

April 12, 2012

Dear Superintendent and members of the School Board:

There may be a case of harassment at one or more of your schools within your school district against a student or students who are, or are perceived to be, lesbian, gay, bisexual or transgender (LGBT). On behalf of the American Civil Liberties Union Foundation (ACLU), I am writing to inform you it is your legal responsibility to investigate such cases of bullying, both physical and verbal, and ensure that they stop.

This is not just the opinion of the ACLU; it is clearly established law. Federal courts throughout the United States, including trial courts and appeals courts, have recognized the Constitutional requirement of equal protection of gays and lesbians for decades, including in public schools. *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 [public school student] Nabozny based on his sexual orientation was unconstitutional."); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-35 (9th Cir. 2003) ("The plaintiffs are members of an identifiable class for equal protection purposes because they allege discrimination on the basis of sexual orientation."). It is therefore incumbent on school officials to take seriously claims of LGBT-related harassment and fully and effectively resolve them. *See Flores* at 1135-36 ("Failure to take any further steps once he knew his remedial measures were inadequate supports a finding of deliberate indifference"); [*Martin v. Swartz Creek Cmty. Schools*, 419 F. Supp. 2d 967, 974 \(E.D. Mich. 2006\)](#) ("that the school district's efforts ...did not abate the frequency or severity of [anti-gay bullying], might alone create a jury question of whether the school was deliberately indifferent.")

Public schools that ignore or inadequately respond to harassment and bullying of LGBT students pay significantly for such discriminatory treatment. Cases challenging a school district's deliberate indifference to bullying against students because of actual or perceived LGBT status have led to damages awards or settlements as high as \$1.1 million. *See, e.g., Flores*, 324 F.3d 1130 (\$1.1 million in damages and attorneys' fees); *Nabozny*, 92 F.3d 446 (\$962,000 in

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UNION FOUNDATION
LESBIAN GAY BISEXUAL
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PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2627
F/212.549.2650
WWW.ACLU.ORG/LGBT

SAN FRANCISCO OFFICE:
39 DRUMM STREET
SAN FRANCISCO, CA 94111

CHICAGO OFFICE:
180 NORTH MICHIGAN AVENUE
SUITE 2300
CHICAGO, IL 60601-7401

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damages); *Dickerson v. Aberdeen School Dist. No. 5*, No. 3:10-cv-5886 (W.D. Wash. 2010) (\$100,000 in damages); *Theno v. Tonganoxie Unified School Dist. No. 464*, 404 F.Supp.2d 1281 (D. Kan. 2005) (\$440,000 in damages and attorneys' fees); *Henkle v. Gregory*, 150 F.Supp.2d 1067 (D. Nev. 2001) (\$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) (\$135,000 in damages)).

In addition to the clearly established case law, the U.S. Department of Education issued guidelines on bullying in 2010 that further confirm the responsibility of public schools to take seriously 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 IX to investigate and remedy overlapping sexual harassment or gender based harassment." Asst. Sec'y of Educ. Russlynn Ali, Dep't of Educ. Office of Civ. Rights, Guidance on Combating Bullying (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

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 via email at lgbthiv@aclu.org.

Sincerely,



James D. Esseks
Director