

December 7, 2015

Dear Principal or Superintendent:

You have been presented with this letter because one or more of your schools may be failing to protect lesbian, gay, bisexual, or transgender (LGBT) students from severe bullying and harassment. It is your legal responsibility to investigate such cases of bullying, both physical and verbal, and ensure that harassment stops and your school is a safe learning environment for all students.

Public schools that fail to adequately protect LGBT students from severe bullying and harassment can be held liable under Title IX and the Equal Protection Clause. Cases that have determined school districts are liable for anti-LGBT bullying as a result of their deliberate indifference have led to damages awards and settlements as high as \$1.1 million. *See, e.g., Flores*, 324 F.3d 1130 (awarding \$1.1 million in damages and attorneys' fees); *Nabozny*, 92 F.3d 446 (awarding \$962,000 in damages); *Dickerson v. Aberdeen School Dist. No. 5*, No. 3:10-cv-5886 (W.D. Wash. 2010) (awarding \$100,000 in damages); *Theno v. Tonganoxie Unified School Dist. No. 464*, 404 F.Supp.2d 1281 (D. Kan. 2005) (awarding \$440,000 in damages and attorneys' fees); *Henkle v. Gregory*, 150 F.Supp.2d 1067 (D. Nev. 2001) (awarding \$451,000 in damages); *Vance v. Spencer*, 231 F.3d 253 (\$220,000 in damages); *Putman v. Bd. of Educ. of Somerset Ind. Schools*, No. 6:00-cv-00145 (E.D. Ky. 2000) (awarding \$135,000 in damages).

Under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, schools may be held liable if they act with deliberate indifference in failing to protect students from severe peer harassment on the basis of sex. *See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). Harassment based on a student's gender identity, sexual orientation, or failure to conform to sex stereotypes is a form of harassment based on sex under Title IX. *See Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP JCX, 2015 WL 1735191, at *7 (C.D. Cal. Apr. 16, 2015); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 150 (N.D.N.Y. 2011). The U.S. Department of Education issued guidelines on bullying in 2010 that further confirm the responsibility of public schools to take seriously the harassment of students on the basis of their actual or perceived LGBT status. The guidelines state,

When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title

AMERICAN CIVIL LIBERTIES
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IX to investigate and remedy overlapping sexual harassment or gender-based harassment.

Russlynn Ali, Department of Education Office of Civil Rights, Guidance on Combating Bullying (October 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; *see also* Catherine E. Lhamon, Department of Education Office of Civil Rights, Questions and Answers on Title IX and Sexual Violence (April 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

Deliberate indifference to severe harassment and bullying of LGBT students also violates the Fourteenth Amendment. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (“Reasonable persons in the defendants’ positions . . . would have concluded that discrimination against [a public school student] based on his sexual orientation was unconstitutional.”); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-35 (9th Cir. 2003). It is therefore incumbent on school officials to take claims of LGBT-related harassment seriously, and work hard to fully and effectively resolve them. *See Flores* at 1135-36 (“Failure to take any further steps once [the school administrator] knew his remedial measures were inadequate supports a finding of deliberate indifference”); *Martin v. Swartz Creek Cmty. Schools*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006) (“[If] the school district’s efforts . . . did not abate the frequency or severity of [anti-gay bullying], [the ineffective remedy] might alone create a jury question of whether the school was deliberately indifferent.”)

With this information in mind, we urge you to investigate and respond appropriately to the LGBT-related harassment that may be occurring at your school or schools. Please do not hesitate to contact the ACLU if you have any questions about this letter or if we can be of any assistance to you. We can be reached at 212-549-2673.

Sincerely,



James D. Esseks
Director
ACLU Lesbian Gay Bisexual Transgender & HIV Project

Students and parents: Feel free to use this letter as an advocacy tool in your own school.