreme Court case required district courts to analyze, "in the light most favorable to" the plaintiffs, whether the actions of the administrators showed "intentional discrimination on account of their actual or perceived sexual orientation" (*Flores*, 2001, p. 648). The Court concluded that the district court did not do such an analysis and sent the case back to the district court.

The district court performed its analysis and again refused to grant the administrators a summary judgment in their favor or qualified immunity

The final proceeding to date in the *Flores*' case was filed April 8, 2003. Once again, the defendants filed an appeal with the 9th Circuit claiming that the plaintiffs should not be allowed to sue them individually because the administrators were entitled to qualified immunity. Further, the defendants claimed that no clearly established law protecting students from peer harassment existed at the time the alleged incidents took place.

The 9th Circuit Court of Appeals declared that the administrators were not entitled to qualified immunity, that enough evidence existed to suggest that a jury would find that the administrators were deliberately indifferent to the youth in question, and that a clearly established law protecting students from peer sexual orientation harassment did exist at the time the alleged harassment took place. The 9th Circuit Court cited *Nabozny* among their case precedents. The Court found that a jury could logically decide that all the defendants had shown deliberate indifference to the suffering of the students involved in the case.

Because the defendants lost both of their appeals, the plaintiffs were able to take their case to court, but according to "District Settles" (2004), Morgan Hill Unified School District offered a settlement in an attempt to save money. The students shared \$1.1 million, and the district had to institute sensitivity training (p. 5). The article further claims that if the case had gone before a jury and the students had won, the school district would have incurred attorney fees of approximately \$3 million (p. 6) in addition to any recompense the jury might have awarded the students. The sensitivity training had to include all administrators, teachers, counselors, and employees who oversee student behavior. Further, the settlement directed the school district to alter its nondiscrimination policy to include sexual orientation and gender identity, to specifically train seventh and ninth grade teachers to prevent LGBT harassment and discrimination. The district also had to agree to change its policies and student handbooks so the language clearly stated that not only district policies but also state law "expressly prohibited" any type of harassment or discrimination based on perceived or actual sexual orientation or gender

identity. Finally, the district agreed to maintain written records of all anti-LGBT discrimination and harassment (NCLR, 2004, p. 2).

Wang (2004), a senior law student at Tulane, believes this case is important because it establishes the idea that LGBT students are entitled to equal protection of their rights, that this idea is “well entrenched” in the U. S. judicial system, and that it informs administrators in public schools that antigay discrimination “may violate the Constitution” (p. 761).

McLaughlin v. Board of Education of the Pulaski County Special School District, 2003

Thomas McLaughlin attended Jacksonville Junior High School, Grades 8 and 9, in Jacksonville, Arkansas, during the 2002–03 school year. The school is listed as a regular, urban school on the fringe of a mid-sized city. The total student count was 640: 299 male; 341 female; 2 Asian/Pacific Islander; 269 Black; 10 Hispanic; and 359 White. Forty-four students were eligible for free lunch. The student/teacher ratio was 14.5:1, and the school employed 44 full-time teachers. Although the name of the school is “Junior High,” its level is listed as “other.”

According to Thomas McLaughlin’s published court proceeding, *McLaughlin v. Pulaski*, Thomas alleged that he suffered the following discriminations. In November of 2002 then ninth-grader Thomas McLaughlin was stopped by his choir teacher, Ms. Blann, to inquire if he were gay. When Thomas responded yes, Ms. Blann began quoting scripture at him so he would, presumably, know what a sinner he was. A few days later Ms. Blann informed Thomas that he was not to discuss his homosexuality because she found such talk “sickening” (*McLaughlin*, 2003, p. 963). She further threatened Thomas

with removal from the upcoming choir competition because his homosexuality would reflect badly on the boys' choir and might be the cause of other students being attacked and beaten (*McLaughlin*, 2003, p. 963). This incident was not the end of Thomas' ordeal. Within just a couple of days another of his teachers stopped him outside of class to call him "abnormal" and "unnatural." When he tried to defend himself against Ms. Derdon's verbal assaults by discussing the issue, she filed a disciplinary complaint and sent him to Vice Principal McGhee's office, where Thomas was once again preached to about his homosexuality. On that same day, Thomas found himself called into Assistant Principal Sharon Hawk's office, where he was told that he was responsible for several beatings another boy named Thomas received because he had been mistaken for Thomas McLaughlin. She also informed Thomas that his younger brother might not be safe because of Thomas' openness.

Thomas' mother then visited the administrators, informed them that Thomas did indeed have the right to discuss his homosexuality at school during non-instructional time and presented them with a copy of *Tinker* (1969). However, her efforts were fruitless as within just a few days, Ms. Derdon requested a meeting with Mrs. McLaughlin and the school administrators to complain that Thomas' discussion of sexual orientation at school was "inappropriate." All the administrators agreed (*McLaughlin*, 2003, p. 963).

A few months later, in February of 2003, Thomas and another student were discussing his suspension from school for talking about his sexual orientation and his being forced to read the Bible. Yet another parent conference was called by teachers and administrators at which Ms. McLaughlin was informed that Thomas not only could not

discuss his sexual orientation, but he could not discuss suspensions as that discussion would “disturb other students” (*McLaughlin*, 2003, p. 963).

On April 8, 2003, Mrs. and Mr. McLaughlin filed suit on behalf of their son Thomas against the Board of Education of the Pulaski County Special School District and its administrators. Joining the McLaughlins were the American Civil Liberties Union (ACLU) and the Arkansas Department of Human Services. Thomas sought not only financial recompense but also a court order forcing the District to stop infringing on his rights. Specifically, Thomas’ suit alleged the following violations: Thomas’ First Amendment right to free speech, the McLaughlins’ right to parental “autonomy” guaranteed by the Fourteenth Amendment, the equal protection clause, and Thomas’ constitutional right to privacy.

The court’s decision, written by Judge Farnett Thomas Eisele, stated that Thomas was not advocating that he or any other students be allowed to engage in obscene or sexually explicit discussions at school. Furthermore, the defendants, according to Eisele, had submitted no information to indicate that they disagreed with Thomas’ view of events. School officials only submitted their District Policy, which states in part that “the rights of students to express opinions and to support causes without interference from school authorities except when such actions are unlawful or disruptive to the learning process” will not be infringed. Judge Eisele claimed to be somewhat at a loss because the defendants had not submitted reasons for abridging Thomas’ protected First Amendment rights, under *Tinker*, at school. Eisele continued that Thomas was not contesting the constitutionality of the District’s policy but the constitutionality of its

enforcement. Judge Eisele concluded that the Defendants must either “make a clear, voluntary commitment that they will not prohibit Thomas McLaughlin from engaging in speech which discloses or concerns his being gay or concerns past discipline he has received” or they must state why Judge Eisele should not issue a preliminary injunction against the school (*McLaughlin*, 2003, p. 964).

Thomas was able to settle his lawsuit with the district. Although the district admitted no liability, it did pay Thomas and his parents \$24,500, and it agreed not to “discipline students for disclosing or discussing their sexual orientation” (“Recent Rulings Favor,” 2004).

Doe v. Bellefonte Area School District, 2003

“John Doe” attended Bellefonte Area High School for 4 years beginning with the 1999–2000 school year. The following demographics are an average of the information available for the 4 school years. The average number of students in the school for the 4–year period was 928.5: 2.25 Asian/Pacific Islander, 5.25 Black, .5 Hispanic, and 920.5 White. A total of 106.5 students were eligible for free lunch and 60.5 additional students for reduced–price lunch. The student/teacher ratio was 14.1:1, and the school employed a total of 65.8 full–time teachers.

The struggles described in *Doe v. Bellefonte* occurred in the Bellefonte Area School District, Pennsylvania, over a period of 4 years. The young man who brought the lawsuit is known only as “John Doe,” and the situations come from the unpublished transcript.

"John Doe" was a student in the Bellefonte School District's high school from the fall of 1999 until the spring of 2003. During those school years "John Doe" suffered several instances of sexual harassment at school. The facts of the case were not in dispute by either side. "John Doe" was called, at various times by various students such names as "'fairy,' 'pixie,' 'gay,' 'fag,' 'faggot,' and 'peter-eater'" (*Doe v. Bellefonte*, 2003, *6-*14). However, his case is quite different from Jamie Nabozny's and some of the other LGBT students who suffered sexual harassment. First of all, "John Doe's" school district had in place "school-wide, comprehensive measures to deal with sexual harassment" including a "zero-tolerance policy . . . in effect at all relevant times" (*Doe v. Bellefonte*, 2003, *23). Second, "John Doe" did not report all instances of sexual harassment. Third, when "John Doe" did report a problem, the principal immediately spoke with the offender, applied the stated punishment, and alerted all "John Doe's" teachers in writing to be aware of the situation and to watch for further problems. Fourth, "John Doe" never had a second problem with any of his harassers once the principal took action. However, "John Doe" filed a lawsuit against his school district for violation of Title IX (*Doe v. Bellefonte*, 2003, *6-*26).

U. S. District Judge Malcolm Muir ruled in favor of the Bellefonte Area School District. He did find that "John Doe's" suffering was pervasive and severe, thus meeting the qualifications in *Davis v. Monroe* (1999) for bringing Title IX into play. However, Judge Muir could find no reason by which to conclude that the school district had been negligent or indifferent to "John Doe's" suffering. The principal had, at all times,

followed the pre-established and published guidelines, and the perpetrators never again bothered "John Doe."

Hansen v. Ann Arbor Board of Education, 2003

This case is very different from the majority of those presented in this chapter; in fact, it aligns more closely with *Saxe* (2001). In this instance a female high school student was not allowed to participate in an Ann Arbor high school's Diversity Week celebrating diversity because her viewpoint did not align with the view of the celebrants. As a consequence, this young woman, Elizabeth Hansen, took her struggle to court for resolution. The facts of this case, which are undisputed, come from the published transcript *Hansen v. Ann Arbor Public Schools, 2003*.

Elizabeth attended Pioneer High School during the 2001–02 school year when she faced her struggle. The high school, Grades 9–12, was a regular school located in the mid-sized city of Ann Arbor, Michigan. The school served 2,596 students: 1,306 male; 1,290 female; 13 American Indian/Native Alaskan; 169 Asian/Pacific Islander; 343 Black; 81 Hispanic; and 1,990 White. One hundred eighty-seven students were eligible for free lunch with another 40 eligible for reduced-price lunch. The student/teacher ratio was 20.7:1, and the school employed 125.2 full-time teachers.

Every year for approximately 10 years, Pioneer High School had held Diversity Week. The 2001–02 school year was not different; Diversity Week was again on the schedule. Usually, student council was in charge of the panel discussion, but because the students were overworked, they asked other groups for assistance; the school's GSA offered to organize the sexual orientation panel. The GSA decided to change the panel

from a discussion of sexual orientation to one entitled "Religion and Homosexuality." This panel included local Ann Arbor clergy sympathetic to sexual orientation matters, explaining how religion and sexual orientation meshed rather than clashed with each other. During the planning of Diversity Week, Betsy Hansen, a member of a group called Pioneers for Christ (PFC), told the student leader of the GSA that she wanted to be a part of the panel dealing with homosexuality and religion. Some of the GSA members thought a different viewpoint on the panel would be interesting. However, as plans proceeded, the faculty advisors, two openly gay men, thought that Betsy's appearance on the panel would not be a good idea because they felt that too often people were presented with a negative view of sexual orientation through religion. In the meantime, Betsy had requested that her parish priest also be on the panel, and she was granted permission. Betsy was not given a deadline for affirming his appearance, and, indeed, she had not secured his attendance.

After checking with a school lawyer, those in charge of Diversity Week learned that they could not bar Betsy from the panel. After much discussion, the advisor in charge of Diversity Week decided to cancel the "Religion and Homosexuality" panel. But, the panel got reinstated shortly before Diversity Week began, leaving Betsy with not enough time to secure her parish priest's attendance. The faculty advisor then offered Pioneers for Christ an opportunity to have their own panel; however, PFC declined because they did not have enough time to organize a panel discussion. In order to somewhat soothe Betsy, the faculty advisor in charge of Diversity Week offered Betsy the opportunity to speak at the general session held at the opening of the week. Betsy was going to deliver a

speech entitled "What Diversity Means to Me." Betsy wrote her speech, submitted it for approval, but had parts deleted by the principal and assistant principal before they would approve it. The deleted parts expressed Betsy's religious attitude toward homosexuality, which was in opposition to the GSA's panel's view.

As a consequence, Betsy and her parents, Constance Hansen and Ralph Martin, filed suit against Ann Arbor Public Schools, the principal and assistant principal of Pioneer High School, the two teachers in charge of the GSA, and the school's Equity Ombudsman, all in both their official capacities and as individuals. Betsy's suit claimed violation of her First Amendment right to speech, violation of the First Amendment's Establishment Clause, violation of the First Amendment's Free Exercise Clause, and violation of the Fourteenth Amendment's equal protection clause. Joining their daughter's suit, Betsy's parents claimed that the school had violated their rights as parents to control the religious upbringing of their daughter. Ann Arbor Public Schools et al. requested qualified immunity.

After citing many precedents as the basis for his decisions, U. S. District Judge Gerald E. Rosen ruled in the following manner. He refused to grant qualified immunity. Next, he ruled that the school and its administrators and its teachers had violated Betsy's First Amendment right to free speech by not allowing her to voice her opinion during Diversity Week. Rosen also ruled that the school, et al. violated the Establishment Clause because the GSA's panel was composed entirely of religious leaders with only one point of view regarding homosexuality. Rosen further ruled that the school, et al., had violated Betsy's right to equal protection because they refused her the opportunity to present her

view but allowed the GSA to present its view. The Judge did not find any violation of the Free Exercise Clause because Betsy had not been forced to change her beliefs or her views. Finally, Judge Rosen ruled that no violation of the parents' right to control the religious upbringing of their daughter existed. He clarified that attendance at Diversity Week was not required nor was attendance at any of the panels (*Hansen, 2003, pp. 792–815*).

Finally, Betsy and her parents did not seek a large sum of money; thus, Judge Rosen ordered Ann Arbor Schools, et al. to pay the damages and Betsy's lawyers. He did grant the defendants the right to object to any of the fees and costs according to court rules and state statutes. Any monetary settlement is unknown.

Judge Rosen also took the opportunity to make the point that this case was not "about intolerance towards homosexuality or the appropriateness, religiously or otherwise, of different lifestyles. . . . [but] about tolerance of different, perhaps 'politically incorrect,' viewpoints in the public schools" (*Hansen, 2003, p. 783*).

Schroeder v Maumee Board of Education, 2003

Matthew Schroeder, younger brother of a gay young man, spoke out about gay rights beginning when he was in fourth grade at Fort Miami Elementary School, Maumee, Ohio, and continued when he attended Gateway Middle School also in Maumee. During Matthew's sixth and seventh grade years at the middle school, he suffered the greatest degree of harassment that led to his lawsuit. No specific years indicating Matthew's sixth and seventh grades at school are stated in the lawsuit, but based on his age at the time of the final decision, 15, and the fact that he "filed his case

over three years” (*Schroeder*, 2003, p. 873) previous to its conclusion, one might conclude that Matthew was in sixth and seventh grades from 1999 through 2001. During those years, Gateway Middle School, a regular, urban school located on the fringe of a large city, had an average student body of 689.5: 358 male; 331.5 female; 1.5 American Indian/Native Alaskan; 5.5 Asian/Pacific Islander; 19 Black; 6 Hispanic; and 657.5 White. The student body had 35 students eligible for free lunch and an additional 28.5 eligible for reduced-price lunch. The student/teacher ratio was 10.3:1, and the total full-time faculty was 70.45. The Maumee Board of Education and Gateway Middle School had “a sexual harassment policy prohibiting all forms of sexual harassment” (*Schroeder*, 2003, p. 872).

Matthew’s allegations come from the published transcript of *Schroeder v. Maumee Board of Education* (2003). Matthew claimed three violations of his guaranteed rights: the Fourteenth Amendment’s guarantee to equal protection, the First Amendment’s guarantee to free speech, and Title IX’s guarantee to an education. He filed suit against the Maumee Board of Education and its superintendent; he also filed against the principal and vice principal of Gateway Middle School as individuals and in their professional capacity (*Schroeder*, 2003, p. 870).

Matthew, who believed that he suffered harassment because he spoke in favor of gay rights and because he was perceived to be homosexual himself, alleged many instances of harassment. In fourth and fifth grades, Matthew was called names, jumped on, hit and kicked resulting in a trip to the hospital. When he entered middle school, the harassment “escalated” (*Schroeder*, 2003, p. 871). Matthew alleges that he told his

middle school principal, Mr. Conroy, about the harassment which continued despite Matthew's reporting it. When Matthew next informed the principal of harassment, Conroy asked Matthew which of his brothers was gay and then asked him "so are you a fag, too?" (Schroeder, 2003, p. 871). Conroy then told Matthew that he could "learn to like girls. Go out for the football team" (Schroeder, 2003, p. 871). Another time, Matthew claims Conroy told him that he wouldn't get into so much trouble if he would "shut his mouth about gay rights" (Schroeder, 2003, p. 871).

Matthew claimed that when he was harassed, he tried not to respond or fight back, but admitted that on occasion he did respond verbally, and when he was hit he sometimes punched back. On one occasion, a harasser hit Matthew while another told him "hat's what you get, you little fag" (Schroeder, 2003, p. 871). Another time, when Matthew was in seventh grade, he was beaten by two older students who "slammed" him head first into a toilet, chipping a tooth, while calling him a "little faggy queero," a "bitch," and being told by one boy "I'm going to kill you. I'm going to beat the living shit out of you" (Schroeder, 2003, pp. 871-872). When Matthew reported this last incident, he was the one who suffered disciplinary measures rather than the attackers (Schroeder, 2003, p. 872). Another time Matthew claimed that the vice principal witnessed other students calling Matthew names and beating him, but the vice principal did nothing and failed to discipline those involved (Schroeder, 2003, p. 873).

The Maumee School Board, the superintendent, the principal, and the vice principal of the middle school asked to have the case dismissed. Judge James G. Carr cited many cases as precedents in determining his ruling; he included among those

precedents previous LGBT cases: *Nabozney* (1996), *Montgomery* (2000), and *Flores* (2003). Judge Carr's final decision addressed each of Matthew's charges. First, the judge declared that Matthew had a reasonable chance of convincing a jury that his Fourteenth Amendment right to equal protection had been violated by his administrators at the middle school because they were deliberately indifferent due to their belief that Matthew was homosexual. However, the judge exempted the Maumee Board of Education and its superintendent from this charge (*Schroeder*, 2003, p. 873). Second, Judge Carr dismissed Matthew's First Amendment claim. He believed that Matthew had not demonstrated that school officials were deliberately indifferent because they did not like him speaking about gay rights. Third, Judge Carr allowed the Title IX claim to stand because he felt Matthew provided enough evidence that a jury might find that he "suffered severe, pervasive, and objectively offensive harassment" (*Schroeder*, 2003, p. 879). Also, Carr said that Matthew presented evidence that he was discriminated against because of perceived sexual orientation and administrators failed to take steps to stop the harassment. Judge Carr cited as an example that Matthew had been disciplined for calling a girl a "lesbian" and a "slut" but others were not disciplined for calling Matthew a "fag" a "queer" or shoving his face against a bus window and being told "kiss it, you little fag. Kiss it" (*Schroeder*, 2003, p. 880).

Judge Carr allowed Matthew to take his grievance to trial; however, whether or not Matthew went to court or settled with those involved is not clear. According to "Sexual Harassment Evidence" (2004) this case shows that homosexuals and those

perceived to be so are “members of a protected class and can bring an equal protection lawsuit if they are discriminated against” (What it means).

Natalie Young, 2004

During the 2001–02 school year, Natalie (Nicky) Young, a lesbian and star basketball player, attended MS 210 E. Blackwell Middle School in Queens, N.Y., encompassing Grades 7 and 8. At that time the school, a regular school located in a large city, New York City Public Schools, served 2,069 students: 1,049 male; 1,020 female; 4 American Indian/Native Alaskan; 534 Asian/Pacific Islander; 404 Black; 942 Hispanic; and 185 White. The student body had 1,564 students eligible for free lunch and an additional 294 eligible for reduced-price lunch. The student/teacher ratio was 23.8:1, and the total full-time faculty was 86.8.

Nicky’s allegations are detailed in *Gay City News*, *Newsweek*, and the *New York Blade*. She asserts that she suffered years of harassment in her school district, back to elementary school. A student stole her book bag, but administrators did nothing about the theft. On another occasion, Nicky wore gay pride beads, a necklace with colored beads, to school. She claims a dean chased her down a hall and told her she had to take them off because they could be used as a weapon (Spence, 2003). Another time a teacher told her ““Your mother is gay and that’s why you’re gay””; Nicky’s mother is heterosexual (Meenan, 2003). During seventh grade, other students called Nicky a ““dyke”” and she would go home in tears daily (Meenan, 2003). Nicky felt she had no one to talk to and even contemplated suicide (Meenan, 2003). Although Nicky’s mother asked the principal for help, he provided none. However, Nicky found a school safety officer in whom she

could confide; this person talked her out of committing suicide (Spence, 2003).

Eventually, Nicky was put in touch with a youth support group.

On April 10, 2002, shortly after one of Nicky's teachers said "all gays and lesbians are going to go to hell," (Spence, 2003) she decided to wear a t-shirt to school which said "Barbie is a Lesbian" (Juarez, 2004). When her math teacher saw the t-shirt, he reported it to the office and an assistant principal came and took Nicky from class. Nicky alleges the principal said "'I can't let you go through the school day with that shirt on'" (Meenan, 2003). The principal called Nicky's mother who arrived with a local news team, and Nicky was sent home (Meenan, 2003), but not before she was told that she "would be suspended again if she ever returned to school in the T-shirt" (Spence, 2003).

Nicky filed a lawsuit in Manhattan Federal Court on June 19, 2003. She alleged that her First Amendment right to freedom of speech had been violated (Spence, 2003). Furthermore, the suit requested that the Board of Education provide a dress code for students and that faculty and staff at MS 210 be given sensitivity training (Meenan, 2003). Her lawyer concluded that if Nicky had worn a t-shirt saying "'Barbie is a Christian'" to school, "'no one would have been upset'" (Spence, 2003).

Whether the suit actually went to trial or not is not clear, as I was unable to find any published or unpublished court records. However, the New York Department of Education settled the suit with Nicky in 2004, paying her \$30,000 in the only case of its type, up to this time, to have a monetary settlement (Juarez, 2004). Furthermore, the Department of Education admitted no guilt, but instead provided a copy of the current dress code which stated that students have the right to "'wear political or other types of

buttons, badges, or armbands, except where such material is libelous, obscene, or materially disrupts the school, causes substantial disorder, or invades the rights of others” (Torres, 2004).

Doe v. Perry Community School District, 2004

“John Doe’s” struggle took place during the 2003–04 school year at Perry High School, a regular, urban school located on the fringe of a mid-sized city. The latest statistics available for the school come from the 2002–03 school year. The school served 569 students: 324 male, 245 female, 2 American Indian/Native Alaskan, 7 Asian/Pacific Islander, 10 Black, 137 Hispanic, 413 White, 63 migrant students. The student body had 134 students eligible for free lunch and an additional 50 eligible for reduced-price lunch. The student/teacher ratio was 12.6:1, and the total full-time faculty was 45. In comparison, the average for the 5 previous school years, 1998 through 2003, are as follows: 578.6 students: 322.4 male; 256.2 female; 1 American Indian/Native Alaskan; 6.8 Asian/Pacific Islander, 8.6 Black; 103.6 Hispanic; 458.6 White; and 54.4 migrant students. The student body had 122.6 students eligible for free lunch and an additional 44.6 eligible for reduced-price lunch. The student/teacher ratio was 13.68:1, and the total full-time faculty was 42.38. These figures do not indicate a major change for the 2003–04 school year.

In this situation “John Doe,” a senior at Perry High School in the Perry Community School District, Perry, Iowa, requested that the court force his school to protect him from harassment, to allow him to speak out against harassers without punishment, and to keep the local police from arresting him. Further, Doe also filed a

complaint alleging several violations of his rights: violation of the First Amendment's guarantee to free speech, violation of the Fourteenth Amendment's guarantee to equal protection and due process, violation of Title IX, false arrest, and irreparable harm. Doe's allegations come from the published transcript of the court proceeding, *Doe v. Perry*, 2004.

At the time of this proceeding, Doe was a high school senior. He was currently being taught at home, but wished to return to his high school for the last few weeks of his senior year. However, he felt he could not return to school if his administrators would not guarantee his safety. In fact, as a safety measure, the school district was allowing him to finish his studies at home and providing him with a tutor.

"John Doe" claimed that for a period of 3 years he suffered various types of harassment, verbal and physical, due to his perceived homosexuality. This particular court proceeding concerned Doe's request that the court take action against the school district, its administrators, and the Perry police. District Court Judge James E. Gritzner had to decide if the case merited the court's intervention. In determining his ruling, the judge reviewed the background of Doe's situation.

Doe's harassment was not unlike that suffered by the LGBT students in previous cases. Students called him names such as "'queer,'" "'homo,'" "'pussy,'" and "'faggot'" (*Doe*, 2004, p. 815). On one occasion, a wrestling teammate grabbed Doe's cell phone and typed "'Huge Homo'" on the opening screen (*Doe v. Perry*, 2004, p. 816). Doe's locker had also been "vandalized" with anti-gay sentiments. Further, Doe had been threatened with and been the object of physical violence at school. Other students had

pushed him into lockers and one young man urinated on Doe in the shower. In an attempt to halt this harassment and keep himself out of trouble, Doe consulted the local police officer assigned to the school as a Resource Officer. The officer's response was that Doe had two choices: ignore the comments or confront the students in the presence of others. Doe asked if he should take action if someone hit him, and the officer replied that Doe should "just stand there and let him hit you" (*Doe v. Perry*, 2004, p. 817). Later, students told Doe that a particular student had made derogatory comments about him, so Doe decided to confront the student. The other student told Doe he would "fuck you up anytime," called him a "fucking fag," and walked away. Doe followed this student to the student's locker and confronted him. The response was more anti-gay verbal abuse. As Doe began walking away, the other student pushed him. Doe pushed back, the other student slugged him, and Doe hit back. A scuffle ensued. A teacher witnessed the fight, intervened, both students suffered "minor injuries" (*Doe v. Perry*, 2004, p. 818).

Both boys were punished with a 3-day out of school suspension, and both were arrested by the Resource Officer on charges of disorderly conduct. At this point Doe and his parents filed their suit.

Judge Gritzer's responsibility was to rule whether or not the court would require the school district and its administrators to acquiesce to Doe's demands. Gritzer's final ruling was against Doe in all his requests. Judge Gritzer found that the punishment Doe received was for fighting, a violation of school policy, not for speaking out against anti-gay comments. Nor could Gritzer find any evidence that school officials had tried to keep Doe from speaking out against harassment. Gritzer also believed that Doe would not have

a very good chance of convincing a jury of the violation of his right to speech. Thus, Judge Gritzer ruled that Doe's First Amendment right to freedom of speech had not been violated.

On the second claim, violation of Doe's right to equal protection and due process, the judge again found little chance that Doe would be able to convince a jury that these rights had been violated. In determining his ruling in this instance, Gritzer turned to *Nabozny* (1996) and *Montgomery* (2000), among others, for precedents on which to base his decision. In Jamie's case the judge found the suffering lengthier and more severe and the attitude of the administrators "much more egregious" (*Doe v. Perry*, 2004, p. 830). Gritzer also found that Jamie had presented "compelling evidence" which Doe had not, and that Jamie's administrators had made an exception when dealing with Jamie's problem. Although Judge Gritzer felt that Doe had made "credible assertions" about his suffering over three years, Gritzer asserted that the Perry School administrators were not "totally lacking" in their reaction as Jamie's had been (*Doe v. Perry*, 2004, p. 831). In fact, Gritzer cited the fact that school officials had attempted to keep Doe from harm in several ways. Thus, Gritzer ruled again that Doe would have a hard time convincing a jury that his rights to equal protection and due process had been violated.

The only remaining item Judge Gritzer had to consider to render his decision was the false arrest accusation. In this instance, the judge found once more that Doe would have a difficult time convincing a jury that he was falsely arrested.

Thus, Judge Gritzer declined to grant Doe's request. Whether Doe continued his suit against Perry Community Schools and the administrators of the high school is not clear.

Harper v. Poway Unified School District, 2004

Tyler Harper attended Poway High School in Poway, California, Grades 9–12. It is a regular, urban school located on the fringe of a large city. Tyler's struggle took place during the 2003–04 school year. The latest statistics available for the school come from the 2002–03 school year. The school served 3,124 students: 1,588 male; 1,506 female; 14 American Indian/Native Alaskan; 262 Asian/Pacific Islander; 63 Black; 327 Hispanic; and 2,428 White. The student body had 169 students eligible for free lunch and an additional 42 eligible for reduced-price lunch. The student/teacher ratio was 24.7:1, and the total full-time faculty was 126. In comparison, the average for the 5 previous school years, 1998 through 2003, are as follows: 3,306.6 students: 1,689.4 male; 1,605 female; 17.2 American Indian/Native Alaskan; 281.6 Asian/Pacific Islander; 49.8 Black; 348.6 Hispanic; and 2,641.8 White. The student body had 182.2 students eligible for free lunch and an additional 70 eligible for reduced-price lunch. The student/teacher ratio was 24.74:1, and the total full-time faculty was 133.76. These figures do not indicate a major change for the 2003–04 school year.

This case is similar to *Chambers* (2001), but the outcome is different. The summary of the proceedings is taken from the published transcript *Harper v. Poway Unified School District*, (2004). Tyler Harper, a Christian, was a student at Poway High

School when he learned that the school was going to observe a “Day of Silence”; he decided to protest. A “Day of Silence” is

a student-led day of action where those who support making anti-LGBT bias unacceptable in schools take a day-long vow of silence to recognize and protest the discrimination and harassment — in effect, the silencing — experienced by LGBT students and their allies. (Day of Silence, 2005)

During the “Day of Silence” the previous year at Poway High School, several confrontations and “altercations” took place between students, and Tyler was aware of them (*Harper v. Poway*, 2004, p. 1120).

As a Christian opposed to homosexuality, Tyler felt the day “‘endorsed, encouraged, subsidized and promoted’ homosexual activity” (*Harper v Poway*, 2004, p. 1099). Therefore, he wanted to protest and did so for 2 consecutive days by wearing a hand-lettered t-shirt. On the designated “Day of Silence” Tyler’s shirt read “‘I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED’” on the front and “‘HOMOSEXUALITY IS SHAMEFUL Romans 1:27’” on the back. On the second day, his shirt said “‘BE ASHAMED’ ‘OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED’” on the front, and the same message as before on the back (*Harper v. Poway*, p. 1100).

On the second day, one of Tyler’s teachers told him to remove the shirt or report to the school office. Prior to this request, the teacher had become aware that Tyler’s shirt was causing classroom disruption (*Harper v. Poway*, 2004, p. 1120). Tyler reported to the office where one vice principal informed Tyler that he had violated the dress code

because the t-shirt had a hand-lettered message rather than a printed one. She also told him that the t-shirt message was “inflammatory,” and that he needed to remove the shirt if he wanted to finish the school day. Tyler declined. The principal then spoke with Tyler to inquire why he had worn the shirt on both days and to tell him that the message was “too aggressive” (*Harper v. Poway*, 2004, p. 1100). At one point, Tyler told the principal that the t-shirt had resulted in a “tense verbal conversation with a group of students” (*Harper v. Poway*, 2004, p. 1120). The principal then informed Tyler that he would have received the same punishment whether the message had been homemade or pre-printed. Because Tyler refused to remove the shirt, he was confined to the office. During his confinement, another vice principal spoke with Tyler, and explained that he, the vice principal, was also a Christian, but when he came to school he “had to leave his faith in the car.” He advised Tyler to do the same (*Harper v. Poway*, 2004, p. 1101). Also during this time a deputy sheriff spoke with Tyler, and told Tyler that Christians did not base their faith on “hate” and that the t-shirt was “inflammatory” (*Harper v. Poway*, 2004, p. 1101). At the end of the school day, Tyler was directed to leave the building by the most direct route, without going to his locker. The next day Tyler’s father discussed the incident with the principal. About 5 weeks later, Tyler’s parents filed a legal complaint in his name.

Tyler claimed several violations of his rights: freedom of speech, freedom to exercise religion, equal protection, due process, establishment clause, and the California Civil Code, section 52.1. He requested monetary damages and, finally, the judge’s intervention to require the school to stop enforcing its “policies and practices,” called a

preliminary injunction (*Harper v. Poway*, 2004, p. 1119). The school district responded with a request to have all claims dismissed and, if that request failed, to have all claims dismissed because of qualified immunity.

U. S. District Court Judge John A. Houston clarified that he was bound by 9th Circuit court decisions before rendering any of his own. Judge Houston first dealt with each alleged violation and dismissal request, second with the qualified immunity question, and finally with Tyler's request for a preliminary injunction.

Judge Houston began by ruling on the freedom of speech claim and the school district's request to have the claim dismissed. After examining several precedents and definitions, Houston declared that the message on Tyler's t-shirt was "clearly derogatory" (*Harper v. Poway*, 2004, p. 1105). Nevertheless, the message on the t-shirt did not meet other requirements that allowed school officials to ban it. Thus, Judge Houston refused to dismiss the First Amendment complaint.

The next issue Judge Houston ruled on was Tyler's claim that he was denied the free exercise of his religion when he was told he could not wear his t-shirt. Houston concluded that Tyler presented evidence to indicate that he was kept from practicing his religion. Thus, he refused to dismiss Tyler's second claim.

Tyler's third complaint did not meet with the success his first two complaints had. In determining whether or not Tyler's right to equal protection had been violated, Judge Houston again looked at several precedents. He concluded that Tyler had presented no information that suggested this right had been violated. In this instance, Houston granted the school's request and dismissed the equal protection complaint.

The fourth complaint, violation of Tyler's due process was predicated on the belief that the school dress code as delineated in the handbook and elsewhere was not clear and that any student might have trouble understanding what is forbidden clothing and what is not. Judge Hanson, however, pointed out again the derogatory messages on Tyler's shirts and found that those messages clearly violated school policy. Thus, he dismissed the complaint alleging violation of due process, but he dismissed it "with prejudice" (*Harper v. Poway*, 2004, p. 1112), meaning that Tyler could not re-file the complaint at a later date.

Complaint number five referred to the establishment clause of the First Amendment. Specifically, Tyler alleged that the school district's policies and the enforcement of them in connection with his t-shirt showed that the school was advocating one religion over another. His complaint directly mentioned the comments of the vice principal who spoke to him about religion and those of the deputy sheriff. Judge Houston determined that Tyler might be able to convince a jury that the establishment code had been violated; therefore, Houston refused to dismiss this complaint.

Tyler's final complaint alleged that the school officials violated the California Civil Code, section 52.1 because they attempted to get him to change his mind about his shirt through "threats, intimidation, and/or coercion" (*Harper v. Poway*, 2004, p. 1114). School officials told Tyler that he could be suspended or expelled. In this instance, Judge Houston ruled in favor of the defendants and dismissed the charge.

Next Judge Houston took up the question of qualified immunity and Tyler's claim for damages. He ruled that under the Eleventh Amendment, Poway School District was

immune, and he dismissed Tyler's claim for damages. He found the same to be true for the individuals being sued in their official capacities and dismissed this claim also. Judge Houston then turned to the question of qualified immunity and whether or not the individual administrators could be sued in their "personal capacities." Houston ruled in favor of the school officials and dismissed Tyler's damage claims against the officials in their "personal capacities" (*Harper v. Poway*, 2004, pp. 1116–1118).

Finally, Judge Houston considered Tyler's request for a preliminary injunction. At this stage the judge noted that three of Tyler's claims had not been dismissed, so his job was to determine their likelihood of success before ruling on the final request. In all instances Judge Houston ruled that Tyler had not demonstrated a likelihood of success on his claims. Therefore, Houston denied Tyler's request (*Harper v. Poway*, 2004, pp. 1119–1122).

The result of this suit was that Tyler was not allowed to wear his t-shirt to school, but he could sue the school district based on a violation of his First Amendment rights (Hendrie, 2005). The outcome of Tyler's suit is unknown at this time.

Mathewson v. Webb City, 2004

This last struggle also concerns a student's t-shirt. Unless otherwise noted, the information about the struggle comes from the brief the ACLU filed with the court. Brad Mathewson was a student at Webb City High School in the Webb City R–VII School District, Madison, Missouri. Webb City, Grades 9–12, is a regular, urban school located on the fringe of a mid-sized city. Although the struggle took place during the 2004–05 school year, the latest statistics available for the school come from the 2002–03 school

year. The school served 1,068 students: 560 male; 508 female; 16 American Indian/Native Alaskan; 6 Asian/Pacific Islander; 15 Black; 24 Hispanic; 1,007 White; and 7 migrant students. The student body had 263 students eligible for free lunch and an additional 85 eligible for reduced-price lunch. The student/teacher ratio was 16.6:1, and the total full-time faculty was 64.5. In comparison, the average for the 5 previous school years, 1998 through 2003, are as follows: 1,016.6 students: 514.8 male, 501.8 female, 10.6 American Indian/Native Alaskan, 4.28 Asian/Pacific Islander, 5.8 Black, 16.2 Hispanic, 979.8 White, 7.2 migrant students. The student body had 218.8 students eligible for free lunch and an additional 80.6 eligible for reduced-price lunch. The student/teacher ratio was 16.568:1, and the total full-time faculty was 85.74. A look at the individual numbers per year indicates a constant increase in students across the board. Thus, school year 2004–05, if it followed the trend, found the high school with a few more students than the 2002–03 numbers would suggest.

According to the principal the school is located in the “Bible Belt” (*Mathewson*, 2004, p. 3). Brad alleges the halls of the school contained anti-gay marriage stickers, signs, and posters throughout (“ACLU Sues,” 2004; Curtis, 2004). On October 20, 2004, Brad’s homeroom teacher sent him to the principal’s office because he had on a t-shirt that said “FHS⁴ [Fayetteville High School] Gay–Straight Alliance” on the front and “Make a Difference” on the back. Also on the back were a pink triangle and three pairs of symbols: a pair for males, a pair for females, and a pair for male and female (“ACLU Solds,” 2004, para. 3). Brad had worn the same shirt to school several times previously,

⁴ Brad and his mother had moved from Arkansas where Brad had attended Fayetteville High School.

and no one had mentioned it. This time the assistant principal told Brad that the shirt was “inappropriate, distracting, and offensive to other students” (*Mathewson*, p. 3). Brad claimed he was just expressing his personal beliefs much as other students in the school who wore shirts, posted signs, stickers, and decals stating that gay marriage was wrong. The assistant principal told Brad those items were “a different situation” (*Mathewson*, p. 3). Brad was given the option of turning his shirt inside out or changing it; Brad decided to turn it inside out. However, on his way to the restroom, he met a heterosexual friend, and they decided to switch t-shirts. The other young man wore Brad’s shirt all day, right side out, and received no comment.

Again on October 27, 2004, Brad wore a t-shirt that stated “I’m Gay and I’m Proud” (*Mathewson*, 2004. p. 4). The assistant principal saw Brad and demanded that Brad either turn the shirt inside out or change it. This time Brad refused to do either, so he was sent home. Brad’s mother met with the principal and assistant principal to discuss the issue. At that time she was told the “primary reason” Brad was not allowed to wear his shirt was that it was “distracting” (*Mathewson*, p. 4). After his mother requested more information about the reasoning, the principal told her that he was “trying to protect” Brad from his peers who might react against Brad for being gay, and that Brad was ““flaunting”” his sexual orientation (*Mathewson*, p. 4). The principal continued saying that if he allowed Brad “to wear a gay themed shirt,” he would have “to allow other students to express anti-gay messages” (*Mathewson*, p. 5). When asked if an African American student would be allowed to wear a t-shirt that said “I’m Black and I’m Proud,” the principal responded negatively.

On October 29, 2004, while in homeroom, Brad and a fellow classmate were discussing the incidents with his t-shirts. His homeroom teacher told them not to discuss the issue; Brad and his friend stopped. However, after homeroom he inquired why he had been told to stop talking about his situation. The teacher at first refused to answer his question, but when Brad repeated it, the teacher took him to the office as a discipline referral. The principal supported the teacher and told Brad that he “needed to respect a teacher’s orders in class” (*Mathewson*, 2004, p. 6). Brad pointed out that he had, and the principal repeated the same statement. Brad and the principal then got into a “heated” discussion about the t-shirts; Brad said the administration was “narrow minded” and that ““You people suck”” (*Mathewson*, p. 6). At this point the principal told Brad the word *suck* was a “curse word” and that he would be disciplined for saying it (*Mathewson*, p. 6).

The principal requested that Brad’s mother come to school to discuss the situation; however, when Mrs. Mathewson told him he would have to talk with her lawyers, the principal refused and suspended Brad from school until Mrs. Mathewson came to school for the discussion. Finally, on November 2, 2004, Brad, his mother, and their lawyer met with the superintendent of the district and the principal. At that meeting Brad was informed that if he continued to wear his gay pride shirts, he would not be allowed back in class and he would receive “further disciplinary action” (*Mathewson*, 2004, pp. 6–7). At this point Brad acquiesced, but upon returning to school that day, he saw another student wearing a t-shirt with an anti-gay message.

Brad filed a lawsuit claiming several violations of his rights: the First Amendment right of free speech and the Fourteenth Amendment. His suit requested that the school

cease its actions immediately and allow Brad to wear his shirts; the suit also requested a monetary settlement and attorney fees.

On Tuesday, November 30, 2004, 10 of Brad's classmates wore t-shirts in support of Brad. The shirts had various messages on them: "If This Shirt Offends You, Look the Other Way," "We Have the Right to Be Who We Want to Be," "We Support Gay Rights," "I'm Gay and I'm Proud," and "I Have a Gay Friend and I'm Proud of Him" (Curtis, 2004, paras. 8–10). However, these students met with the same results as Brad: they either had to change their t-shirts or be sent home. Three of the students changed their shirts, but the other seven were sent home.

What would have happened in this case is unknown. Sometime in December 2004, Brad withdrew from Webb City High School and withdrew his lawsuit (Bradley, 2005).

Summary

Since *Nabozny* (1996), school systems' failures to deal with sexual orientation discrimination has cost them great sums of money. Based on the cases discussed in this chapter, individual school districts in this country have lost thousands of dollars, totaling well over \$2 million, not only in what they have paid to LGBT victims but also in lawyer fees. These expenses are ones school districts can ill afford. Those school districts that fail to be proactive rather than reactive in understanding and dealing with LGBT harassment continue to have mounting costs, both monetarily and emotionally.

The individual cases cited above suggest that students who find their rights violated may have legal recourse. LGBT students, in particular, may be able to use Title IX to sue administrators not only in their official capacities as representatives of the state but also as individuals. Further, Title IX may also allow LGBT students to sue school districts that fail to intervene appropriately in peer sexual harassment taking place on school grounds during regular scheduled classes. Finally, although Title IX does not allow for cases based on sexual orientation, it does allow for suits based on gender. Officials cannot discriminate against a student based on her/his gender.

U. S. Code 42, section 1983 and The Equal Protection Clause of the Fourteenth Amendment may also provide some surcease for the LGBT student. First, the student must prove that the alleged offending official was acting in an official capacity; then, the Fourteenth Amendment comes into play. Because the Equal Protection Clause requires equal protection for all students, administrators must apply the same rules and punishment for a sexual harassment case involving an LGBT student as they would for a

heterosexual student suffering the same harassment. Students filing a claim under this clause would need to demonstrate that the school official was “intentionally indifferent” to the victim’s situation.

Finally, in situations where school administrators try to silence LGBT students about their sexual identity, students may be able to sue charging violation of First Amendment rights.

CHAPTER V

GAY/STRAIGHT ALLIANCES: PREVENTING LGBT
ABUSE IN AMERICA'S MIDDLE AND SECONDARY SCHOOLS

Protecting LGBT students in America's middle and secondary schools does not always have to mean litigation and adversarial relationships between a student and school officials. Students and schools can take steps to educate all students and school personnel about the rights of and the necessity for protecting all students. One way to accomplish this type of education is through the formation of Gay/Straight Alliances (GSAs). Students may initiate and form GSAs under the Equal Access Act (EAA), which states that

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. (Equal Access Act, a)

The Act goes on to define a limited open forum as any public secondary school that “grants an offering to or opportunity for one or more noncurriculum [sic] related student groups to meet on school premises during noninstructional [sic] time” (Equal Access Act,

b). As long as a non-curriculum student group “does not materially and substantially interfere with the orderly conduct of educational activities within the school” and follows the other guidelines outlined in the Equal Access Act, school officials who have established a limited open forum may not deny students the right to organize their group and join the limited open forum (Equal Access Act, c4). School officials who deny this right to students have two choices: they may choose not to accept federal funds (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, Ky.*, 2003); they may choose to close down the limited open forum by requiring all their student groups to be curriculum related.

Because GSAs are open to and encourage heterosexual and LGBT members, the organizations help promote understanding and unity among the members of the student body through meetings and education. Further, the organizations support heterosexual students who have LGBT parents or other family members (Lee, 2002, p. 14). However, the road to creating a GSA is not always smooth nor without its roadblocks, twists, and turns. Some, but certainly not all, school officials have attempted to deny students the right to form such groups.

One concern in several of the following cases is the definition of a non-curriculum related club. The United States Supreme Court provided such a definition in *Board of Education of Westside Community Schools v. Mergens* (1990). The Justices stated that

(1) a student group is “noncurriculum [sic] related” within the meaning of the EAA [Equal Access Act] if the group does not directly relate to the body of

courses offered by the school, in the sense that (a) the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course, (b) the subject matter of the group concerns the body of courses as a whole, (c) participation in the group is required for a particular course, or (d) participation in the group results in academic credit. (*Board of Education of Westside v. Mergens*, 1990, p. 227)

The following GSA struggles are organized according to the dates of final decisions; thus, if a plaintiff or defendant appealed the judgment to a higher court, the case is listed according to the most recent conclusion of a particular case. Each struggle opens with a brief recounting of the school's demographics when the incidents occurred.

*East High Gay/Straight Alliance v. Board of Education
of Salt Lake City School District, 1999*

One of the earliest GSA struggles to go to court and, according to Mawdsley, (2002) at the time "the only reported non-religious student club case to be decided on the merits" (p. 15) and the "first case to address a request by a gay student group" (p. 29), was the East High Gay/Straight Alliance in the Salt Lake City, Utah, school district. Their story began during the 1995–96 school year. At the time, the make up of the school's 1,986 member student body was as follows: 43 American Indian/Alaskan Native; 169 Asian/Pacific Islander; 41 Black; 235 Hispanic; and 1,498 White. Of these students, 147 were eligible for free lunch. The student/faculty ratio was 21.7:1 with a total of 91.4 full-time teachers. East High was a regular school in a mid-sized city encompassing Grades 9–12.

The struggle began when several students applied for the right to form a GSA and meet on school grounds. The case evolved through four different hearings: *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (1998); *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (Jan. 1999); *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (Oct. 1999); and *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* (Nov. 1999).

The published transcripts beginning November 1998 through October 1999 and the unpublished transcript of November 1999 document the students' allegations.

The principal did not respond immediately to the application but instead contacted the state's Attorney General to learn his responsibility. Once he was informed of the law's requirement under the Equal Access Act, he complied. Soon, however, controversy enveloped the organization, and the school board's solution, in a 4-3 vote, was to "ban all non-curricular clubs from the district" beginning with the 1996-97 school year (Lee, 2002, p. 15). In fact, on February 20, 1996, the Board of Education decided not to provide the students with a limited open forum and to that end drafted and passed a resolution requiring all school clubs to be curriculum related (*East High*, Oct. 1999, p. 1168). This response engendered even more controversy; the very next day students from both East and West high schools staged a walkout to protest the cancellation of all clubs (Autman, Skordas, & Bryson, 1996). Students from West High marched on the state Capitol, while close to 700 students from East High lined a busy thoroughfare, some in

favor of the GSA and some against it (Autman et al., 1996). Ironically, Utah Senator Orrin Hatch (R) sponsored the Equal Access Act in 1984.

With the aid of outside help, the East High GSA met outside the school location for a time and was later allowed to use the school building after hours. However, the GSA was not allowed to post fliers, use the PA system during school hours, use the bulletin boards, or post notices as other seemingly non-curricular clubs, Future Business Leaders of America (FBLA), the National Honor Society (NHS), and the Improvement Council at East (ICE), were allowed to do (*East High*, 1998, p. 1357). In 1998 several of the students decided to contact the ACLU and Lambda Legal in an attempt to reinstate all banned clubs and acquire equal treatment for their GSA, the Rainbow Club.

The Court's problem was to decide the definition of a curriculum related club. Judge Bruce S. Jenkins found that FBLA was indeed curricular related because its advisor, the business teacher, offered points to students for being members and participating in events, the club engaged in activities related to classroom instruction in business, and its origins were in the Vocational Act of 1963 (*East High*, 1998, p. 1361). The judge also found the NHS to be curricular related because it encouraged academic excellence (*East High*, 1998, pp. 1362–1363). ICE, the final group East High GSA presented as a non-curricular club did not apply. The judge found that the club had not been approved as a student group and was not allowed to meet at the school. Consequently, Judge Jenkins found that the Salt Lake School District did not violate the Equal Access Act.

Nevertheless, the Rainbow Club did not give up. In December 1998, they re-filed in an effort to draw a distinction between a "limited open forum" as defined by the Equal Access Act and a "limited public forum" as allowed by the First Amendment. The Salt Lake School District Board of Education did not wish to establish a "limited open forum" as defined by the Equal Access Act (*East High*, Jan. 1999, p. 1200). Lawyers for the GSA, the ACLU and Lambda Legal, argued that the Board's policy violated the First Amendment and thus a "limited public forum" right (*East High*, Jan. 1999, pp. 1200–1201). Lawyers for the GSA felt the distinction was clear. Under the Equal Access Act, if the school board allowed non-curricular clubs to meet, it must allow all non-curricular clubs to meet or it violated the "limited open forum" rule. However, a violation of the First Amendment "limited public forum" may exist when a violation of the "limited open forum" does not.

The GSA lawyers wanted to look into the Board of Education's reasons for its decision not to provide a "limited open forum." If the Board of Education simply wanted to "suppress a particular point of view" with its decision, it would be violating the First Amendment. The lawyers for the school district, however, opposed "discovery into the Board's motives" in determining its policy regarding "limited open forum" (*East High*, Jan. 1999, p. 1200).

Judge Jenkins asserted that the main questions to be answered were whether or not "an unwritten policy exist[ed] that prohibit[ed] [members of the Rainbow Club] from expressing their viewpoint on matters germane to the permissible subject matter of the existing forum for 'curriculum-related' student groups." The second question was

related to the first: if such a situation existed at East High, did the policy violate the First and Fourteenth Amendments (*East High*, Oct. 1999, p.1197)? Jenkins differentiated between viewpoint discrimination and allowable content discrimination. Content discrimination is permissible in order to maintain the purposes of the nonpublic forum, but viewpoint discrimination is not permissible if it attempts to silence speech that would normally be allowed within the established forum. Jenkins felt that the Board's policy of February 1996 was meant to allow students a voice in curriculum-related student groups, and he further declared that the Board had established a closed forum of clubs that related to the curriculum and that the subject matter under discussion was not "generally open." Thus, he concluded that the Board did not violate the First Amendment (*East High*, Oct. 1999, pp. 1185-1188).

Next, Judge Jenkins considered the Board's policy of February 20, 1996. The Rainbow Club charged that the Board enacted its policy as a way to hide its desire to silence gay-positive rhetoric. But, since the Club's lawyers could present no concrete evidence of such a situation, Jenkins did not find in their favor. However, the Assistant Superintendent in a letter denying the Rainbow Club's application stated that "even if the Rainbow Club were somehow curriculum related, I would still deny the application. In my opinion, as a professional educator, sexual orientation is not the proper organizing subject matter of a curriculum-related club" (*East High*, Oct. 1999, p. 1196). The Assistant Superintendent went on to cite state and district laws supporting her assertions. The Board lawyers wanted this information disregarded as they claimed the formation of the club had nothing to do with the litigation. However, lawyers for the club insisted that

this letter was factual evidence that the Board had “engaged in impermissible viewpoint discrimination” on the basis of viewpoint and content (*East High*, Oct. 1999, pp. 1196–1197). Judge Jenkins concluded that he could not reach a resolution on that point

Judge Jenkins summarized his findings as follows: he found in favor of the Rainbow Club because it was denied access to the limited open forum during the 1997–1998 school year, but he denied the Club’s other motions. Jenkins found in favor of the Board in relation to the creation of a closed forum at East and West High schools because at the time a closed forum did exist. However, he found against the school district in regard to the Equal Access Act. He also found for the Board in relation to their February 20, 1996, policy, which created a reasonable restriction on clubs. Next, Judge Jenkins denied the Rainbow Club’s First Amendment claims.

Finally, he set a Pretrial Conference for both sides concerning the remaining questions: did an unwritten policy exist at East High keeping students from expressing “gay-positive” viewpoints? If that policy did exist, did it suppress students’ free speech as guaranteed in the First Amendment and the Fourteenth Amendment? (*East High*, Nov. 1999, p. 1356). At this hearing Jenkins ruled that the Salt Lake City School District did violate the Equal Access Act, 20 U. S. C. sections 4071–4072 during the 1997–98 school year, and he granted declaratory relief. However, he denied any other declaratory or injunctive relief. Second, Judge Jenkins dismissed the complaint alleging the existence of an unwritten policy prohibiting “gay-positive” speech due to lack of factual evidence (*East High*, Nov. 1999, p. 1359).

Even though the Rainbow Club lost its lawsuit, the case had a positive effect. As the first such case of its kind, it brought national attention to the matter, gained the students an enormous amount of publicity, mobilized thousands of students in the state, and produced a documentary (GLSEN, 2000). However, the story did not end with Judge Jenkins' ruling. Lambda Legal had planned at least two more lawsuits against the school but dropped them in October 2000 when the Salt Lake City Schools decided to reinstate all clubs and allow the Rainbow Club to meet. The District developed two new categories concerning clubs: curriculum related, which would get school funding, and extra curricular, which received no funding. The District's decision came after Utah refused to make any more funds available for court costs (Gerber, 2000).

Mawdsley (2002), at the time, President of the Education Law Association and Professor of Educational Administration at Cleveland State University, believes the case has ramifications in several areas. First, he questions the court's method of determining curriculum-relatedness, especially in regard to the NHS. Although the court used *Board of Education of Westside Community Schools v. Mergens* (1990) (known as *Mergens*, 1990) to determine curriculum-relatedness, Mawdsley feels that one could argue that the court misinterpreted *Mergens* and "overstepped its bounds" (p. 25) by recognizing the NHS as curriculum related. The NHS does not have an "interactive relationship" with the curriculum but a "passive" one (p. 25); its members are simply an "output of the curriculum" (p. 24). Another problem area that concerns Mawdsley is that any teacher seems to be able to determine curriculum relatedness and as such could validate any group of students as curriculum-related simply by offering credit to classroom students

who join that club (p. 26). In this case, not all club members would have to receive class credit to belong to the club. He concludes that "for students with unpopular views, East High exposes the Achilles heel of the EAA" (p. 31).

Colin v. Orange Unified School District, 2000.

The *Colin* case began in August 1999 when Anthony Colin, then a sophomore at El Modena High School, California, along with his friend Shannon MacMillan, decided to form a GSA after learning about the murder of Matthew Shepherd. El Modena was a regular, urban school, Grades 9–12, located on the fringe of a large city. Total student population was 1,994: 971 male; 1,023 female; 7 American Indian/Native Alaskan; 224 Asian/Pacific Islander; 33 Black; 597 Hispanic; and 1,133 White. Of these students, 371 were eligible for free lunch and another 76 were eligible for reduced-price lunch. The student/faculty ratio was 24.5:1 with a total of 81.5 full-time teachers.

The following allegations come from the published court case, *Colin v. Orange Unified School District*.

Anthony and Shannon claimed their intent was to "promote acceptance among and for gay and straight students" (*Colin*, 2000, p. 1137). To this end, Colin and MacMillan found a willing faculty advisor, obtained the proper papers, filled them out, and submitted them for approval during the first week of school. At this time the El Modena High School had a limited open forum, so Colin and MacMillan felt that their club would be recognized. However, their application was destined for defeat. During the spring of the previous school year, the assistant superintendent told the principal of El Modena that should any students wish to form a GSA, he wanted to be informed because

the Board of Education “may not approve it.” This step was irregular because none of the other 38 non-curricular clubs was required to get Board approval. In fact, approval traditionally came from the principal. The application went from principal to assistant superintendent, to superintendent, to the Board of Education. While the students awaited a decision, an event called “Club Rush” took place. Colin and MacMillan presented the principal with a signed petition requesting participation in the event since a decision about their existence had not yet been made; at this time they first learned their application had been submitted to the board. Their request to be part of “Club Rush” was denied. The Board, meanwhile, delayed its vote on the application in order to conduct a public forum to determine public feelings about the issue.

In the meantime, the principal informed Colin and MacMillan that the proposed name of the club, Gay–Straight Alliance Club, was “inappropriate” (*Colin*, 2000, p. 1139). He suggested several other names: Tolerance Club, Acceptance Club, and Alliance. This request was out of the ordinary because neither the principal nor the Board had approached any of the other clubs with suggested name changes. By this time, late October 1999, the situation at El Modena High School had generated a considerable amount of press coverage. The local chapter of GLSEN learned of the problem and offered its support to Colin, MacMillan, and other students involved in the attempt to form the GSA. Finally, in early November, the Board held its public forum at which people spoke both for and against the formation of the GSA at El Modena High School. At the public forum one Board member commented that the GSA was asking them to “legitimize sin,” and another Board member commented that she knew “the law is on

their side, but our community members don't want it'" (*Colin*, 2000, p. 1139). It was at this meeting that high school junior Heather Zetin got involved with the GSA's formation.

After the public forum, the Board voted again to delay a vote on the proposed GSA. Then, on Dec. 7, 1999, the Board of Education unanimously voted to reject the application for a GSA at El Modena High School. The Board provided four reasons for its decision:

1. the proposed GSA has a subject matter related to sexual conduct and sexuality
2. the District and El Modena High School offer courses that address sex, sexual conduct, sexual abstinence, and sexual transmission of diseases
3. the State of California in the Education Code imposes strict requirements on how, when and by whom sex education and related courses are taught
4. the Board should consider that unrestricted, unsupervised student led discussion of sexual topics is age inappropriate and is likely to interfere with the legitimate educational concerns of the District in this sensitive area of sex education. (*Colin*, 2000, pp. 1139–1140)

The Board, however, did not close its books on the situation. It suggested that if the students resubmitted a revised mission statement "'for a tolerance club with an appropriate name and a mission statement that clearly states that sex, sexuality, [and] sex education, will not be the subject of discussion in club meetings'" they might reconsider the application (*Colin*, 2000, p. 1140). To this end, the Superintendent and the Principal

pulled several students out of class to discuss the situation. The administrators suggested changes in the Mission Statement, and in fact, rewrote much of it taking out all references to *gay*, *straight*, and *sexual orientation*. Further, the principal changed the name of the club to "Tolerance for All." The principal concluded her revisions by adding the statement that "sex, sexuality, [and] sex education" would not be topics of discussion at any meetings of the club (*Colin*, 2000, p. 1140). Colin, Zetin, and several other students involved in the formation of the GSA found these bowdlerizations unacceptable. In fact, under oath Colin testified that he felt the principal was "tearing my rights down," and Zetin testified that adding the new language "would communicate that gay people are inherently more sexual or sexually promiscuous when they're just people" (*Colin*, 2000, p. 1140). At this point the students were frustrated and talks between the school authorities and the students fell apart. Colin, Zetin, and other students began meeting across the street from the school but were still unable to post notices of meetings, use the public address system, or meet on campus as other clubs did. The result was that many interested students (even though the GSA was not permitted to take part in "Club Rush," 58 students had signed a petition in support of the GSA) were unaware of the meetings and attendance was low (*Colin*, 2000, p. 1140),

Only after 3 months of delays did Colin and Zetin decide to file against the Board of Education, the District, the superintendent, and the principal. The two students presented six claims against the District, the Board of Education, the superintendent, the assistant superintendent, and the principal. They were as follows:

1. violation of the Equal Access Act

2. violation of the Fourteenth Amendment: Rights of expression and association
3. violation of the Fourteenth Amendment: Equal protection clause
4. violation of the California Constitution: Article I, section 2
5. violation of the California Constitution: Article I, section 7
6. because of the previous violations, the students are entitled to have access to school facilities on the same basis as other noncurricular student groups. (Colin, n.d., pp. 13-19).

United State District Judge David O. Carter presided over the hearing in which Colin and Zetin, as representatives of the Gay–Straight Alliance of El Modena High School, requested a preliminary injunction requiring the District to allow the GSA to meet on school grounds and use school resources. Judge Carter granted this injunction for several reasons.

First, Judge Carter found that the Board of Education, the Superintendent, the Assistant Superintendent, and the Principal had violated students' rights under the Equal Access Act. The school system had clearly established a limited open forum and, therefore, could not deny the student club equal access to the school building and grounds.

Second, Judge Carter dealt with the four reasons, stated earlier, the Board submitted for not recognizing the club, all of them having to do with sex education in one way or another. The District claimed the GSA could not be a club because the students' concerns were related to the curriculum and the club would be a curriculum related one

not subject to the Equal Access Act. The District presented several “proofs” of this connection. Judge Carter found the proofs invalid and stated that “as a matter of fact . . . the subject matter of the proposed Gay–Straight Alliance was not covered in the curriculum at El Modena High School.” He went on to declare that even if similarities did occur between the students’ discussions and the schools’ curriculum, this situation did not alter the District’s responsibility because under the Equal Access Act once a school system establishes a limited open forum, the school system cannot cut off “access to the ‘limited open forum’ merely by labeling a group curriculum–related” (*Colin*, 2000, pp. 1144–1146).

The District, the School Board, and other officials offered another reason to reject the application for the GSA. They felt that such a club was not monetarily feasible for the District. They asserted that allowing the GSA to meet would “trigger” the parental notification laws and would ultimately cost the District thousands of dollars because it would have to mail notifications to parents before each weekly meeting (*Colin*, 2000, p. 1150). However, Judge Carter refused to accept this argument claiming that it was simply a pretext for denying the group recognition. He pointed out that the California law came into play only with school–sponsored instruction, not student sponsored, non–curriculum speech. Second, several GSAs already existed in California, and their meetings had not triggered the law; and finally, even if the club would trigger the law, by law the school was only required to do one mailing at the beginning of the school year (*Colin*, 2000, pp. 1149–1150).

A final Board and District defense was the claim that the GSA would be controlled by non-school personnel; the Board and District arrived at this conclusion based on the fact that GLSEN had recommended the name Gay-Straight Alliance. Judge Carter found in favor of the students again. First, the initial idea for the club was Colin's and entirely student "initiated." Second, GLSEN only got involved after the Board of Education had postponed voting on the club for several months. The local chapter of GLSEN offered only "moral support" to the students and informed them of their rights. Furthermore, Judge Carter stated that having a name the same as several other student groups and only suggested by GLSEN was not proof that an outside party would control the meetings. He stated that the school allowed clubs named MECHA and Red Cross/Key Club that were associated with national organizations, and the District had imposed no restrictions on those groups (*Colin*, 2000, pp. 1146-1147).

Third, Judge Carter found that the District, Board, and other officials further violated the Equal Access Act by denying the club the same benefits that other clubs enjoyed: access to the school's PA system, posting flyers in school, using the school grounds for meetings, selecting their club name, no restrictions on what could and could not be discussed at meetings. In clarifying these points, the judge pointed out that the Board infringed on freedom of speech rights in requiring the group to change its name. Further, the requirement that the club insert a statement that the students would not discuss sexual activities when no other clubs functioned under such sanctions further infringed on the students' rights. Carter continued his finding for the students stating that

the Court finds that the moderate position taken in court by Defendants, that the club would be approved with a few "modest" changes, is not credible. Absent the threat of litigation and court-ordered enforcement of the students' rights, Defendants were unlikely ever to recognize the club. (*Colin*, 2000, p. 1149)

Judge Carter did not rule on the students' claim of a violation of their free speech because he found that the Board and others had violated the Equal Access Act.

Finally, Judge Carter found that the District, the Board of Education, the superintendent, the assistant superintendent, and the principal "irreparably injured" the students because the students could not "effectively address the hardships they encounter[ed] at school everyday," and because the students had to meet across the street from the school (*Colin*, 2000, pp. 1149–1150). He concluded that granting the injunction was in the best interest of the community and acceptable public policy because the case was not just about "student pursuit of ideas and tolerance for diverse viewpoints. . . . but [he claimed] this case may involve the protection of life itself. [sic] Since the Gay-Straight Alliance seeks to end discrimination on the basis of sexual orientation" (*Colin*, 2000, p. 1151).

Berkley (2004), a law student at Washington & Lee University, is concerned with the curriculum-related aspect of the *Colin* decision. He asserts that the court's belief that the school district could not ban the Gay Straight Alliance even it were curriculum related is based on a false assumption. Berkley claims that such a determination is premised on the belief that the only method of restricting a student club under the EAA is using the "*Tinker* standard" (p. 1890), meaning that a club meeting would have to "materially and

substantially” disrupt the educational process at the school. Berkley finds such a premise to be “simply false” because the EAA offers administrators other avenues of limitation (pp. 1890-1891). He goes on to state that the court’s interpretation that the EAA protected even curriculum related clubs is erroneous and “would undermine the concept of ‘limited’ in limited open forum” (p. 1894).

Franklin Central Gay/Straight Alliance v. Franklin Township

Community School Corporation, 2002

Amy Obermeyer, a senior at Franklin Central High School, Indianapolis, Indiana, and other students desirous of forming a GSA, first filed a complaint against Franklin Central High School and the Franklin Township Community School Corporation (collectively referred to as FCHS) in October 2001 because FCHS would not allow the Franklin Central Gay/Straight Alliance to meet as a club at the school. Franklin High School was a regular school located in a large city. The school served 1,571 students: 803 male; 768 female; 2 American Indian/Native Alaskan; 24 Asian/Pacific Islander; 89 Black; 13 Hispanic; and 1,443 White. Of these students, 124 were eligible for free lunch and another 59 were eligible for reduced-price lunch. The student/faculty ratio was 19.7:1 with a total of 79.6 full-time teachers.

The following summary of student allegations comes from the unpublished court case, *Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corporation*.

The court determined that FCHS was a public school, accepted federal funds, and had established a limited open forum. On August 29, 2002, Judge Larry J. McKinney

ruled that FCHS had violated the Equal Access Act in refusing to recognize the club. Further, he ordered FCHS to recognize the GSA and “instate [it] as an official [sic] school club for the . . . school year 2002–2003, with all the rights and privileges” the other school clubs enjoyed (*Franklin*, 2002, *1–*2). The ruling, coming when it did, was not helpful to Amy because she had graduated. However, her brother and several other students wished to continue the GSA. Unsure of the circumstances at the opening of the school year, they failed to file the proper papers with the principal. Thus, FCHS, in an attempt to nullify the GSA, asked the court to reconsider its earlier decision because Amy had graduated. FCHS presented two arguments: the GSA did not really exist and did not have standing (*Franklin*, 2002, *4).

FCHS claimed that the GSA did not exist because Amy was no longer a student and that the GSA was nothing more than her alter ego. Furthermore, the school stated that the GSA did not apply for recognition at the beginning of the 2002–2003 school year, proving that the club did not exist. Judge McKinney pointed out that FCHS should have contested the existence of the GSA in the previous case, not more than a year later at a hearing to reconsider the court’s initial decision. Further, McKinney cited current Indiana law proving that the GSA did exist at the time of the first hearing and had a right to join in the suit. Second, although Judge McKinney recognized that the Court’s decision no longer affected Amy, he asserted that since she had not filed her suit against FCHS alone but with the GSA as a separate entity, the Court recognized that the controversy continued (*Franklin*, 2002, *3–*8).

Next Judge McKinney dealt with the issue of whether or not the GSA was a club at the present hearing. FCHS claimed the GSA did not exist because it did not file a club form nor did it ask to be represented at the annual Club Fair held at school in September 2002. Despite these facts, Judge McKinney found evidence that the club did, indeed, exist. When FCHS filed its motion to reconsider, David Obermeyer filed a brief in opposition identifying himself as co-founder of the GSA, which had six additional members at that time. David further asserted that the group still desired to meet during club meeting times at the school (*Franklin*, 2002, *9).

McKinney posited two reasons for the failure of the GSA to file papers and request participation in the Club Fair. One, he felt that since the Court's decision had come so late, David and other members may have assumed that the school would reject their application, so they did not apply. Second, he conjectured that by the time the court had made its decision and David learned of it, the time to submit an application had passed. Judge McKinney reiterated his original finding in August 2002. He clarified, however, that the decision granted no special rights to the GSA that other clubs did not enjoy. For instance, the club still needed to find a faculty advisor, fill out the proper paperwork listing the names of the members, the advisor, and the meeting time. He concluded by reminding both parties that FCHS had to recognize the GSA provided the GSA followed the "same procedures expected of other clubs" (*Franklin*, 2002, *9-*11).

Although this case took place in Indiana, it is instructive to students in other states. One, students should make sure they know and follow all the rules governing the existence of extra-curricular clubs at their schools; two, make sure they know and follow

all state laws for recognition as an entity; and three, make sure they keep records of their actions, procedures, and responses.

*Boyd County High School Gay Straight Alliance v. Board of Education
of Boyd County, Ky., 2003*

Boyd County High School, Grades 9–12, was a regular, rural school located in Ashland, Kentucky. During the 2001–02 school year, the school served 951 students: 494 male; 457 female; 1 American Indian/Native Alaskan; 6 Asian/Pacific Islander; 7 Black; 2 Hispanic; 935 White; and 8 migrant students. Of these students, 236 were eligible for free lunch, and another 75 were eligible for reduced-price lunch. The student/faculty ratio was 19.1:1 with a total of 49.9 full-time teachers.

Allegations in the *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County* come from the published court case. This case is somewhat different than the preceding ones because initially school officials were in favor of students forming a GSA. In fact, students at Boyd County High School (BCHS) in Cannonsburg, Kentucky, first approached their principal in January 2002 to get permission to circulate a petition among students to form a GSA; he granted them permission. Later, English teacher Kaye King approached the principal and learned he had granted permission for the circulation of the petition. King also spoke with the superintendent who informed her that the GSA “was the right thing to do for all students and that the School District needed the students to follow through with starting the GSA Club at BCHS” (*Boyd County*, 2003, p. 671). Shortly thereafter, King agreed to become the faculty advisor for the GSA.

Controversy erupted when the student body became aware of the imminent GSA. Some students wore t-shirts to school saying "Adam and Eve, not Adam and Steve"; others wore shirts proclaiming "I'm Straight" (*Boyd County*, 2003, p. 671). When the students first applied for club status, the Diversity Awareness Council at BCHS requested the GSA change its name because antigay harassment was taking place and increasing. However, the students involved with the formation of the GSA declined to make a change, stating that removal of the word *gay* would defeat the purpose of the club which was to "promote understanding and tolerance" (*Boyd County*, 2003, p. 671). Then the Diversity Awareness Council decided that the BCHS really did need the GSA. The next step was an application to the Site-Based Decision Making Council (the Council), composed of three teachers, two parents, and the principal, to obtain official recognition. The principal, however, requested that the students wait a month until some of the unrest died down. After complying with the principal's request, the students resubmitted their application a month later only to be denied recognition because they were applying too late in the school year. The principal suggested that the students reapply in the fall of the new school year. He assured the advisor, King, that "in a stack of club applications, no one would notice the GSA's application and it would slide right through" (*Boyd County*, 2003, pp. 671-672).

When the GSA resubmitted its application in the fall of 2002, the GSA's was the only one denied recognition. At this point the ACLU became involved, wrote a letter to the Council explaining the Equal Access Act and the school's responsibilities. The GSA resubmitted its application after the Council had received the ACLU letter, but the

Council "tabled reconsideration" until later in the month. Finally the Council approved the GSA in late October 2002.

Opponents of the club were vocal and allegedly hostile. One student harassing a GSA member during an English class in late October stated they needed "to take all the fucking faggots out in the back woods and kill them" (*Boyd County*, 2003, p. 671). The hostility did not cease, and in January during a basketball game, several students with megaphones chanted at one of the GSA members "'faggot-kisser,' 'GSA,' and 'faglover'" (*Boyd County*, p. 671). Harassment came not only from students but also from parents and other community members. For instance, several local ministers appealed the Council's decision. Others in attendance when the Council relayed its decision confronted GSA members "'with facial expressions, hand gestures . . . some very uncivil body language . . . loud . . . and angry voices.'" Some members of the Council were worried that people would get hurt. However, during this uproar, the GSA members remained calm and silent (*Boyd County*, pp. 672–673).

Only 2 days later some students protested the Council's decision and tried to keep other students from entering the school. They shouted, "'If you go inside, you're supporting the GSA.' 'We don't want something like that in our school.' and 'If you go inside, you're supporting faggots'" (*Boyd County*, 2003, p. 674). The protestors did not keep students from entering the school, and the principal and assistant principal addressed the protestors in an attempt to calm them. The administrators allowed those who wished to continue the protest to do so in the parking lot, while other students decided to enter school. Classes were held, teachers taught, and the schedule remained

intact. In November 2002 another organized protest took place; about half the student body did not show up for school. However, students who arrived at school attended classes and once again the teachers taught. King reported receiving threats and having her car keyed, but she continued to teach (*Boyd County*, 2003, p. 674).

As the anger of the anti-GSA protestors increased, so did threats to members of the Council, members of the Board of Education, and members of the Administrative Staff. Parents threatened to remove their children from BCHS, but the school indicates that no one left the district due to the existence of the GSA. On the other hand, the GSA members did their best to remain calm and quiet and keep their meetings orderly and non-disruptive. In one incident a student left a classroom "because of supposed pressure from GSA supporters" (*Boyd County*, 2003, p. 675).

However, on December 16, due to the protests and threats, the superintendent, in an effort to halt the uproar, recommended that the Council ban all non-curricular clubs for the rest of the 2002-03 school year. Also that day, the Board of Education met and considered banning all non-curricular clubs and writing a closed forum policy. At their December 7 meeting, the Council did not vote on the proposal. But only 3 days later the Board of Education called an emergency meeting and, in a unanimous vote, cancelled all curricular and non-curricular clubs for the 2002-03 school year to halt the disruption resulting from the recognition of the GSA. An important note here is the recognition that the disruption was caused not by the GSA members or their meetings but by those who opposed them (*Boyd County*, 2003, p. 675).

When school resumed on January 2, 2003, the principal informed King that the GSA could no longer meet during non-instructional time during school hours, but that the GSA could apply to meet on campus "as an outside organization" either before or after school. King applied for permission for the meetings, but the principal and the superintendent then rejected the application. Despite the Board's ruling that all clubs were denied access to the school during non-instructional time and before and after school, BCHS seemingly did allow several groups to continue to meet and to use the facilities: Kentucky United Nations Assembly, Mock Trial and Teen Court, Academic Teams, Athletics Teams, Cheerleading squads, Future Farmers of America (FFA), Future Career and Community Leaders of America (FCCLA), Future Business Leaders of America (FBLA), Health Occupation Student Organizations (HOSA), Drama Club, Bible Club, Executive Councils, and Beta Club (*Boyd County*, 2004, p. 676).

The Boyd County High School Gay Straight Alliance filed a motion for a preliminary injunction against BCHS for several violations: violation of the Equal Access Act, violation of First Amendment rights of expression and association, and violation of the Kentucky Education Reform Act (KERA). The injunction would require BCHS to provide the GSA with the same rights they were affording the other groups (i.e., permission to meet during non-instructional time, permission to use school hallways and bulletin boards for posters, and permission to use the intercom to announce club information; *Boyd County*, 2003, p. 669).

Upon hearing all the evidence, Judge David L. Bunning ruled in favor of the GSA and granted its motion for a preliminary injunction.

First, he considered four major non-curricular clubs and their relationship to BCHS: Bible Club, Drama Club, Executive Councils, and Beta Club.

Several allegations surfaced; one indicated that the Bible Club held regular meetings before school in the main hall just outside the principal's office. The principal contended that because he did not spend much time in his office, he was unaware of these meetings. Judge Bunning, however, pointed out that lack of knowledge as a defense is unacceptable under the Equal Access Act; furthermore, the Act states that a school has a limited open forum when the school "grants an offering to or opportunity for" such a group to meet (Equal Access Act, b). He concluded that since the principal opened the doors to the school before school began, he had provided an "opportunity for" the club to meet; thus, the school had a limited open forum. Judge Bunning continued that school officials also provided an opportunity for non-curricular clubs to meet when "they know or should know the group is violating administration rules but take no action to prevent further meetings" (*Boyd County*, 2003, pp. 685-686).

Three additional clubs operating in BCHS proved the school had established a limited open forum: the Drama Club; the Executive Councils, Junior and Senior; and the Beta club. Judge Bunning determined that these clubs were non-curricular because they did not meet the criteria the Supreme Court established in the *Mergens* case. Nevertheless, the administration allowed students in these clubs to use the school's PA system, to use school facilities, and to use hallway bulletin boards to post announcements (*Boyd County*, 2003, pp. 686-687).

At this point Judge Bunning declined to consider the remaining 13 clubs. As he pointed out, BCHS had only to allow one non-curricular club to use school premises to activate the Equal Access Act.

The next question Judge Bunning addressed was whether or not allowing the GSA to use BCHS's facilities would "materially or substantially interfere with the orderly conduct of educational activities." He concluded that although the club was the object of controversy within the community because of its mere existence, the GSA and its members had done nothing to disrupt school. In fact, he pointed out, the opponents of the GSA had been the ones causing the disruption and were the ones the administrators were responding to in canceling all clubs. In finding for the GSA, Bunning cited the Supreme Court case *Tinker* (1969) where students were suspended from school for wearing black armbands to protest the Vietnam War because school administrators wanted to "avoid the controversy which might result" (*Boyd County*, 2003, pp. 688–689). He went on to cite yet another precedent, *Terminiello v. Chicago* where the court declared that expressing a view different from someone else's might result in disruption. However, a speaker cannot be punished simply because her/his words result in disruption. Finally, Judge Bunning concluded that based on these two cases school authorities could not ban a club just because other students and community members are opposed to it and might cause a disturbance. Only if the GSA had engaged in disruptive actions that resulted in the school administrator's inability to keep order and discipline could the school authorities deny the GSA equal recognition (*Boyd County*, 2003, pp. 689–690).

Judge Bunning next had to determine if the GSA had a strong likelihood of succeeding on its claim that the school district violated the GSA's rights under the Equal Access Act. Citing *Colin* (2000), Judge Bunning concluded that even though the Board of Education members and administrators might not approve of students discussing sexual orientation and the need for acceptance, the Board and administrators could not legally suppress the students' speech. Thus, he ruled that the GSA had a very strong likelihood of proving that the school district and the Board of Education had violated the GSA students' rights under the Equal Access Act (*Boyd County*, 2003, p. 691).

Another question Judge Bunning had to answer was whether or not the GSA students would be "irreparably injured" without being granted the preliminary injunction they sought. Citing *Elrod v. Burns* (1976), he pointed out that losing one's First Amendment rights, even for a short period of time constituted an "irreparable injury." He ruled that the students who wanted the GSA at BCHS "were irreparably injured by 'the inability to effectively address the hardships they encounter[ed] at school every day'" (*Boyd County*, 2003, p. 692).

Judge Bunning's next decision involved the requested injunction. He concluded that complying with his injunction would not cost much, if anything, and would require little effort on the part of the school and its authorities to allow the GSA to meet with the same privileges as other non-curricular clubs. Judge Bunning claimed that despite the disruption in the community, no evidence existed suggesting that the GSA meetings caused any uproar. Finally, he believed that the injunction would "serve the public interest" by redressing a wrong, and he quoted the 6th Circuit Court's consistent ruling

that “it is always in the public interest to prevent the violation of a party’s constitutional rights” (*Boyd County*, 2003, p. 692).

In granting the injunction, Judge Bunning did not address violations of the GSA students’ First Amendment rights or violations of KERA for two reasons. One, he believed that addressing those claims was not necessary since he found that the school and its officials had violated the Equal Access Act, and two, that the Supreme Court preferred that lower courts not deal with constitutional questions if possible (*Boyd County*, 2003, p. 691).

Berkley (2004), in his comment on this case, is once again concerned with the curriculum-related aspect. Just as in the *Colin* (2000) case, Berkley believes that the *Boyd County* court was too broad in its explanation and interpretation of the EAA. He claims that the judge used a personal interpretation of the EAA rather than quote it, so that when Judge Bunning asserted that the EAA broadly defined the word *meeting* “to include all activities in which student groups are permitted to engage in a particular school” (*Boyd*, 2004, pp. 684-685), Bunning was actually extending the EAA to provide “protection for all activities” that students in a particular school are allowed to attend, and he was incorrect (Berkley, p. 1891). Berkley points out that the EAA defines *meeting* as “those activities of student groups which are permitted under a school’s limited open forum and are not directly related to the school curriculum” (pp. 1891-1892⁵). Consequently, the interpretation of that section of the EAA is much too broad, Berkley asserts, because the protection only extends to groups in the limited open forum that “are not directly related

⁵ See also the Equal Access Act, definitions in Appendix B

to the school curriculum” (p. 1892). Again, Berkley (2004) believes that to accept this overbroad definition would “undermine the concept of ‘limited’ in limited open forum” (p. 1895).

On the other hand, Berkley (2004) believes that the court’s overall decision was correct. He again cites *Tinker* (1969) clarifying that students’ speech cannot be curtailed simply because others may become violent in response (p. 1882). He views a curtailment of this type of speech as a violation of the United States’ “bedrock principle of . . . free speech” (p. 1882).

Caudillo v. Lubbock Independent School District, 2004

This Texas case presents yet another interpretation of the Equal Access Act and qualified immunity. Previous cases involving individuals only dealt with qualified immunity and Title IX; however, this case deals with qualified immunity and the Equal Access Act, which invokes a different set of criteria. Information comes from the 2003 complaint, the unpublished 2003 court proceedings, and the 2004 published case.

The initial struggle began in September 2002. At that time, Lubbock High School, Grades 9–12, was a regular school located in the mid-sized city of Lubbock, Texas. The school population was 1,808 students: 920 male; 888 female; 5 American Indian/Native Alaskan; 60 Asian/Pacific Islander; 125 Black; 964 Hispanic; 35 migrant; and 654 White. Of these students, 520 were eligible for free lunch and 117 for reduced-price lunch. The student/faculty ration was 16.6:1 with a total of 109.2 full-time teachers.

Yvonne Caudillo, Mirah Curzer, and the Lubbock High School Gay Straight Alliance filed suit against the principal of Lubbock High School and also against the

superintendent of the Lubbock Independent School District (LISD) in both their official and individual capacities for violation of the Equal Access Act, violation of the Civil Rights Act of 1871, U. S. C. 42, sections 1983 and 1988, and violation of the First Amendment. The students asked for declaratory relief including a monetary award to pay for attorneys and other damages.

The November 10, 2003, hearing determined whether or not the Superintendent of Lubbock schools would be granted qualified immunity as requested in his motion for a summary judgment in his favor. Judge Sam R. Cummings found in favor of the superintendent. What made this part of the case interesting is that Judge Cummings rejected precedents in earlier cases concerning the Equal Access Act that occurred outside the realm of his circuit court; he declined to consider the basis for which qualified immunity was denied other school officials in cases dealing with Title IX violations.

Further complicating this case was part of the statement the GSA originally submitted to high school administrators. Before the GSA adopted the name Lubbock High School Gay Straight Alliance, the group was known as Gay and Proud Youth (GAP) but changed its name to make clear that they welcomed heterosexual students as well (*Caudillo*, n.d., p. 3). When GAP presented its papers to the principal of Lubbock High School, one of the stated goals was to “educate willing youth about safe sex, AIDS, hatred, etc.” (*Caudillo*, 2003, *5). However, LISD had an abstinence-only policy in place that applied to any “matters concerning sexual activity” forbidding discussion of them (*Caudillo*, 2003, *3). At the time Texas had a valid state law prohibiting sexual acts between homosexuals, a law against minors of the same sex engaging in sexual activity,

and a law against heterosexual minors engaging in sexual activity if the two involved were more than 3 years apart in age (*Caudillo*, 2004, p. 558). The GSA's stated goal conflicted with the District's policy. The superintendent, feeling caught between the District policy and state law on the one hand and the Equal Access Act on the other, decided to follow the former and denied the group equal standing with the other non-curricular clubs at the school.

Judge Cummings believed the issue, then, was whether or not the superintendent had the right to deny the GSA recognition when one of its stated goals was diametrically opposed to a declared policy of the District and laws of the state. Even the fliers the GSA wished to post in the school listed the GSA's web address with direct links to "explicit sexual material and discussions" (*Caudillo*, 2003, *17-*18). Judge Cummings relied on the superintendent's testimony and sworn affidavits that he had based his decision on exceptions to the Equal Access Act, specifically, that he could not allow the students to engage in activities that broke state laws. Further, the superintendent claimed he also depended on the injunction that he must maintain order and protect students from harassment and possible physical injury. Judge Cummings ruled that upholding the laws of the state was maintaining order. He also stated that the superintendent was protecting the students because the superintendent had received calls from parents worried about their children's safety should the GSA be allowed to exist.

This final ruling is rather interesting. A brief look at other cases discusses this very question: the possibility of injury to the students because of the controversy. In the other cases judges relied on the Supreme Court's ruling that just the possibility of

disruption and harassment was not reason enough to violate either the first amendment or the Equal Access Act.

Finally, although Yvonne Caudillo removed one of the offensive links from the group's website, he did not remove both links. Judge Cummings, therefore, concluded that the GSA had not complied with all the District's requirements for forming a club.

Judge Cummings then took up the question of the precedents to this case. Lawyers for the GSA submitted as precedents the GSA cases discussed above plus *East High School Prism Club*. He concluded that based on these cases the superintendent had no reason to suspect that he acted unlawfully when refusing the GSA's application. The cases occurred outside the jurisdiction of his court and the state, and none of the opinions were from a circuit court. He believed that the cases plaintiffs cited should have been decided by higher courts rather than "obscure district court[s]" (*Caudillo*, 2003, *19–*20).

The next point Judge Cummings addressed was the First Amendment violation. He felt that because the students were minors and the situation involved a web site with direct links to sexually explicit material, the law was less clear about the limits the superintendent could impose. Nevertheless, Cummings concluded that the GSA did not show that the superintendent had violated the students' right to free speech, because of District policy and state laws, nor had they shown that the superintendent's actions were "objectively unreasonable" (*Caudillo*, 2003, *20–*21). Cummings believed that not "all reasonable superintendents" (emphasis in original) would have reacted differently due to the District policy and state laws (*Caudillo*, 2003, *24).

Judge Cummings granted the superintendent's motion for a summary judgment based on qualified immunity and dismissed the case against the superintendent in his individual capacity. Cummings found that the superintendent was neither "plainly incompetent" nor had he "knowingly" violated the law. Were the superintendent culpable in either of these areas, he could have been sued in his individual capacity (*Caudillo*, 2003, *25).

Dismissing the case against the superintendent in his individual capacity was not the end of this case. The remaining parties met before Judge Cummings again on March 3, 2004. This time the remaining defendants filed a motion asking the court to find in their favor and dismiss the case; the plaintiffs filed the same motion in their favor. Once again Judge Cummings found in favor of the defendants and denied the plaintiffs' motion (*Caudillo*, 2004, pp. 559–561).

As far as violations of the First Amendment, Judge Cummings also found in favor of LISD. Based on community standards the GSA's remaining website link provided information that was "1) lewd, 2) indecent, and 3) obscene" when applying the test in *Miller v. California*. Cummings declared that having such information available to students as young as 12 was "inappropriate," and, of course, it violated the District's abstinence-only policy (*Caudillo*, 2004, pp. 561–562).

Next, Judge Cummings explained his decision related to the Equal Access Act. The remaining defendants, as did the superintendent, claimed they based their decision to reject the GSA on exceptions to the Equal Access Act. Once again Judge Cummings partially based his decision on the fact that "no case law within this circuit or from the

Supreme Court defining the boundaries of the exceptions to the EAA under such circumstances” existed (Caudillo, 2004, pp. 564–565). He asserted once again that the exception requiring the maintenance of order and discipline on the campus came into play. By allowing students to discuss sexual homosexual activity, the District would be allowing the groups to violate Texas law and thus the “discussions would substantially and materially interfere with the orderly conduct of the school’s education activities within the school,” specifically with the school’s abstinence-only policy. In addition, such discussions and the website promoting sexual activity among minors of the same sex, Cummings viewed as acts clearly against state law (Caudillo, 2004, pp. 565–566). He also allowed defendants to invoke the exception for maintaining safety on the campus. Judge Cummings felt that since the administrators involved had so many years of experience, they knew the risks and their judgments were sound. These officials clearly believed, he asserted, that the “potential for sexual-orientation harassment existed on the LISD campuses that could lead to disruptive and dangerous conditions for those students” (Caudillo, 2004, pp. 569–570).

The final exception the defendants cited was the well being of the students. First, they asserted the state’s desire and interest in protecting children both mentally and physically; they concluded that both the stated goals and website content of the GSA would endanger students. Since the school, acting *in loco parentis*, assumed the responsibility to protect children, it could not allow the GSA equal rights with other non-curricular clubs (Caudillo, 2004, p. 570). Also, the administrators believed the state had an interest in “protecting” students from teen pregnancy, sexually transmitted disease,

and other harms that might result from teenage sex; therefore, the school had to protect these children from the GSA. Judge Cummings agreed with the defendants and declared that the GSA's stated goals and the links on its web site could be injurious to the well-being of the students. He based this opinion on the Supreme Court's finding that a school does have a right to exert control over its students that it would not be able to exert over adults; that the school for some purposes acts *in loco parentis*, in place of the parents; that schools do have a responsibility to support laws enacted to protect children. Finally, he cited the Texas Family Code giving the school the right to care for minors' well-being (Caudillo, 2004, pp. 570–571). For all of these reasons, Judge Cummings declared that the claimed exceptions were valid, and granted summary judgment for the defendants and denied it to the plaintiffs.

This case clearly had some unique aspects to it. However, some questions remain about Judge Cummings' decision. Dowling–Sendor (2004), an authority on school law and an assistant appellate defender of North Carolina in Durham, believes that Cummings really only had two “legitimate” reasons for his rulings: the GSA's goal to discuss safe sex and the links on the GSA's website. He disagrees with Cummings' findings that LISD could reject the GSA's application in order to protect students from anti-gay harassment because of the “heckler's veto,” which the law does not recognize (p. 62). The “heckler's veto” is the law that says the government cannot silence someone's speech because of the possibility of violent reaction. Dowling–Sendor also points out that discussions of sexual orientation do not necessarily lead to or include discussions of sexual activity. He further states that Judge Cummings' implications that the GSA was

“at its core based on sexual activity” falsely “reduces sexual orientation to sexual activity” (p. 62). This is the same perception students in the *Colin* (2000) case wanted to avoid by being forced to change their language so that the words *sexuality* and *sexual orientation* did not appear in a description of their GSA. Dowling-Sendor concludes that even if a district does have an abstinence-only policy, it could not refuse recognition of a GSA that limited itself to a support group (p. 62).

Berkley (2004) also weighs in on this case and agrees with Dowling-Sendor. Berkley finds the court’s interpretation of *Tinker* (1969) that students do not have the same free speech rights as adults and that the administrators can limit students’ speech to be “highly suspect” (pp. 1882-1883). Berkley continues that the purpose of the EAA was not only to “maintain the constitutional rights of students” but also to “expand” those rights (p. 1883). As such, Berkley maintains, the court cannot interpret the EAA to “limit or restrict” students’ constitutional rights (p. 1883).

Summary

The Equal Access Act in conjunction with the Supreme Court's definition of a non-curriculum related club (*Mergens*, 1990) may be yet another tool LGBT students can use to help ensure their rights and their safety. The above cases indicate that schools with limited open forums cannot deny students the right to join that forum based on "religious, political, philosophical, or other content of the speech" (Equal Access Act, a). School systems that wish to deny one group of students that right must deny all of their students that right; school districts must close that open forum by refusing to allow any non-curriculum student group to meet. In implementing its policy, a district must follow the Supreme Court's ruling in *Mergens* (1990). Further, students wishing to join the limited open forum do not have carte blanche; students, as suggested by *Caudillo*, must adhere to their school system's rules and their state's laws in determining the group's parameters.

CHAPTER VI

SUMMARY, RECOMMENDATIONS, AND FURTHER STUDY

Research Questions

Adolescence is a difficult time for even the most well-adjusted teen. One-parent homes, two-working-parent homes, low-income homes, alcoholic homes, abusive homes (the list could continue *ad infinitum*) all add to an adolescent's difficulty in adjusting to the world and growing to a mature, well-adjusted adult. Based on the psychological studies in chapter III, one can conclude that when adding to this mix the LGBT adolescent, society has a teen who experiences more difficulty adjusting than any other adolescent in America.

Homosexual adolescents are not the latest fad or the newest cult. They have been around since the beginning of time despite society's attempt to explain away the youths' feelings as just another phase they will outgrow. These adolescents are not as fearful as earlier generations, and they often assert themselves long before adulthood. As a result, they often suffer more abuse than if they had remained closeted. They suffer verbal insults from peers and adults alike; they are often not safe at home, on the streets, or even in an educational setting. Consequently, LGBT youth suffer mentally, socially, and physically.

This historical study of LGBT students' struggles reveals several answers to the research questions.

Are LGBT students safe in America's schools?

The short answer to this question is that many LGBT students are not safe in America's middle and secondary schools. Many are neither safe psychologically nor physically as the psychological studies and the court transcripts reveal.

If these students are not safe, what types of suffering have LGBT students in America's schools encountered?

The answer to this question is more involved than the previous answer and requires a two part response: psychological injuries and physical injuries.

Psychological Injuries

The psychological studies in this work document the obstacles many LGBT adolescents face on a daily basis. These young people are more likely to drop out of high school than non-LGBT youth, often have lower GPAs, and lower self esteem. These adolescents may even find themselves disowned and living on the streets. They sometimes see no future for themselves because they see themselves as outcasts and unworthy; they have almost no role models to look to for their developing maturity. They are made fun of and denigrated at school, sometimes on a daily basis. Hurtful words give rise to social ostracization and can lead to physical abuse.

Some LGBT youth attempt to fit in with their peers by denying their homosexuality and acting overtly heterosexually, resulting in increased feelings of alienation. These youth can end up with unwanted children and/or may turn to drugs in an

attempt to ease their psychologic pain. Some are so busy proving they are heterosexual that they have little time to attend to their everyday responsibilities. As a result, many LGBT adolescents have little time for school work. Emotionally, many are exhausted in their attempts to maintain their heterosexual façade.

Some adolescent LGBT youth who do not attempt to pass for heterosexual are often worn out by the constant torment and physical abuse they suffer at school. Because of the mental, social, and physical suffering, LGBT adolescents are more prone than the average adolescent to engage in risky behavior such as drugs, alcohol, promiscuous sex, and suicide attempts. All of these behaviors are detrimental to obtaining a solid education. Acquiring an education is even more difficult for the LGBT teen when the harasser is a faculty member or an administrator or when the faculty member or administrator fails to take action to protect the student from her/his peers.

Physical Injuries

Discrimination leveled against LGBT students is not solely psychological but also physical. Legal transcripts and local and national stories reveal that the physical struggle of LGBT youth covers a wide range of activities. In some instances youth are called names such as "faggot," "queer," "homo," "dyke," "fucking faggot," and/or "fucking dyke." In some escalated episodes LGBT youth receive anonymous notes expressing negative sexually explicit comments and suggestions, expressing hatred, some even expressing death threats. In other instances LGBT students have obscene messages carved on their locker doors. Those youth not satisfied with verbal assaults often abuse LGBT youth in other ways, such as shoving, tripping, and spitting on them. In some

cases LGBT youth find their books and school supplies knocked to the floor by their classmates and sometimes their book bags ripped from their backs. In more extreme cases LGBT youth have their heads shoved in toilets, are mock raped, and/or beaten.

Repeated physical abuse has a psychological effect on LGBT youth as well. At least two of the students presented in chapter IV, Nabozny and Dahle attempted suicide (Young considered it) because they felt unable to deal with the physical abuse any longer. *If these students are not safe, what actions have they taken to protect themselves?*

The answer to this question is relatively simple. Because of the Equal Access Act, LGBT students in districts with limited open forums have the right to form GSAs as a method of protection. A GSA, which involves both LGBT youth and heterosexual youth promotes understanding, acceptance, and tolerance among the students.

If these students are not safe, how can they legally safeguard their security?

In several situations, LGBT youth have turned to the law for relief. Through several individual lawsuits against school systems, administrators, and teachers, LGBT youth have learned that although no specific laws have been enacted to protect them, they can access existing laws to gain relief; in fact, Bedell (2003) suggests that when administrators will not help stop the harassment and abuse LGBT youth are suffering, they may be able to “stop the abuse indirectly by bringing a lawsuit against school officials” (p. 848). Oftentimes the students can also receive compensation for their suffering and require school districts to change policies that will benefit LGBT students and students in favor of LGBT rights in the future. Monetary rewards are all well and good, but they do not heal students’ emotional suffering nor remove the scars of

discrimination and abuse. Plaintiffs and defendants may not always agree with the outcome of their cases, but judges based their decisions on precedents. Precedents set by each case are not only important for those who come later, but vital to those future hearings as judges must use precedents to determine the outcome of the cases before them. Also important to LGBT student rights is an understanding of the reasoning behind the decisions, but that is another study.

The 27 suits brought by individuals have helped to clarify some laws and provide insight as to their benefit for LGBT students. The landmark *Nabozny* (1996) case provided important precedents in two areas: (1) gender and equal protection, (2) sexual orientation and equal protection. The 7th Circuit clarified that administrators cannot treat students in similar situations differently because of their gender. Thus, a girl who complained of physical abuse and a mock rape would have received immediate attention from the administrators, the 7th Circuit justices claimed, but because Jamie was male, his administrators told him he should expect such behavior if he was going to be open about his sexual orientation. Thus, Jamie was discriminated against based on his gender. Second, the 7th Circuit justices stated for the record that “homosexuals are an identifiable minority subjected to discrimination in [American] society” (*Nabozny*, 1996, p. 457). This statement of belief led the way for the justices to grant equal protection for sexual orientation. Although other Circuit Courts are not bound by the 7th Circuit’s findings, courts outside the 7th Circuit’s jurisdiction followed its lead in other LGBT cases, specifically the 9th Circuit in the *Flores* (2003) case.

Several more of the above cases had important ramifications for LGBT students. *Vance* (2000) served notice to school districts and their officials that if the response to the harassers did not result in a cessation of the discrimination, the officials must reevaluate their response and try another. The young woman involved in this case suffered through not just 1 year of school-based discrimination, but through 4 years; the administrators had ample time and knowledge to address the problem, yet they failed to do so. Of further concern was the girl's age; one can only conjecture about the emotional damage she must have sustained considering the abuse began when she was about 12. Thinking back to the psychological studies, one can easily understand the girl's depression and desire to commit suicide by the time she was in ninth grade.

The case *O. H. v Oakland Unified School District* (2000) is also instructive. First of all, it clarifies under what circumstances a plaintiff can try to hold teachers and administrators culpable individually under Title IX and 42 U. S. C. section 1983. Also, LGBT students and their supporters in lawsuits should note that trying to file a lawsuit for conspiracy when one is sexually abused and/or harassed is quite difficult. The plaintiff must provide specifics as a basis for the conspiracy charge.

Putman (2000) is important because it built on the foundation already laid by *Nabozny*. The more these cases are cited as precedent, the more effective they become in the battle to protect LGBT students. With each succeeding case, administrators find it more and more difficult to hide behind the qualified immunity of the Eleventh Amendment and find themselves becoming more and more responsible as individuals for

their decisions. This case suggests that being hurt in the pocketbook is more effective than appeals to moral decency and to ethical behavior.

The next important case is *Henkle* (2001) because it dealt directly with school officials' failure to act based solely on sexual orientation. Further, *Henkle* is the first LGBT case to state that LGBT students have the right to speak about their sexual orientation at school; they cannot be compelled to keep silent about their core identity.

Although *McLaughlin* (2003) is not a groundbreaking case and does not involve, yet, the disbursement of thousands of dollars to the plaintiff, the case is, nevertheless, important. First, it clearly shows that the courts will not only uphold the findings in the *Henkle* case in regard to students' First Amendment rights, but they will consistently apply the rulings in *Tinker*. Second, seeing what will happen in this case could be interesting, as the administrators in Thomas' school may have overstepped their bounds in quoting Bible verses to Thomas, in requiring him to read the Bible, in suspending him for talking about who he is, and for trying to silence him about his school experiences. Not only did Thomas experience the attempted silencing of himself from society at large, but he also experienced the very real attempt to shove him back into the closet by his teachers and administrators.

The GSA cases further provide a legal basis for permitting LGBT students to safeguard their security. In any school district with a limited open forum, students may form a GSA as a means of promoting understanding among students and thus attempting to protect themselves. The cases reveal that legally school districts with limited open forums cannot deny this right to LGBT youth.

These cases are important not only for their legal findings, but most importantly because they clearly document the struggles of LGBT youth and the verbal and physical harassment some LGBT youth undergo in U. S. public schools. Based on the reports of the psychologists and psychiatrists, despite what a court may think constitutes enough harassment to deny a student educational opportunities, some LGBT students have clearly been denied those opportunities. No one can know the debilitating effect of a pervasive, daily fear of being discovered to be LGBT or of being harassed verbally or physically. All of these cases are important in students' struggles to obtain their rights. Most of the students in these cases are LGBT students, but some of the plaintiffs may not have been LGBT, yet they also suffered because of people's assumptions about them. Thus, the laws are not just to protect LGBT students, but also any student perceived to be LGBT. Because one can never know the psychological effect of discrimination, the toll on LGBT students is incalculable. Monetary rewards are all well and good, but they don't heal students' emotional suffering nor remove the scars of discrimination and abuse.

Recommendations

The number of students per classroom affected by LGBT issues is not relegated to just those who may be LGBT, but extend to any student who may have a relationship with LGBT people such as mothers, fathers, sisters, brothers, cousins, aunts, uncles, friends. Fontaine (1998) claims that considering the "involvement of siblings of homosexual youth and parents who identify as gay or lesbian, as many as 9 students in a classroom of 30 could be affected by homosexual issues" (para. 10). Thus, despite the results of the court cases, the question remains for LGBT students and students affected

by LGBT issues in America's middle and secondary schools: How do I protect myself?

No simple answer exists.

As the demographics suggest, one cannot point to any particular type of school in any particular state and say the students in this school will harass LGBT youth. If anything, the demographics reveal that LGBT harassment occurs across the country, whether a state has specific sexual orientation language or not, whether a school district has specific sexual orientation language or not, whether the district is poor, wealthy, located in an urban, rural, or suburban area. It matters not whether the school is composed of mainly minority students or non-minority students: harassment is everywhere in the United States public education system.

What is the first step in protecting LGBT youth in America's middle and secondary schools? Ideally, school districts should take the lead in this area in order to protect their students because the school environment is vitally important to the well-being of America's youth. For instance, Nichols (1999) claims "feelings of alienation decrease with the increasing awareness that there are surrounding individuals who are supportive" (p. 512). These individuals could be trained, informed, and caring teachers. Russell, Seif, and Truong (2001) claim that

teachers play a leading role in explaining the school troubles experienced by sexual minority adolescents . . . Youth with positive feelings about their teachers were significantly less likely than their peers to experience the broad range of school troubles. Supportive teachers can help prevent school troubles of sexual minority youth. (p. 124)

Russell, Seif, and Truong (2001) further assert that the way students feel about their teachers is one of the biggest indicators in “predicting the troubles of both boys and girls with bisexual attractions in school” (p. 120).

School districts can begin by adding language to their policies prohibiting discrimination based on sexual orientation. Next would come training for all district personnel. Training need not be expensive. GLSEN offers free and inexpensive, downloadable training materials. A district needs teachers or officials willing to plan a day or two of training for their peers. For those districts with the available funds, GLSEN can put them in touch with experienced speakers and diversity trainers.

Too often teachers allow prejudiced, threatening remarks to pass without comment; violence can be the result. Savin-Williams (1999) claims that “this violence has its roots in [American] culture’s tolerance of children calling each other ‘faggot’ and ‘dyke,’ of teachers who do not correct or stop gay-related name calling, and . . . myths about gay people” (p. 150).

Another positive support for LGBT students is the inclusion of information about LGBT people in courses across the curriculum. For instance, English teachers could discuss the homosexuality of and the impact of being LGBT on many great writers rather than ignoring that information. History, art, and math teachers could do the same. The presentation of positive role models for LGBT students and their peers may go a long way in decreasing the prejudice many people feel.

If districts are unable or refuse to take these steps in providing safety for their students, the students themselves can take effective measures to improve the school environment for LGBT youth and those affected by and sympathetic to LGBT issues.

The first step is to be proactive rather than reactive. Students should learn the education laws of their resident state. As of June 2004, according to GLSEN (2004) only eight states and the District of Columbia have statewide legal protections for students based on sexual orientation: Connecticut, Massachusetts, Vermont, Washington, Wisconsin, California, Minnesota, and New Jersey. Only three of these states provide protection for sexual orientation and gender identity (p. 2). The first step, then, might be to start lobbying lawmakers in states that do not offer LGBT students safety.

A second step would be the formation of a GSA. Since all public schools accepting federal funds that have established limited open forums must recognize student initiated clubs equally, the most proactive step a student can take is to establish a GSA in her school. This action requires courage and endurance. The student is likely to meet opposition perhaps from administrators, teachers, parents, community organizations and leaders, and/or even fellow students. Actions from name calling to physical threats and injuries may ensue. When such situations occur, the student must be willing to stand her ground and fight for her rights; many organizations, such as Lambda Legal and the ACLU, are willing to help students secure those rights.

The third step involves students who have already suffered harassment and abuse, have asked school officials for help, and have been denied or ignored. They may wish to

contact the Office for Civil Rights, consider lawsuits based on Title IX, the First Amendment, and/or the Fourteenth Amendment.

No one can predict with any certainty what will happen in the struggle to obtain safety for America's middle and secondary LGBT students. What is sure is the fact that if no one takes steps to counteract the bigotry and prejudice and ignorance, another Matthew Shepherd may not be too far away.

Further Study

Many avenues exist for future studies. With more and more adolescents "coming out" during their middle and secondary school years, the possibility of interviewing these students while they are still students becomes a realistic goal. Learning about these youths' experiences may help to alter school districts' rules and regulations regarding discrimination. Another possibility would be to interview those students who harass LGBT youth to learn their motivations. Future research projects could involve comparing schools with stated policies prohibiting harassment based on sexual orientation to those schools that do not have such policies in place. These studies might indicate which districts are most successful in safeguarding LGBT students.

Because only eight states have specifically written policies dealing with sexual orientation, one might select eight superintendents in those states to interview about the increase or decrease in LGBT harassment and compare them to eight superintendents in states without such policies. In this same vein, one might survey recent high school graduates in those states with sexual orientation policies to see if the number of LGBT graduates has increased or not by comparing the statistics to a survey of students prior to

the policy being put in place. The suicide rate is another area one might explore. Do school districts with specific written sexual-orientation policies successfully graduate more LGBT students than those districts without such a policy? Another area of study could be to look into the schools in a specific state with a written sexual orientation policy to see which schools have successfully implemented the policy and which have not. Just because such a policy is in place does not necessarily make it effective. Finally, one might survey schools with GSAs and compare them to schools without to see if the atmosphere of prejudice has been reduced or increased due to a GSA. Or, one might even compare schools with GSAs to learn similarities and differences in terms of success.

LGBT youth and their school experiences can provide a wealth of information for those educators interested in providing the best possible learning experience for their students.

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Appendix A

Appendix A

A beginning list of resources for exploring
the results of social stigmatization on LGBT youth.

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Appendix B

Appendix B

42 U.S.C. Section 1983

The following is the exact language of Section 1983 of title 42 of the United States Code (42 §1983):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Equal Access Act

US CODE COLLECTION

TITLE 20 > CHAPTER 52 > Sec. 4071, 1990

Sec. 4071. - Denial of equal access prohibited

- (a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

- (b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

- (c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that -

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof -

- (1) to influence the form or content of any prayer or other religious activity;
- (2) to require any person to participate in prayer or other religious activity;
- (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
- (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
- (5) to sanction meetings that are otherwise unlawful;
- (6) to limit the rights of groups of students which are not of a specified numerical size; or
- (7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

- (f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

TITLE 20 > CHAPTER 52 > SUBCHAPTER VIII > § 4072
§ 4072. Definitions

Release date: 2004-08-06

As used in this subchapter—

- (1) The term “secondary school” means a public school which provides secondary education as determined by State law.
- (2) The term “sponsorship” includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
- (3) The term “meeting” includes those activities of student groups which are permitted under a school’s limited open forum and are not directly related to the school curriculum.

(4) The term “noninstructional time” means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Title IX, Education Amendments of 1972

(Title 20 U.S.C. Sections 1681-1688)**Section 1681. Sex**

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices --

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association; Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institutions of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined.

For the purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college or department.

Section 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient

as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 1683. Judicial Review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

Section 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity; but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Section 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Section 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Section 1687. Interpretation of "program or activity"

For the purposes of this title, the term "program or activity" and "program" mean all of the operations of --

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributed such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2854(a)(10) of this title, system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2) or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 if this title to such operation would not be consistent with the religious tenets of such organization.

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BINDERY, INC

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12/15/2005

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.