PERSONAL LIABILITY OF SCHOOL OFFICIALS UNDER § 1983 WHO IGNORE PEER HARASSMENT OF GAY STUDENTS

JEFFREY I. BEDELL*

The harsh reality of peer harassment of students based on perceptions of sexual orientation is an ever-growing problem in America's K–12 schools. Bedell delves into the systemic problems in deterring this abuse and identifies that school officials are tacitly approving, vis-à-vis inaction, the harassment.

After identifying the problem, the author examines Title IX and finds—based in large part on courts' interpretations of Title IX through prior interpretations of Title VII—unavailable to students a cause of action against school officials or peers for harassment on the basis of sexual orientation. Bedell also examines state law and finds inadequate protection for students facing this harassment.

Bedell investigates the scope of bringing an action under § 1983 to assess potential for liability at the top of the food chain—the school officials and school board. The author argues that school officials who do nothing to stop peer harassment based on sexual orientation are violating students' rights under the Equal Protection Clause of the Fourteenth Amendment and could be personally liable under § 1983. The author recommends that states should pass comprehensive anti-discrimination and bullying statutes to end the anti-gay harassment of students by their peers in school.

I. INTRODUCTION

Alana Flores was a ninth grader at Britton Middle School when her classmates first began calling her a "dyke."[1] When she matriculated to Live Oak High School in Morgan Hill, California, she hoped the new environment would be more hospitable than the last.[2] Instead, the harassment became more acute as students began to leave notes in her locker that said things such as "[y]ou don't belong here," and that called her

* *I would like to thank Professor Carlos Ball, Nada Djordjevic, and my wonderful Notes Editor Jennifer Bruno for reading and commenting on my drafts. I would also like to give thanks and love to my parents.*

1. Stacy Finz, *Emerging from a Secret: Taunts and Internal Conflict Pushed Student to the Brink*, S.F. CHRON., June 12, 2000, at A1.

2. *Id.*

anti-gay epithets and threatened her with death.[3] Students daily screamed "dyke" and other slurs at Alana across the quad.[4] Mocking flyers were placed on campus advertising a "support group" for gay bashers with the phone number 1-800-RED-NECK.[5] One student approached Alana with a photo of a man and woman engaging in intercourse and told her, "[t]his is the way you should be doing it."[6]

The abuse culminated in someone leaving an obscene photo in Alana's locker of a woman bound and gagged with her throat slashed.[7] Accompanied by a friend, she took the photo to the Vice-Principal's office. After Alana tearfully explained to the Vice-Principal the harassment she had been experiencing, the Vice-Principal asked her, "[w]ell, are you a gay?"[8] When Alana said she was not, the Vice-Principal responded, "[w]ell, if you're not gay, why are you crying?"[9] The Vice-Principal reportedly then tore up the photo and commanded Alana to stop "bring[ing] me this trash."[10] Thereafter, Alana faced continuous harassment from her peers and later attempted suicide.[11]

Unfortunately, Alana's story is not unique.[12] Other reported abuses of gay students include Derek Henkle of Reno, Nevada, who was lassoed around the neck by fellow students who then suggested dragging him behind a truck.[13] School police officers reportedly witnessed another assault on Derek, again by fellow students, that left him with a gouge behind his ear and bleeding profusely from his mouth and nose.[14] In response, the officers "turned around and walked the other direction."[15] At a school in Westchester County, New York, an informal poll written on a boy's bathroom wall asks "[w]ho is the biggest faggot in school?"

3. *Id*.
4. *Id.*
5. Jason Hoppin, *School Liability Tests Well in Court*, THE RECORDER, Oct. 6, 2000, at 1.
6. Finz, *supra* note 1.
7. *Id*.
8. *Id*.
9. *Id*.
10. Bettina Boxall & Duane Noriyuki, *Abuse of Gay Students Brings Increase in Lawsuits Harassment: Victims, Once Silent or Ignored, Now Strike Out Against a Favorite Form of Campus Torment*, L.A. TIMES, May 28, 1999, at A1.
11. Finz, *supra* note 1.
12. The recounting of these alleged incidents is not meant to be gratuitous, but simply to show that the treatment of gay students goes beyond ordinary adolescent teasing.
13. Henkle v. Gregory, 150 F. Supp. 2d 1067, 1069 (D. Nev. 2001). Derek escaped to a classroom and called the principal. *Id.* When the Assistant Vice-Principal arrived two hours later, he responded to the story with laughter. *Id.* The incident was then reported to the Principal, but no disciplinary actions were taken despite knowledge of the students' identities. *Id*. Derek subsequently reached an out-of-court settlement with the school district in the amount of $451,000. John Koopman, *Ex-student Hopes Settlement Will Stop Anti-Gay Attacks*, S.F. CHRON., Aug. 29, 2002, at A2. The school district also agreed in the settlement to change the school's policies to protect gay students' safety and freedom of expression of sexual orientation. *See id*.
14. Maria Hinojosa, *Young, Gay and Scared to Death at School*, CNN, *at* http://www.cnn.com/US/9909/23/hate.crimes.gays/ (last visited Sept. 23, 1999).
15. *Id.*; *see also Henkle*, 150 F. Supp. 2d at 1070 (stating the defendant police officers also encouraged Henkle not to report the incident).

and solicits votes by use of tally marks next to a student's name.[16] A young lesbian student described the experience at her school as one where she could "walk outside and hear one word and know that someone wants you dead."[17]

These stories lay bare the daily abuse faced by students in K–12 schools who are, or are perceived to be, gay, lesbian, or bisexual. The harassment these gay students[18] face from their peers is as vicious and cruel as it is pervasive. Students harassed on the basis of their perceived or actual sexual orientation are subjected to slurs, crude sexual comments, threats, physical intimidation or humiliation, physical assaults, and even sexual assaults.[19] This maltreatment, besides leaving the student incapable of receiving a basic education,[20] has profound negative consequences on a student's psychological and physical health.[21]

Exacerbating the problems faced by these students is the fact that in many cases adults who are in a position to end the harassment do nothing. Public school officials[22] in authority positions often have negative personal opinions on the subject of homosexuality that prevent them from coming to the aid of a harassed student.[23] Also, some school officials perceive harassment in schools as an unavoidable consequence of interaction between immature youths.[24] Students who harass other students based on their perceived or actual sexual orientation interpret this inaction on the part of school officials as tacit approval to continue or even escalate the abuse.[25]

16. Kate Stone Lombardi, *Long Days, Long Hallways*, N.Y. TIMES, Jan. 27, 2002 (Westchester), at 1.

17. Hinojosa, *supra* note 14.

18. I use the phrase "gay students" to refer to students who are gay, lesbian, or bisexual and those who are heterosexual, but are nevertheless harassed because of their perceived homosexual or bisexual orientation. Although some of the analysis contained in the Note may be relevant to those students who are transgendered or transsexual, I do not specifically include them in this group. Discrimination against these students may involve a tenable claim of sex discrimination or discrimination based on gender, which is often unavailable to gay students. *See infra* notes 95–132 and accompanying text (discussing the distinction between sex and sexual orientation discrimination).

19. *See infra* Part II.A.

20. *See infra* notes 65–68 and accompanying text.

21. *See* discussion *infra* Part II.C.

22. The phrase "school official" as used in this note has different meanings if we are discussing a § 1983 suit against a school official acting in an individual capacity or a suit against a school official acting in an official capacity. For a discussion of this distinction, see *infra* Part III.A.1.b. Significant constitutional and statutory restrictions exist that may bar a school official, such as a counselor or teacher, from being held liable under § 1983 when acting in an official capacity. *See infra* notes 129, 132 and accompanying text. In contrast, when discussing individual liability, which is this note's focus, the phrase "school official" refers to someone sued in an individual capacity, which would include individuals such as school counselors and teachers, who is an employee of a public school and acting under color of law.

23. *See infra* Part II.B.2.

24. *See* HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 38 (2001), *available at* http://www.hrw.org/reports/2001/uslght/toc.htm [hereinafter HATRED IN THE HALLWAYS].

25. *See id.* at 36.

Gay students who are being harassed and who wish to resort to legal remedies are often left with no recourse under state law. Few states prohibit discrimination or harassment in schools on the basis of sexual orientation.[26] Federal law similarly does not forbid peer harassment on the basis of sexual orientation, though peer sexual harassment may be actionable.[27] A student with no cause of action under either federal or state law is left to rely on the protection of a local school official. If that protection is unavailing or inadequate, as it commonly is, a student is faced with the option of either seeking other educational settings—where the abuse is likely to follow with all-new harassers—or, surviving the abuse until graduation.

This note argues that gay students who face peer harassment may rely on federal law, namely 28 U.S.C. § 1983, to sue school officials who turn a blind eye to harassment. When a school official knowingly allows the harassment of a gay student to continue, that school official violates the student's right to equal protection under the Fourteenth Amendment to the United States Constitution.[28] Furthermore, this note argues that school officials who do not take steps to end known anti-gay harassment of students by peers are not shielded, even under the lowest level of scrutiny, from personal liability by the affirmative defense of qualified immunity.[29]

Part II of this note details the anti-gay harassment that currently occurs in America's K–12 schools, why it is condoned or ignored by school officials in many cases, and the negative impact it has on youth who are subjected to this harassment. Both state and federal law are analyzed to illustrate the lack of protection that currently exists for peer harassment based on actual or perceived sexual orientation. This part also considers the criticisms made by commentators of how federal courts currently interpret Titles VII and IX. Because both statutes have been interpreted as not prohibiting harassment on the basis of sexual orientation, gay students must find another way to stop peer harassment.

Part III first details what a claim under § 1983 entails, who may be sued, what must be proven, and why proving liability on the part of a school district or school board is extremely difficult. Next, this part argues that gay students who face peer harassment may, in the face of inaction by school officials who are aware of the harassment, sue such school officials under § 1983 for violation of the right to equal protection.[30] Finally, part III asserts that school officials who respond to claims of peer harassment on the basis of perceived or actual sexual orientation with in-

26. *See* discussion *infra* Part II.D.1.
27. *See* discussion *infra* Part II.D.2.
28. *See* discussion *infra* Part III.C.
29. *See* discussion *infra* Part III.D.
30. This Note does not discuss alternative theories of liability under § 1983, such as a claimed violation of due process under the Fourteenth Amendment.

adequate or discriminatory measures do not enjoy qualified immunity from suit.

In part IV, comprehensive antidiscrimination and bullying statutes, passed at the state level, are recommended for ending anti-gay harassment of students by their peers in school. If state legislatures are not inclined to pass these measures, local school boards and school districts should step in to fill the void. Part IV reiterates that school officials should not wait for action on this front by legislative bodies as personal liability under § 1983 may exist even absent specific legislation addressing harassment and discrimination towards gay students.

II. HARASSMENT OF GAY STUDENTS IN SCHOOL AND THE LACK OF LEGAL PROTECTION

The halls and classrooms of America's schools are filled each day with homophobic slurs and harassment of gay students. The majority of this behavior goes unpunished by adults in a position to stop the abuse. As would be expected, this harassment and abuse has a serious and negative impact on its victims. The gay student who might wish to stop the abuse finds that the laws of most states and the federal government usually offer little help.

A. Anti-Gay Harassment as an Everyday Occurrence in K–12 Education

Elementary and secondary schools in America represent a hostile and frightening environment for gay students. Halls, classrooms, and gyms are scenes where harassment against those with an actual or perceived homosexual or bisexual orientation is carried out every day with disturbing frequency. In a study conducted by the Gay, Lesbian, and Straight Education Network (GLSEN) consisting of interviews with 904 gay, lesbian, bisexual, or transgendered youth from forty-eight states and the District of Columbia, 84.3% of these students reported hearing the remarks "faggot" or "dyke" frequently or often.[31] A 1993 survey commissioned by the Massachusetts Governor's Commission on Gay and Lesbian Youth reported that 97.5% of students heard homophobic remarks made at their school.[32] Other forms of homophobic verbal harassment include spreading vicious rumors, such as statements that a stu-

31. Gay, Lesbian, and Straight Education Network, *The 2001 National School Climate Survey*, *available at* http://www.glsen.org (Oct. 10, 2001) [hereinafter GLSEN Study].

32. THE GOVERNOR'S COMMISSION ON GAY AND LESBIAN YOUTH, MAKING SCHOOLS SAFE FOR GAY AND LESBIAN YOUTH 9 (1993) [hereinafter MASSACHUSETTS GOVERNOR'S COMMISSION]. The Commission surveyed approximately 400 male and female students at Lincoln-Sudbury Regional High School to ascertain their "attitudes towards gay, lesbian, and bisexual issues." *Id*. at 46; *see also* GLSEN Study, *supra* note 31 (reporting that 91% of students hear the expression "that's so gay," or "you're so gay," frequently or often).

dent is infected with AIDS.[33] The incidence of homophobic remarks in schools occur even with children as young as eight or nine.[34]

Gay and lesbian youth frequently face forms of mistreatment even more severe than verbal insults. Physical harassment because of sexual orientation was experienced by 41.9% of the respondents in the GLSEN study, while 21.1% reported being physically assaulted because of their sexual orientation.[35] In another study on the subject, researchers asked gay youth from fourteen major metropolitan areas about the incidence of anti-gay harassment they faced.[36] The youths' responses to the survey were classified in one of three categories—Attack I, Attack II, or Attack III—with each category representing an escalating level of violence.[37] Based on the classification used by the researchers, 80% of youth experienced Attack I victimization, 44% Attack II, and 17% Attack III.[38] When the subtypes of victimization were explored, researchers found a frequency of "[v]erbal insults, 80%; threats of attack, 44%; property damage, 23%; objects thrown, 33%; being chased or followed, 30%; being spat on, 13%; physical assault, 17%; assault with a weapon, 10%; and sexual assault, 22%."[39] One researcher reviewing the levels of violence directed at gay students concluded that "[b]ecause much of this violence occurs in schools, school is too punishing and dangerous for many lesbian, gay male, and bisexual youths to tolerate."[40]

33. HATRED IN THE HALLWAYS, *supra* note 24, at 34.

34. Laura Sessions Stepp, *A Lesson in Cruelty: Anti-Gay Slurs Common at School*, WASH. POST, June 19, 2001, at A01; *see also* Boxall & Noriyuki, *supra* note 10.

35. GLSEN Study, *supra* note 31. Among these two types of reported abuse, physical harassment was defined as "being shoved, pushed, etc. . . ." while "being punched, kicked, injured with a weapon" qualified as a physical assault.

36. Scott L. Hershberger & Anthony R. D'Augelli, *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay, and Bisexual Youth*, 31 DEVELOPMENTAL PSYCHOL. 65, 67 (1995).

37. *Id.* The researchers classified the incidents based on the following methodology:

> For Attack I, the respondent was asked whether verbal insults or threats of attack had ever been experienced; for Attack II, the respondent was asked whether personal property had ever been damaged or destroyed, whether objects had ever been thrown at the respondent, and whether the respondent had ever been chased, followed, or spat on; for Attack III, the respondent was asked whether a physical assault had ever occurred, sexual or otherwise, and if a weapon was involved.

Id. What is unclear from the study is precisely how many incidents of each category were experienced (i.e., one respondent may have suffered one verbal insult while another suffered 1000 verbal insults, but both respondents are classified the same).

38. *Id*. at 68.

39. *Id*. The study did not pinpoint precisely what percentage of these attacks *were inflicted by their peers and occurred in school*. However, given the respondents' age range—15 to 21—it is safe to assume that a fair portion of these attacks occurred in school. For more research detailing verbal and other harassment of gay students in school and the resulting increase in behavioral and health risks, see Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 PEDIATRICS 895, 897 (1998).

40. Ritch C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCHOL. 261, 264 (1994).

B. School Officials Overwhelmingly Do Not Intervene in Cases of Anti-Gay Harassment

Inaction in the face of anti-gay harassment and abuse either personally witnessed by, or reported to, a school official appears to be the rule rather than the exception in America's public schools.[41] Some school officials remain intentionally unaware of a problem with anti-gay peer harassment because they deny the existence of gay or lesbian students in the school.[42] Officials who are aware of a problem and would like to intervene when they witness or learn of anti-gay harassment often do not, especially when a colleague is the source of the homophobic insults or remarks.[43] These adults cite a number of facts, including that school policy is often unclear about the forms of harassment prohibited,[44] or that the training given to new teachers does not address harassment and discrimination on the basis of sexual orientation.[45] Others choose inaction out of fear they will be identified as gay themselves,[46] or will be accused by parents of promoting homosexuality.[47] It should be kept in mind that there is no single reason or explanation why school officials habitually choose inaction when presented with anti-gay peer harassment, and a malignant motive cannot, in every case, be imputed to the school official. Listed below are some other commonly given explanations.

1. Harassment Because of Sexual Orientation Is Not Taken Seriously Enough

The harassment of gay students is simply not taken as seriously as other forms of harassment. The vast majority of both school officials and

41. *See, e.g.*, GLSEN Study, *supra* note 31 (noting that 81.8% of those interviewed "reported that faculty or staff never intervened or intervened only some of the time when present when homophobic remarks were made"); *see also* SAFE SCHOOLS COALITION OF WASHINGTON STATE, THEY DON'T EVEN KNOW ME! 20 (1999) [hereinafter SAFE SCHOOLS].

42. *See* James H. Price & Susan K. Telljohann, *School Counselors' Perceptions of Adolescent Homosexuality*, 61 J. SCH. HEALTH 433, 435 (1991) (reporting in a survey conducted by the authors that one in six counselors believed there were no gay students in the school); Leo Treadway & John Yoakam, *Creating a Safer School Environment for Lesbian, and Gay Students*, 62 J. SCH. HEALTH 352, 352 (1992) (reporting that one school professional, when asked if they knew of any gay or lesbian students, responded "[w]e don't have that problem in this school").

43. *See* Treadway & Yoakam, *supra* note 42, at 355 (observing that "most educators felt powerless to challenge abusive remarks from colleagues or students aimed at lesbian or gay youth"); *see also* SAFE SCHOOLS, *supra* note 41, *passim*.

44. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 82.

45. *See id.*; MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 10.

46. *See* MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 21–23 (explaining that "[t]he fear of discrimination on the part of adults in school remains pervasive, extending even beyond those who really are gay or lesbian"). Even many gay teachers aware of gay students being harassed remain passive, usually out of fear of losing their job if publicly identified as gay or lesbian. HATRED IN THE HALLWAYS, *supra* note 24, at 80, 90.

47. *See* MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 23; Boxall & Noriyuki, *supra* note 10; *see also* Barbara A. Rienzo et al., *The Politics of School-Based Programs Which Address Sexual Orientation*, 66 J. SCH. HEALTH 33 (1996).

students view sexual harassment, or harassment aimed at an individual because of race or religion, as unacceptable and treat it as such.[48] In the case of anti-gay peer harassment, homophobic insults are routinely dismissed as ordinary "teasing" every adolescent encounters.[49] Educators either ignore the problem[50] or advise students that this treatment unfortunately goes along with being gay.[51] Another way of dealing with the harassment includes telling students, as in Alana's case,[52] that if they are not gay, there is no reason to be upset.[53]

2. *Homophobia of School Officials Prevents Discipline of Harassment*

School officials are members of society and as such may share certain biases, conscious or unconscious, towards gay students that prevent them from taking anti-gay harassment seriously. School counselors perceive that approximately one-fourth of teachers seem to harbor significant prejudice towards gay students.[54] In the GLSEN study, 23.6% of the respondents reported hearing homophobic remarks from faculty or staff at least some of the time.[55] A school official who disapproves of homosexuality is not inclined to condemn this behavior and come to the aid of a gay student being harassed by peers.[56] Consequently, prevailing negative attitudes towards homosexuality on the part of school officials then act as a barrier to helping a gay student targeted for harassment by fellow students.[57]

48. *See* Treadway & Yoakam, *supra* note 42, at 356 ("Most school professionals do not let racist or sexist remarks go unchallenged."); Stepp, *supra* note 34 (quoting a student as saying "[i]f we were to say other words which we all know are wrong . . . someone would stop us"); Hinojosa, *supra* note 14 (observing "teens can often make progress against anti-Semitism and racism—but losing their homophobia—that bigotry is often the last to go").

49. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 37–38. Some students absorb the underlying message inherent in this sentiment. One student stated he was called "fag" and "homo" by classmates "incessantly," but that he had "never been harassed," because no one "ever actually wanted to fight" him. *Id*.

50. *See id.* at 38, 80–81.

51. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 83; SAFE SCHOOLS, *supra* note 41, at 30, 47; *see also* text accompanying *infra* notes 187–208 (recounting the facts of Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996)).

52. Finz, *supra* note 1.

53. *Id.*

54. Price & Telljohann, *supra* note 42, at 436.

55. GLSEN Study, *supra* note 31; *see also* SAFE SCHOOLS, *supra* note 41, at 28 (providing examples of teachers' reactions to homosexuality).

56. Reinforcing the idea that it is acceptable to harass gay students, school officials do appear to take harassment more seriously when it is a straight student that has been "mistakenly" targeted. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 31 (quoting the executive director of a national youth advocacy coalition as saying "'a lot of times it's not until that fact is pointed out to them do school administrators perk up their ears'").

57. *See, e.g., id*., at 83 (recounting an incident where a principal responded to a gay student's complaint of harassment by remarking "'[y]ou chose this lifestyle; you need to carry all the baggage that comes with it'").

3. School Officials Decline in General to Discuss Sexuality with Students

In addition, some school officials fail to discuss matters of sexuality with gay students not because they disapprove of a student's actual or perceived sexual orientation, but because school officials have a general fear or reluctance to discuss topics relating to sexuality with students.[58] In one case, a counselor sensed that a particular student had a problem but declined to speak with him about the subject out of fear of alienating or frightening him by asking direct questions about his sexual orientation.[59] Fear among educators of even discussing subjects like sexuality with students prompted one to observe, "[t]hey don't know how to cross that street safely, so they don't even step off the curb."[60]

C. Impact of Anti-Gay Harassment on Gay Students

1. Suicide

The result of this continuous harassment is that gay students are placed at higher risk for a host of negative health outcomes. While suicide is the third leading cause of death among all youth between the ages of fifteen and twenty-four,[61] it is the leading cause of death among gay youth.[62] In one study, almost half of the gay and lesbian youth sampled had "repeatedly attempted suicide, while approximately one-third reported they had engaged in an intentional 'self-destructive' act."[63] The

58. *See, e.g.*, James Lock & Hans Steiner, *Gay, Lesbian, and Bisexual Youth Risks for Emotional, Physical, and Social Problems: Results from a Community-based Survey*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Mar. 1, 1999), *available at* 1999 WL 11376107, at *8, 11 (noting that school administrators' anxieties about discussing sexual issues can impede research of problems facing gay, lesbian, and bisexual youth). This problem is compounded when the specific topic of discussion is homosexuality given the potential negative reactions of parents, principals, school boards, and communities at large. *See, e.g.*, MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 22; *see also* Boxall & Noriyuki, *supra* note 10, at A1.

59. Treadway & Yoakam, *supra* note 42, at 352. Not all school officials hesitate to discuss topics of sexuality with students. Some confront students with invasive questions about the student's sexuality in an intimidating fashion because of their own homophobic attitudes. For example, one student reported that a teacher held him after class to ask thinly veiled questions about his sexual orientation such as, "[w]hich side of the road do you drive on?" in order to "get a rise out of" the student. Lombardi, *supra* note 16. When the student falsely responded he was heterosexual, the teacher told him he could go.

60. Stepp, *supra* note 34.

61. *See* Centers for Disease Control, *Suicide in the United States*, *at* http://www.cdc.gov/ncipc/factsheets/suifacts.htm (Mar. 25, 2002). For more research on the disproportionate number of suicides and attempted suicides among gay youth, see Robert Garofalo et al., *Sexual Orientation and Risk of Suicide Attempts Among a Representative Sample of Youth*, 153 ARCHIVES PEDIATRIC & ADOLESCENT MED. 487, 487–93 (1999); Gary Remafedi et al., *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH 57 (1998).

62. Paul Gibson, *Gay Male and Lesbian Youth Suicide*, U.S. DEP'T OF HEALTH & HUMAN SERVS., *in* 3 REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110 (Marcia R. Feinleb ed., 1989) [hereinafter YOUTH SUICIDE].

63. Gary Remafedi et al., *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 PEDIATRICS 869, 873 (1991).

incidence of suicidal tendencies among gay youth is not particular to one race or gender either—"homosexual orientation seems to be a risk factor for suicidal behavior that cross-cuts gender and racial/ethnic groups."[64]

2. *Physical and Psychological Side-Effects*

There are also other destructive consequences that follow from the harassment suffered by gay students.[65] For example, gay students' thoughts at school may become dominated by planning to get from one class to another without facing the gauntlet of abuse awaiting them in a certain hallway where bullies congregate.[66] Consequently, students' attention and energy is diverted from substantive learning.[67] Some gay students stop going to school completely or seek alternative schooling.[68] Others cope with the harassment by abusing drugs or alcohol,[69] engaging in unsafe sex or sex at an early age,[70] or running away from home.[71]

Not all students targeted by peers for anti-gay bullying and harassment respond in the same manner. Instead of engaging in self-destructive behavior, some students lash out at peers in violent ways with deadly consequences. Adolescence is a time for young men and boys when an accusation of homosexuality is considered to be "the No. 1 insult."[72] It is no surprise then that in a spate of school shootings across America, each of the young men identified as the shooter was the target of homophobic remarks and insults by fellow classmates.[73] Both Dylan

64. Iris Wagman Borowsky et al., *Adolescent Suicide Attempts: Risks and Protectors*, 107 PEDIATRICS 485, 490 (2001), *available at* 2001 WL 12729477, at *8.

65. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 37, 68–76; Garofalo et al., *supra* note 39, at 900; Savin-Williams, *supra* note 40, at 264–66.

66. *See* MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 13; Boxall & Noriyuki, *supra* note 10.

67. *See* MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 17; SAFE SCHOOLS, *supra* note 41, at 13–14, 17.

68. *See* GLSEN study, *supra* note 31, at 12 (documenting that "31.9% of [gay students] had skipped a class at least once in the past month" because "they felt uncomfortable or unsafe in school" and "30.8% had missed at least one entire day of school in the past month because they felt unsafe."); MASSACHUSETTS GOVERNOR'S COMMISSION, *supra* note 32, at 18–19; SAFE SCHOOLS, *supra* note 41, at 2, 13. Some students elect to be home schooled. *See* Lombardi, *supra* note 16.

69. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 69–70; Savin-Williams, *supra* note 40, at 264–65.

70. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 71–72; Garofalo et al., *supra* note 39, at 897; YOUTH SUICIDE, *supra* note 62, at 131–32.

71. *See* HATRED IN THE HALLWAYS, *supra* note 24, at 72–74; Savin-Williams, *supra* note 40, at 264.

72. Susan Reimer, *In Our Boys, a Hatred Bread of Fear*, BALT. SUN, June 8, 1999, at 1E; *see also* HATRED IN THE HALLWAYS, *supra* note 24, at 36–37 (reporting findings from one survey that 86% of students would be "very upset" if someone thought they were gay. For boys, the accusation of homosexuality provoked a stronger reaction than even actual physical abuse.).

73. By all reports, each one of these young men was heterosexual. *See* Jonah Blank, *The Kid No One Noticed: Guns, He Concluded, Would Get His Classmates' Attention*, U.S. NEWS & WORLD REP., Oct. 12, 1998, at 27; William Butte, *Tolerating Violence Produces Deadly Situation*, S. FLA. SUN-SENTINEL, Dec. 24, 2001, at 17A; Stepp, *supra* note 34. I do not in any way point out this fact to suggest that because the targets were heterosexual, the harassment was somehow more unacceptable. I

Klebold and Eric Harris, who were responsible for murdering fifteen of their Columbine High School classmates, were regularly called "fags" and harassed by more popular kids at school.[74] Michael Carneal of West Paducah, Kentucky, was repeatedly called a "faggot" by his classmates, among other things.[75] When a gossip column in the school newspaper insinuated that he was gay, Carneal responded by shooting and killing three of his classmates, including the article's author.[76] Finally, Andy Williams of San Diego, who experienced anti-gay bullying as a transfer student at his new school, killed two classmates in a shooting attack.[77]

D. Most Peer Harassment of Gay Students on the Basis of Sexual Orientation Is Not Prohibited Under Either State or Federal Law

1. State Law Protecting Gay Students from Peer Harassment

Peer harassment on the basis of sexual orientation is prohibited in only a minority of states. This protection can take the form of specific civil rights laws passed by the legislature or executive regulations issued by the educational oversight body of a state. In the remaining states with no specific protection for gay students, there is, in practical terms, no existing legal remedy under state law for peer harassment on the basis of sexual orientation.

a. Through Statutes, Six States and the District of Columbia Explicitly Protect Gay Students from Harassment and/or Discrimination

Six states and the District of Columbia (D.C.) extend to gay students protection from either harassment or discrimination, or both, on the basis of sexual orientation. California, Connecticut, D.C., Massachusetts, Vermont, Washington, and Wisconsin each prohibit—under their respective education codes—discrimination or harassment of students on the basis of sexual orientation.[78] Some states offer more protection than others. Vermont, for example, affirmatively requires local school boards

only mention it to show that anti-gay harassment aimed at some heterosexuals can incite a violent response.

74. Stepp, *supra* note 34.

75. Blank, *supra* note 73, at 28.

76. Butte, *supra* note 73.

77. Kristen Green & Bruce Lieberman, *Bullying, Ridicule of Williams Were Routine, Friends Say*, S.D. UNION TRIB., Mar. 10, 2001, at A1.

78. *See* CAL. EDUC. CODE § 220 (West Supp. 2002); CAL. PENAL CODE § 422.6(a) (West 1999); CONN. GEN. STAT. ANN. § 10-15c(a) (West Supp. 2002); MASS. ANN. LAWS ch. 76, § 5 (Law. Co-op. Supp. 2002); VT. STAT. ANN. tit. 16, § 11(26) (Supp. 2001); 2002 Wash. Legis. Serv. 207 (West) (effective June 13, 2002); WIS. STAT. ANN. § 118.13(1) (West 1999); D.C. CODE ANN. § 2-1402.41 (2001) ("It is an unlawful discriminatory practice . . . for an educational institution: (1) To deny, restrict, or abridge the use of, or access to, any of its facilities and services to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon the . . . sexual orientation . . . of any individual . . . .").

to develop and adopt harassment prevention policies.[79] The remedy for violation of these statutes varies from state-to-state, and there is evidence of inconsistent enforcement within a state from district-to-district.[80]

b. Two States Extend Protection to Gay Students Under General Civil Rights Laws or Statutes

Gay students in two states are also protected from harassment and discrimination by virtue of a noneducation specific civil rights law. Both Minnesota and New Jersey protect gays and lesbians generally from discrimination in a wide range of activities such as employment, housing, and education.[81] Specifically, New Jersey prohibits discrimination on the basis of sexual orientation in the area of public accommodations,[82] including public schools,[83] while Minnesota prohibits "[e]ducational institutions"[84] from "discriminat[ing] in any manner in the full utilization of or benefit from . . . or the services rendered thereby to" a student based on sexual orientation.[85] As with other states that have laws that protect gay students from harassment and discrimination in school, incidents of anti-gay harassment still occur.[86]

c. Two States Extend Protection to Gay Students Under Administrative Regulations

Finally, both Pennsylvania and Rhode Island have administrative agencies that interpret applicable state law to prohibit discrimination against students on the basis of sexual orientation. Pennsylvania's Board of Education has promulgated regulations guaranteeing that "[*a*]*ccess to*

79. VT. STAT. ANN. tit. 16, § 565 (Supp. 2001).

80. Stories of anti-gay harassment and official inaction still persist in these states. *See, e.g.*, Ellen Cronin, *St. J School District Sued Over Bullying*, CALEDONIAN RECORD, *available at* http://www.caledonian-record.com/pages/local-news/story/07f5d6f8d (Feb. 7, 2002); Kate Ramunni, *Gay Student Harassed*, CONN. POST, *available at* http://www.connpost.com/stories/o,1413,96%257E3750%257E469212,00.html?search=filter (Mar. 17, 2002). In some states, extraordinary measures have been taken to combat peer harassment of gay students, including the Massachusetts Attorney General securing a "civil rights order" preventing a teenager "who allegedly engaged in a pattern of anti-gay intimidation and harassment and a violent assault" against a gay student from "assaulting, threatening, intimidating or harassing the victim or anyone else in the Commonwealth based on their actual or perceived sexual orientation." Press Release, Office of Massachusetts Attorney General Tom Reilly, AG Reilly Obtains Civil Rights Order Against Holbrook Student For Alleged Anti-Gay Assault (July 18, 2001), *available at* http://www.ago.state.ma.us/press_rel/holbrook2.asp (last visited Mar. 28, 2002).

81. *See* MINN. STAT. ANN. § 363.03, subd. 5 (West Supp. 2002); N.J. STAT. ANN. §§ 10:5-4 to -5, 5-12(f)(1) (West Supp. 2001).

82. N.J. STAT. ANN. § 10:5-4 (West 1993). This New Jersey statute prohibiting discrimination in public accommodations was famously at issue in a significant First Amendment case dealing with freedom of association and the right of the Boy Scouts to exclude homosexuals as scoutmasters. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

83. N.J. STAT. ANN. § 10:5-5(l) (West 1993 & Supp. 2002).

84. MINN. STAT. ANN. § 363.03, subd. 15 (West Supp. 2002).

85. *Id.* subd. 5(1).

86. *See, e.g.*, Elaine D'Aurizo, *A Lonely Battle Against Gay Bashing*, THE RECORD, Oct. 18, 1998, at NO1.

educational programs shall be provided without discrimination on the basis of . . . sexual orientation . . . ."[87] Rhode Island's Department of Education has issued a "Policy Statement" which specifies that "it is the Policy of the Board of Regents that no students shall be excluded from, discriminated against, or harassed in any educational program, activity or facility in a public school on account of sexual orientation or perception of same."[88] This "Policy Statement" is not a binding regulation and does not have the force of law;[89] therefore, its language while commendable is nothing more than precatory. It is unclear whether school officials in either state have an affirmative duty to protect students from peer harassment, or are even aware of these guidelines issued by the executive agency overseeing education.

d. Suing Under State Tort Law

In the other forty states that do not extend protection to gay students subject to peer harassment on the basis of sexual orientation,[90] students are left to rely on tort law if they wish to pursue legal remedies. School officials stand in a custodial relationship to students and therefore have a duty to address foreseeable harm in a school setting.[91] In reality, a tort suit is often not viable because a state may either completely grant immunity to a school district, or there may be a statutory cap on damages that makes a lawsuit not economically feasible.[92]

2. *Federal Law, as Written by Congress and Interpreted by the Courts, Does Not Cover Most Harassment of Gay Students*

Existing federal law inadequately protects gay students from harassment on the basis of sexual orientation. Title IX of the Education Amendments of 1972 (Title IX) is the most significant federal statute governing discrimination in America's schools.[93] However, to discuss the provisions of Title IX, one must first look to Title VII of the 1964 Civil

87. 22 PA. CODE § 4.4(c) (2002) (emphasis added).

88. R.I. Dep't of Educ., *A Policy Statement of the State Board of Regents Prohibiting Discrimination Based on Sexual Orientation* (on file with the University of Illinois Law Review).

89. Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

90. Some local school districts have chosen to protect gay students from peer harassment and discrimination even though no protection exists at the state level. For example, while Illinois has no statute protecting gay students from peer harassment on the basis of sexual orientation, the Board of Education of the City of Chicago has adopted the "policy . . . to prohibit discrimination or harassment against any employee or student on the basis of . . . sexual orientation . . . ." Chicago Board of Education Board Rules, § 1-14 (2002), *available at* http://www.cps. k12.il.us/AboutCPS/Board/Board_Rules/Chapter_I/Chapter_I.pdf (last visited Sept. 17, 2002).

91. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 320 cmt. a (1965).

92. *See, e.g.*, Michael Gilbert, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in Public Schools*, 142 U. PA. L. REV. 471, 471 n.3 (1993); Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After* Deshaney, 90 COLUM. L. REV. 1940, 1961 (1990).

93. 20 U.S.C. §§ 1681–1688 (2000).

Rights Act (Title VII)[94] Because both statutes contain similar prohibitions, and because chronologically Title VII was enacted several years before Title IX, federal courts look to Title VII as a guide for interpreting and applying provisions of Title IX. Therefore, a discussion of Title VII is needed as background before explaining Title IX and its provisions.

a. Title VII

Title VII, in relevant part, makes it an unlawful employment practice to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[95] The Supreme Court has held that sexual harassment constitutes impermissible discrimination on the basis of sex under Title VII.[96] Two forms of sexual harassment are prohibited under Title VII—quid pro quo and hostile work environment.[97]

The lower federal courts uniformly agree that Title VII does not prohibit discrimination on the basis of sexual orientation.[98] On several occasions, courts have interpreted Congress's rejection of Title VII amendments that would have prohibited discrimination on the basis of sexual orientation[99] as circumstantial evidence that Congress does not intend Title VII, in its current form, to prohibit such discrimination.[100] The Supreme Court, while not deciding this particular question, unanimously held in *Oncale v. Sundowner Offshore Services, Inc.*,[101] that same-sex sexual harassment is actionable under Title VII. The Court in *Oncale*

94. 42 U.S.C. §§ 2000e–e-17.

95. *Id*. § 2000e-2(a)(1).

96. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986). Both men and women are protected under Title VII from sex discrimination. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).

97. *Meritor*, 477 U.S. at 65–66.

98. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Blum v. Gulf Oil Corp., 597 F.2d 936, 937 (5th Cir. 1979); DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 329–30 (9th Cir. 1978). For a perspective why this issue has been wrongly decided by the courts, see Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (arguing for an interpretation of Title VII that prohibits discrimination based on sexual orientation); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991) (same).

99. *See* Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. (2001), *available at* http://thomas.loc.gov; Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996), *available at* http://thomas.log.gov; Employment Nondiscrimination Act of 1995, H.R. 1863, 104th Cong. (1995), *available at* http://thomas.loc.gov; Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994), *available at* http://thomas.loc.gov.

100. *See, e.g.*, *Bibby*, 260 F.3d at 261.

101. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

stressed that its holding in no way abrogates the requirement that a plaintiff under Title VII must prove "*discrimina[tion]* . . . because of . . . sex."[102]

b. Title IX

Title IX,[103] in relevant part, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance . . . ."[104] The Supreme Court has looked to previous interpretations of Title VII to define the scope of sex discrimination under Title IX.[105] Accordingly, the Court imported principles derived from Title VII to find that sexual harassment is also a form of sex discrimination prohibited under Title IX.[106] In addition, the Court in *Davis v. Monroe County Board of Education* quoted with approval *Oncale*'s standard that "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships.'"[107]

Title IX contains a judicially implied private right of action for discrimination against the funding recipient.[108] The Supreme Court has also held that an individual exercising this implied right of action may recover monetary damages.[109] The Court subsequently clarified the circumstances under which this private right of action may be maintained specifically against school officials. In *Davis*,[110] the Court held that a school board may be held liable under certain circumstances for damages under Title IX when it fails to respond to student-on-student sexual harassment.[111]

102. *Id*. at 81 (alteration and emphasis in original).

103. 20 U.S.C. §§ 1681–1688 (2000).

104. *Id*. § 1681(a).

105. *See, e.g*., Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

106. *Id*. at 75 ("Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex . . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student.").

107. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting *Oncale*, 523 U.S. at 82).

108. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979). The prevailing view in the lower courts is that a claim under Title IX will lie only against the grant recipient and not an individual employee. *See, e.g*., Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999); Smith v. Metro. Sch. Dist. Perry Township, 128 F.3d 1014, 1019 (7th Cir. 1997); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 884 (1st Cir. 1988).

109. *Franklin*, 503 U.S. at 76. An open question exists whether a plaintiff under Title IX may recover punitive damages from a school district. *See, e.g*., Landon v. Oswego Unit. Sch. Dist. #308, 143 F. Supp. 2d 1011, 1014 (N.D. Ill. 2001) (permitting punitive damages recovery); Schultzen v. Woodbury Cent. Cmty. Sch. Dist., 187 F. Supp. 2d 1099, 1108 (N.D. Iowa 2002) (opposite).

110. *Davis*, 526 U.S. at 629.

111. *Id*. at 646–47. A plaintiff must show "deliberate indifference," or, in other words, facts that establish "the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id*. at 648. The Court did not specify precisely what steps are to be taken,

c. Barriers to Suing Under Title IX for Anti-Gay Harassment

The forms of relief offered to a putative plaintiff under Title IX, as recognized by the Court, are usually irrelevant to gay students because much of the harassment they face is not defined under the statute as prohibited sex discrimination. The few decisions by federal courts dealing with the issue agree that a claim for discrimination on the basis of sexual orientation is not tenable under Title IX.[112] Executive agencies empowered to interpret Title IX agree with this position and unequivocally state that harassment motivated by animus to the victim's sexual orientation is not prohibited, so long as it is "non-sexual."[113] Several commentators disagree with the interpretation of sex discrimination adopted by the federal courts and executive agencies. These critics advocate the position that harassment based on sexual orientation is in reality sex discrimination and is therefore impermissible under Title IX.[114]

Title IX is consistently reexamined following Title VII decisions.[115] Thus, following *Oncale*, courts have held that same-sex sexual harassment is similarly actionable under Title IX as it is under Title VII.[116] Unlike Title VII, however, few cases have been presented to the federal courts for consideration of whether Title IX itself prohibits discrimination based on sexual orientation. Those that have reached the issue have answered in the negative.[117] There are few reported cases on the subject, but given courts' heavy reliance on Title VII case law, and that Title VII is unanimously interpreted to not prohibit discrimination on the basis of sexual orientation,[118] it is safe to assume that barring amendments to its language, Title IX will consistently be interpreted in future cases not to forbid discrimination on the basis of sexual orientation.

Bolstering the interpretation of Title IX given by the courts are administrative regulations issued by the U.S. Department of Education. As part of effectuating Title IX's mandates, the Department has issued regulations outlining forbidden sex discrimination under the statute. The Department's Office of Civil Rights (OCR), in accordance with judicial

leaving that to the judgment of school administrators in the name of maintaining "the flexibility they require . . . ." *Id.*

112. *See infra* note 117 and accompanying text.

113. *See infra* notes 120–22 and accompanying text.

114. *See infra* note 117.

115. *See supra* notes 105–07 and accompanying text.

116. *See, e.g.*, Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002) (construing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)); Doe *ex. rel.* Doe v. Dallas Ind. Sch. Dist., 153 F.3d 211, 219 (5th Cir. 1998) (same).

117. *See, e.g.*, Montgomery v. Indep. Sch. Dist. #709, 109 F. Supp. 2d 1081, 1093 n.11 (D. Minn. 2000) (finding discrimination on the basis of sexual orientation not actionable under Title IX and citing as precedent Title VII case); Snelling v. Fall Mountain Reg'l Sch. Dist., No. CIV 99-448-JD, 2001 WL 276975, at *4 (D. N.H. March 21, 2001) (finding other grounds to maintain a Title IX action besides discrimination because of sexual orientation).

118. *See supra* note 98.

interpretation, flatly states "Title IX does not prohibit discrimination on the basis of sexual orientation."[119] Thus,

> if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed towards gay or lesbian students . . . may be prohibited by Title IX.[120]

Although gay students are protected from sexual harassment when the basis for that harassment is sex discrimination,[121] a substantial amount of harassment gay students endure is not prohibited by Title IX.[122]

The OCR in conjunction with the National Association of Attorneys General (NAAG) subsequently issued a Guide to schools to help combat hate crimes.[123] The Guide advises school districts to adopt a "comprehensive anti-harassment program,"[124] including developing a written antiharassment policy, swiftly responding to all incidents of identified harassment, establishing a formal complaint and grievance procedure, and creating a school climate that accepts diversity.[125] The Guide counsels that "[s]chool officials should consider whether adopting specific statements or policies regarding harassment based on sexual orien-

119. Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (1997) [hereinafter Sexual Harassment Guidance]. It is noteworthy that the OCR cites exclusively Title VII cases for this proposition. *Id*. at 12,039 n.14.

120. This antiseptic example of anti-gay discrimination chosen by the Office of Civil Rights does not reflect reality and is mild in comparison to the cruelties gay students are subjected to regularly. *See supra* notes 1–19 and accompanying text.

121. *See, e.g*., Centola v. Potter, 183 F. Supp. 2d 403, 409 (D. Mass. 2002) (Title VII case); *Montgomery*, 109 F. Supp. 2d at 1091 (Title IX case); *see also* Sexual Harassment Guidance, *supra* note 119, at 12,036.

122. It should be obvious by now that the obstacle to stating a viable claim under either Title VII or Title IX is convincing a court that harassment was motivated by the victim's gender, and not sexual orientation, when courts remain reluctant to recognize this distinction since they feel it would bootstrap protection for discrimination on the basis of sexual orientation into those statutes. *See supra* notes 99–100 and accompanying text. It would seem some neutral principles are needed when dealing with sexual harassment claims that do not have such a myopic focus on the victim's sexual orientation. For instance, in the case of Alana being showed a picture of a man and woman engaging in intercourse, *see supra* note 6 and accompanying text, imagine that Alana was heterosexual instead of gay, but was widely known on campus to be a devout virgin. If that same student approached her with the same photo and uttered the same words, it seems unthinkable any court or rational person would not consider that to be a form of sexual harassment. Yet, because Alana is gay, many courts would take a far different view of the cause for discrimination for the identical conduct.

123. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, DEPARTMENT OF EDUCATION & OFFICE OF CIVIL RIGHTS, PROTECTING STUDENTS FROM HARASSMENT AND HATE CRIME (1999) [hereinafter PROTECTING STUDENTS]. This Guide is merely advice provided to educators and unlike a regulation does not have the force of law. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

124. PROTECTING STUDENTS, *supra* note 123, at 5.

125. *Id*. at 5–9.

tation will help to protect students from violence and damaging behavior . . . ."[126]

Numerous academics have argued that sex discrimination encompasses discrimination on the basis of sexual orientation and should be recognized as such.[127] The basis for this argument has been explored in depth and will not be scrutinized carefully here. Briefly, the general logic of this argument is that classifications on the basis of sexual orientation are rooted in gender stereotypes about the way men and women should behave. This theory would likely include what courts accept as sex discrimination, for example, the omnipresent use in schools of the words "faggot" (or "fag"), "dyke," or "lesbo" as an insult.[128] A strong argument exists that when used, these words are aimed explicitly towards one gender. A man is simply not called a "dyke" and a woman is not called a "faggot." These epithets are gender-specific; therefore, under this theory their use constitutes an impermissible form of sex discrimination.[129]

The overwhelming majority of courts have rejected the proposition that discrimination on the basis of sexual orientation constitutes sex discrimination.[130] The argument has been accepted on few occasions, most notably the Hawaii Supreme Court's plurality decision in *Baehr v. Lewin* involving same-sex marriage.[131] Since this argument has not been accepted generally by courts, Title IX is often of little avail to gay students who suffer peer harassment. Harassment on the basis of sexual orientation, no matter how severe, so long it is viewed as not "because of sex," is simply not prohibited under Title IX.[132] Thus, the problem remains how a gay student can stop the harassment if both state law and Title IX are unavailing. Part III argues that students must look to § 1983 if they wish to use legal remedies to stop the harassment.

126. *Id*. at 20.

127. *See, e.g*., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Arnold Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Marcosson, *supra* note 98, at 3; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); *cf*. Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001).

128. *See supra* notes 31–32 and accompanying text.

129. Some commentators have adopted this position and proceeded to argue that if discrimination on the basis of sexual orientation were recognized as sex discrimination, then Title IX would apply. *See*, *e.g*., Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000); Amy Lovell, Note, *"Other Students Always Used to Say, 'Look at the Dykes:'" Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617 (1998).

130. *See, e.g*., DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 331 (9th Cir. 1978); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986).

131. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (plurality opinion). One other notable instance where the argument has been accepted is *Baker v. State*, 744 A.2d 864, 897–912 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); *see also* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001); Centola v. Potter, 183 F. Supp. 2d 403, 409 (D. Mass. 2002).

132. The result is similar in Title VII cases. For a particularly disturbing account of harassment on the basis of sexual orientation found not to be prohibited under Title VII, see *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

III. GAY STUDENTS MAY SUE A SCHOOL OFFICIAL FOR VIOLATION OF EQUAL PROTECTION UNDER § 1983

Gay students may stop the abuse indirectly by bringing a lawsuit against school officials. Federal law provides a cause of action for violation of specific constitutional guarantees of individual rights. When a school official consciously and intentionally ignores the constitutional rights of a gay student, that school official is thus liable for those actions and has no recognized legal defense.

A. Section 1983

Section 1983 allows a person to bring a civil suit against a state actor for deprivation of individual rights. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .[133]

Congress created a private right of action in part because "by reason of prejudice, passion, neglect, intolerance, or otherwise . . . the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[134] The Supreme Court has further recognized "[t]hrough § 1983, Congress sought 'to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position.'"[135]

1. "Persons" Defined Under § 1983

a. Local Governments Are "Persons" for Purposes of § 1983

The Supreme Court has delineated in numerous decisions who qualifies as a "person" for purposes of § 1983. The Court in *Monell v. Department of Social Services* overruled prior precedent and explicitly held municipalities are "persons" within the meaning of § 1983.[136] By now, "it is clear that all natural persons, corporate entities, associations, and the like are persons for § 1983 defendant purposes."[137] Therefore, a local school board may be a proper defendant in a § 1983 action, pro-

133. 42 U.S.C. § 1983 (1994).
134. Monroe v. Pape, 365 U.S. 167, 180 (1961).
135. Hafer v. Melo, 502 U.S. 21, 27 (1991) (quoting *Monroe*, 365 U.S. at 172).
136. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (overruling *Monroe*, 365 U.S. at 187). The Court has also held that States are not "persons" subject to suit under § 1983. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).
137. 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 1:15, at 1-18 (4th ed. 2002).

vided the school board does not have immunity under the Eleventh Amendment.[138]

b. Local Government Officials May Be Sued in an Official and Individual Capacity

The Supreme Court has ruled that a state official may be sued in both an official and individual capacity.[139] The distinction recognized between a § 1983 suit against a state officer acting in an official, as opposed to an individual, capacity is crucial. A suit against a state officer acting in an official capacity is "only another way of pleading an action against an entity of which an officer is an agent."[140] Thus, to prove liability for official actions taken, that official's conduct must be tied to a "policy or custom" of the governmental entity that played a part in violation of federal law.[141] In contrast, no official "policy or custom" need be shown in a suit against a state official acting in an individual capacity.[142] A suit seeking to impose personal liability need only establish actions taken under color of state law that deprived a person of federal rights.[143]

2. Acting Under Color of Law

The concept of acting "under color of law" required by § 1983 is interpreted to be synonymous with state action.[144] Therefore, "when state action is present, the color of law requirement is also met."[145] In other words, the alleged deprivation of constitutional rights suffered by a plaintiff must be tied to some governmental action. This requirement is usually not at issue in the case of school officials, as they are acting as em-

138. U.S. CONST. amend XI; *see also* Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 280–81 (1977) (observing that immunity for a school board from suit in federal court is a question whose "answer depends, at least in part, upon the nature of the entity created by state law," and turns on whether the board is considered under state law "an arm of the [s]tate . . . or is instead to be treated as a municipal corporation to . . . which the Eleventh Amendment does not extend").

139. *Hafer,* 502 U.S. at 31 (holding that "state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983").

140. *Monell*, 436 U.S. at 690 n.55; *see also Hafer*, 502 U.S. at 25 (observing that "the real party in interest in an official-capacity suit is the governmental entity and not the named official").

141. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985) (quoting *Monell*, 436 U.S. at 694). A further limitation exists by virtue of the fact that to impose § 1983 liability on a local government for the acts of an official, such official must be invested with "final policymaking authority." Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989). The determination of "whether a particular official has 'final policymaking authority' is a question of *state law*." City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion) (emphasis in original) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion)).

142. *See, e.g.*, *Hafer*, 502 U.S. at 25.

143. *Id.*; *see also Graham*, 473 U.S. at 166.

144. *See, e.g.*, Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982); *see also* United States v. Price, 383 U.S. 787, 794 n.7 (1966).

145. 1 NAHMOD, *supra* note 137, § 2:1, at 2-4.

ployees of the State when in charge of students and invested under state law with "custodial and tutelary" responsibilities.[146]

3. *Causation*

A prima facie § 1983 violation must allege that a defendant's conduct is a cause in fact of the plaintiff's claimed constitutional deprivation.[147] The Supreme Court has found that it is only "when execution of government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983."[148] As one noted § 1983 scholar has pointed out, "[t]he only way to hold a supervisor liable under § 1983 is to show involvement in or encouragement of the wrongful conduct, which includes a causal relationship of some kind between the supervisor's conduct and the plaintiff's constitutional deprivation."[149] Additionally, the Supreme Court has squarely rejected the theory of respondeat superior liability under § 1983 for a municipality based on the constitutional violations of its employees.[150] In the case of harassment of gay students, it is exceedingly difficult to adduce evidence that a school board itself encouraged the harassment of gay students through an official custom or policy or told school officials not to take harassment of gay students seriously.[151]

146. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

147. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978) (stating that § 1983's "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); *see also* 1 NAHMOD, *supra* note 137, § 3:1, at 3-4; *id.* § 3:91, at 3-246.

148. *Monell*, 436 U.S. at 694. The Court has recognized absent an official custom or policy, a "failure to train" employees on the part of the local government may give rise to municipal liability where such failure rises to the level of "deliberate indifference to the rights of persons with whom" such employees come in contact with. City of Canton v. Harris, 489 U.S. 378, 388 (1989) (dealing with "failure to train" in the context of inadequate training of police officers). The Court subsequently decided *Farmer v. Brennan*, 511 U.S. 825 (1994), a case involving prison officials and a claimed Eighth Amendment violation. The Court there clarified that "deliberate indifference" exists only in a case where "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

In the arena of school board liability for failure to train its school official employees, while lower federal courts have acknowledged the applicability of *Canton*, plaintiffs have met with a noticeable lack of success when arguing this theory of causation under § 1983. *See, e.g.*, P.H. v. Sch. Dist. of Kansas City, 265 F.3d 653, 660–61 (8th Cir. 2001); Deborah O. *ex rel.* Thomas O. v. Lake Cent. Sch. Corp., No. 98-3804, 1995 U.S. App. LEXIS 19194, at *6–9 (7th Cir. July 21, 1995) (unpublished opinion); *see also* cases cited in Ivan E. Bodensteiner, *Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 18 n.60 (2000).

149. 1 NAHMOD, *supra* note 137, § 3:4, at 3-9.

150. *Monell*, 436 U.S. at 663–64 n.7.

151. A school board may still be a proper defendant under certain circumstances. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding that in the specific context of school discipline, in this case suspension for spiking punch at a school party, a school board member is not immune from liability for damages under § 1983 if he reasonably should have known that his official action "would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student").

4. *Violation of Specific Rights*

A plaintiff in a § 1983 action bears the burden of specifying precisely what right was violated.[152] Thus, if a plaintiff alleges deprivation of a right "secured by the Constitution and laws," it is incumbent upon that plaintiff to "isolate the precise constitutional violation," that forms the basis of the action.[153] Because of the "intimate relationship" between § 1983 and the Fourteenth Amendment, an understanding of equal protection doctrine is fundamental.[154] The argument made in the next section is that a § 1983 action may lie against school officials for deprivation of a gay student's constitutional right to equal protection under the Fourteenth Amendment.

B. *The Equal Protection Clause of the Fourteenth Amendment*

The Fourteenth Amendment, in part, provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws."[155] This language has not been interpreted by the Supreme Court to demand absolute equality in the treatment of all groups of citizens on the government's part. Rather, "[a]ll equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose?"[156] The answer to this question depends on the classification the government is making among citizens, and the proffered rationale for it.

1. *Differential Treatment of Groups Allowed*

The government is not prohibited from making classifications under the Equal Protection Clause.[157] The Clause itself "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."[158] When the government does make classifications, the Supreme Court employs a sliding scale of review under equal protection to analyze the classification. Generally speaking, classifications made by the government on the basis of race and national origin are subjected to the highest level of scrutiny.[159] Those made on the basis of gender or illegitimacy, for example, are reviewed under an intermedi-

152. *See, e.g.*, Siegert v. Gilley, 500 U.S. 226, 232–33 (1991).
153. Baker v. McCollan, 443 U.S. 137, 140 (1979).
154. 1 NAHMOD, *supra* note 137, § 2:2, at 2-7 (stating that the "Fourteenth Amendment interpretation significantly determines the scope of the prima facie cause of action under § 1983 for claimed constitutional violations").
155. U.S. CONST. amend. XIV, § 1.
156. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES, § 9.1.2, at 527 (1st ed. 1997).
157. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).
158. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).
159. CHEMERINSKY, *supra* note 156, § 9.1.2.

ate level of scrutiny, and all other classifications are reviewed under the lowest level of scrutiny called the "rational basis test."[160]

As to this lowest level of scrutiny, the law itself must be rationally related to a legitimate governmental objective.[161] Rational basis review is satisfied so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[162] In practical terms, the test turns out to be an inquiry into whether the governmental classification is nothing more than arbitrary.[163] A law that is wholly arbitrary or irrational fails rational basis review and offends the Equal Protection Clause.[164]

2. *Intent to Discriminate Is the Touchstone of an Equal Protection Violation*

The Equal Protection Clause guarantees "a right to be free from invidious discrimination in statutory classifications and other governmental activity."[165] To establish a violation, a plaintiff must show that a defendant actually acted with a discriminatory purpose or intent.[166] A discriminatory purpose in enacting the governmental classification is established if it is proved "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' . . . its adverse effects upon an identifiable group."[167]

C. *When a School Official Does Not Act to End Known Peer Harassment of a Gay Student, That School Official Violates the Student's Right to Equal Protection*

1. *Proof of Intent to Discriminate*

A gay student seeking to establish a violation of the Equal Protection Clause by a school official must first establish a discriminatory intent or purpose in dealing with a harassment claim. It is not necessary that a school district have an official policy to deal with harassment claims or that a school official failed to follow set procedure in dealing with a gay

160. *Id.* This thumbnail sketch of equal protection obviously does not do this much-analyzed topic justice, nor is it meant to. For a more in-depth discussion of the levels of review under equal protection and their operation, see generally *id*. ch. 9; RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, ch. 18 (3d ed. 1999).

161. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1988).

162. FCC v. Beach Communication, Inc., 508 U.S. 307, 313 (1993).

163. *See* ROTUNDA & NOWAK, *supra* note 160, § 18.3(b).

164. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

165. Harris v. McRae, 448 U.S. 297, 322 (1980).

166. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

167. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citation omitted).

student's harassment claim.[168] However, with the potential for litigation inherent in harassment claims made by students, many school districts do have formal procedures to address claims of peer harassment, including training of employees.[169] This development of school harassment policies is also due in part to school violence such as incidents like Columbine.[170] If such a general harassment policy exists, this otherwise neutral statute may not be applied so as to invidiously discriminate against certain groups.[171]

A gay student can then show that if a school official deviates from the established protocol for addressing claims of harassment, that school official has "selected or reaffirmed a particular course of action at least in part 'because of'"[172] that student's actual or perceived sexual orientation. The Supreme Court recognized the value of objective evidence of this sort in proving discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* when it stated, "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."[173] The Court later explained that the nature of this "inquiry is practical. What . . . any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid."[174] The pattern of treatment of harassment cases in an individual school will be a crucial inquiry on this point. Once again, it must be emphasized that it is not necessary that there be an official harassment policy to prove discriminatory purpose in handling claims of peer harassment.

Also, discriminatory purpose or intent can often be seen in its starkest form by comments made by school officials. Too often the complaints of gay students are dismissed because of the notion that a certain amount of harassment goes along with being gay.[175] In Alana's case, the Vice-Principal pointedly inquired into Alana's sexual orientation and admonished her that if she was not gay, she should have no complaint about the harassment she was experiencing.[176] Unfortunately, homophobic attitudes among school officials may color actions taken and manifest themselves in discriminatory remarks to gay students.[177]

168. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944) (observing that the failure to follow a state statute in and of itself does not give rise to a claimed violation of equal protection).

169. In regards to sexual harassment, Title IX regulations require a covered entity to "adopt and publish grievance procedures providing for prompt and equitable resolution of student . . . complaints . . . ." 34 C.F.R. § 106.8 (2001); *see also id*. at §106.9 (requiring covered entity to disseminate this written policy).

170. Michael D. Shear & Jacqueline L. Salmon, *An Education in Taunting; Schools Learning Dangers of Letting Bullies Go Unchecked*, WASH. POST, May 2, 1999, at C01.

171. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886).

172. *Feeney*, 442 U.S. at 279 (citation omitted).

173. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

174. *Feeney*, 442 U.S. at 279 n.24 (citation omitted).

175. *See supra* note 51; *infra* notes 191–209 and accompanying text.

176. *See supra* notes 8–9 and accompanying text.

177. *See supra* Part II.B.2.

2. *Difficulty Exists in Establishing Liability on the Part of a School Board or Its Members*

Significant limitations exist in establishing either official liability of a school board itself, or of a board member. First, a school board considered to be an arm of the State is barred from being sued in federal court without its consent under the Eleventh Amendment.[178] Second, even if a school board is not immune from suit under the Eleventh Amendment, respondeat superior is not a valid legal theory for establishing liability under § 1983 on the part of an municipality for acts of its officials.[179] A plaintiff must prove an official policy or custom on the part of the school board itself.[180] In light of this, it is extremely difficult for a gay student to point to a specific policy or custom on the part of the board. As a result, it is very difficult to hold a school board liable under § 1983 as it frequently has no awareness and little or no involvement with individual cases of harassment brought to the attention of school officials. Besides, school boards are not "on the ground," so to speak, and have little or no day-to-day interaction with students. A school board or a school board member may not be in the best position to stop peer harassment, and punishing either one may not effectively deter the harassment.

3. *Discrimination on the Basis of Sexual Orientation Is Presumptively Reviewed Under Rational Basis Review*

The next step in evaluating a claimed violation of equal protection is establishing the appropriate level of review. The Supreme Court has never definitively stated what level of review applies to classifications on the basis of sexual orientation.[181] Numerous commentators have weighed in on both the appropriate analytical framework for deciding the question and an ultimate resolution as to what is the correct standard of review.[182] On only one occasion has the Court heard a case presenting an equal protection challenge to a classification made of gays and lesbians.[183]

178. *See supra* note 134.

179. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

180. *Id.* at 694.

181. The Court, while never decisively stating what level of review applies to classifications on the basis of sexual orientation, has not remained entirely silent on the subject. Justice Brennan, in a case denied review by the Court, discussed alternate theories for heightened scrutiny analysis of classifications of homosexuals. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014–18 (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari). Justice Brennan reasoned in part that heightened scrutiny was appropriate because homosexuals face "immediate and severe opprobrium" and "have historically been the object of pernicious and sustained hostility . . . ." *Id.* at 1014.

182. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 163 (1980) (concluding that it is "a combination of the factors of prejudice and hideability that renders classifications that disadvantage homosexuals as suspicious"); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491 (1994);

In *Romer v. Evans*, the Court dealt with an Amendment to Colorado's Constitution that forbade every level of Colorado's government from granting protected status to a person because of that person's "homosexual, lesbian or bisexual orientation."[184] The Court did not reach the question of the appropriate level of review for classifications on the basis of sexual orientation as it found Colorado's Amendment failed even rational basis review.[185] The lower federal courts have filled the gap left by *Romer* and consistently reviewed classifications of gays and lesbians under the rational basis test.[186] Even accepting rational basis as the appropriate standard of review, the next section argues there is no rational basis, and therefore a violation of equal protection, for allowing gay students to be harassed by their peers.

4. No Rational Basis for Letting One Student Harass Another

The Court has observed that the "[S]tate may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[187] It is impossible to adduce a legitimate rationale for a school official in the face of known peer harassment of gay students to allow that harassment to continue.[188] Given that violations of Title IX carry substantial penalties,[189] school officials may have a much stronger rationale for addressing sexual harassment in a more aggressive manner than other forms of harassment. However, this does not in any way excuse the failure to deal in a decisive manner with cases of peer harassment of gay students brought to the attention of a school official. Ignoring the harassment and abuse inflicted daily upon

Harris M. Miller, II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984). *But cf.* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights, Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393 (1994) (arguing that homosexuals do not share in common the same indicia of suspectness seen in other groups).

183. *See* Romer v. Evans, 517 U.S. 620 (1996).

184. *Id*. at 624.

185. *Id*. at 635.

186. *See, e.g*., Equal. Found. of Greater Cincinnati, Inc., v. City of Cincinnati, 128 F.3d 289, 293 (6th Cir. 1997); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (reviewing military decision based on sexual orientation under rational basis review); Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (same).

187. Deshaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 197 n.3 (1989) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

188. This analysis, naturally, assumes a state of affairs where the school official is actually aware of the harassment. Unfortunately, much of this harassment goes unreported. *See*, *e.g*., YOUTH SUICIDE, *supra* note 62, at 3–119; Stepp, *supra* note 34. A student who is already fearful of negative reaction to her sexual orientation is wary of drawing attention to it by reporting that people are harassing her because they think she is gay. Also, a student may be prevented from reporting this harassment to a school official out of fear the school official will in turn involve her parents. Thus, a school official with no knowledge of anti-gay peer harassment cannot intentionally discriminate against a complaint of peer harassment and there can be no valid claim under § 1983.

189. *See, e.g*., Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641–42 (1999).

gay students constitutes a denial of equal protection in the most fundamental sense. The Seventh Circuit Court of Appeals, in a groundbreaking lawsuit by a gay student against school officials for peer harassment, acknowledged the soundness of this position.[190]

In *Nabozny v. Podlesny*, a student named Jamie Nabozny brought suit against school officials for anti-gay harassment he suffered at the hands of his peers.[191] Beginning in seventh grade, Nabozny was regularly called "faggot" by his classmates and struck or spat on.[192] Nabozny appealed to the school administration for help and the matter was brought to the attention of Principal Mary Podlesny.[193] Podlesny assured Nabozny that he would be protected from the students who harassed him.[194] Soon after, while Nabozny was in class, he was pushed to the ground and held down while two students acted out a mock rape on him.[195] Twenty students looked on and laughed as the boys performing the mock rape told Nabozny he should like it.[196] Nabozny escaped to Podlesny's office and reported the incident.[197] Podlesny responded "'boys will be boys' and told Nabozny that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."[198] The students involved in this incident received no punishment.[199] Nabozny was required to speak to a counselor not about the harassment, but for leaving class without permission.[200]

Numerous incidents followed over the course of Nabozny's seventh, eighth, and ninth grade years, including, but not limited to, being assaulted and urinated upon in the school restroom.[201] These incidents in turn led to meetings between Nabozny's parents and school officials, including Podlesny.[202] In each instance, actions on the part of school officials were promised and these promises were not fulfilled.[203] Nabozny's schedule was adjusted to place him in special education classes; two of his main harassers were in special education.[204] Nabozny twice attempted suicide during his eighth and ninth grade years.[205]

The harassment continued into his tenth grade year where students on the school bus regularly called Nabozny a "fag" and "queer" and

190. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).
191. *Id.* at 449.
192. *Id*. at 451.
193. *Id.*
194. *Id.*
195. *Id*.
196. *Id*.
197. *Id.*
198. *Id*.
199. *Id.*
200. *Id*.
201. *Id*. at 451–52.
202. *Id.* at 451.
203. *Id*.
204. *Id*. at 452.
205. *See id.*

threw steel nuts and bolts at him.[206] Finally, the most violent attack occurred one morning while Nabozny was sitting in the school hallway waiting for the library to open.[207] A group of eight boys approached him and one student attacked Jamie by kicking him for five to ten minutes while the others in the group looked on and laughed.[208] When the incident was reported to Assistant Principal Thomas Blauert, he allegedly laughed and told Nabozny he "deserved such treatment because he is gay."[209]

Nabozny withdrew from school in his eleventh grade year without receiving his diploma after being told by a school counselor that "school administrators were unwilling to help and that he should seek educational opportunities elsewhere."[210] Nabozny left the state and was later diagnosed with Post Traumatic Stress Disorder.[211] He subsequently filed suit against the school district and several school officials.[212]

The Seventh Circuit reversed the District Court's grant of summary judgment for all defendants and reinstated Nabozny's § 1983 claims based on a violation of his equal protection rights due to sex and sexual orientation discrimination.[213] The court then analyzed Nabozny's equal protection claim on the grounds of sexual orientation and reviewed the actions of the school officials under the rational basis test.[214] The court concluded that "[w]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one."[215]

The court in its opinion noted that at the time of the underlying conduct, Wisconsin law protected students from discrimination on the basis of sexual orientation,[216] and that Nabozny's school district had a policy while he attended school that "prohibit[ed] discrimination against students on the basis of gender or sexual orientation."[217] The court stressed, however, that it did "not mean to suggest that the constitutionality of the defendants' conduct turns on the existence of the Wisconsin statute. *The fact that the conduct in question is illegal under the statute neither adds to, nor subtracts from, the conduct's constitutional permissibility*."[218] This analysis applies equally to a hypothetical case of peer har-

206. *Id*.
207. *Id.*
208. *Id*.
209. *Id*. The beating was so severe that Nabozny collapsed later from internal bleeding. *Id*.
210. *Id*.
211. *Id*.
212. *Id.* at 453.
213. *Id*. at 456–57.
214. *Id.* at 457–58. The court was required to conduct this inquiry because the defendant school officials asserted immunity from suit on grounds of qualified immunity. For more about this defense and what it entails, see *infra* Part III.D.
215. *Id*. at 458.
216. *Id*. at 453 (citing WIS. STAT. ANN. § 118.13(1) (West 1999)).
217. *Id*. at 453.
218. *Id*. at 457 n.11 (emphasis added).

assment on the basis of sexual orientation occurring in a jurisdiction that does not extend protection to gay students specifically, or all students generally. Although many schools have them, an existing harassment policy is not required[219] for a potential plaintiff to establish that the actions of a school official were unconstitutional. The absence of an official harassment policy is simply not dispositive when a court is evaluating a potential defense to § 1983 liability.

In the wake of *Nabozny*, gay students have filed lawsuits around the country against school officials for peer harassment.[220] Few have led to reported cases in the federal courts.[221] Of those cases with similar fact patterns and substantially similar federal claims, the *Nabozny* holding is cited to with approval.[222] The greater impact, it appears, of the *Nabozny* case to this point is the effect it has had on school boards and adoption of harassment policies. With cases like *Nabozny* and *Davis*—which dealt with a school district's liability under Title IX for peer sexual harassment, and held that school boards can be potentially liable for large damage awards for peer harassment[223]—antibullying and harassment policies have been examined, and in some cases adopted, to avoid expensive and embarrassing lawsuits.[224]

D. A School Official Who Ignores Peer Harassment of a Gay Student Is Not Entitled to Qualified Immunity

Even if a prima facie case under § 1983 is proved, an official may still escape personal liability for damages under qualified immunity.[225]

219. *See supra* note 39; *see also* Shear & Salmon, *supra* note 170.

220. *See, e.g.*, Tipton Blish, *Man Sues over Anti-Gay Taunts, Discrimination: Lawsuit Against School District Alleging Daily Torment Could Test New State Law Intended to Protect Homosexual Students*, L.A. TIMES, Nov. 11, 2001, at B5; Kim Martineau, *Gay Teen, Parents File Harassment Suit*, TIMES UNION, Oct. 3, 2000, at B4; Dionne Searcey, *Graduate Sues over Anti-Gay Torment*, SEATTLE TIMES, Oct. 29, 1998, at B1; John Seewer, *Lawsuit Contends Student Harassed: Family Alleges Schools Failed to Protect Son Who Defended Gay Brother*, BEACON J., May 19, 2000, at C6.

221. *See* Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123, 2000 WL 33376299 (N.D. Cal. Apr. 14, 2000). Some of these lawsuits do not lead to reported cases because they settle out-of-court. *See, e.g.*, *PA. Teen to Get $312,000 in School Harassment Case*, RECORD, Jan. 18, 2002, at A21, *available at* 2002 WL 4642300; *see also supra* note 13.

222. *See Montgomery*, 109 F. Supp. 2d at 1089; *O.H.*, 2000 WL 33376299, at *10.

223. *See supra* note 106.

224. *See, e.g.*, Boxall & Noriyuki, *supra* note 10; Nicole Zeigler Dizon, *Gay Students' Rights at Issue*, CHI. SUN-TIMES, Oct. 8, 2000, at 30; Finz, *supra* note 1; Lena H. Sun, *Gay Students Get Little Help with Harassment; Changing Attitudes, Court Decisions Prod Schools to Confront the Problem*, WASH. POST, July 20, 1998, at A01; *supra* note 13.

225. Personal defenses such as absolute or qualified immunity may only be asserted by an individual and may not be raised in an official capacity suit. *See* Owen v. City of Independence, Mo., 445 U.S. 622, 657 (1980). The only grounds for immunity that exist in an official capacity suit are those such as sovereign immunity under the Eleventh Amendment. *See* Kentucky v. Graham, 473 U.S. 159, 167 (1985). Thus, while in some cases an individual is immune from suit due to qualified immunity, "[a] local government is now liable under § 1983 for constitutional violations caused by an official policy or custom even where the governmental officials responsible for that policy or custom pass the qualified immunity test . . . ." 1 NAHMOD, *supra* note 137, § 6:62, at 6-188 to -189.

Qualified immunity is "an immunity from suit rather than a mere defense to liability,"[226] not explicitly provided for in the language of § 1983, but recognized by the Supreme Court. This immunity from individual liability arising out of actions taken "reflects a balance between the interest in preventing, and compensating for, constitutional violations and the interest in avoiding the overdeterrence of independent decision making by government officials."[227]

The Court in *Harlow v. Fitzgerald* held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[228] Therefore, a trial court evaluating a claim of qualified immunity must carefully scrutinize both a plaintiff's complaint and the law as it existed at the time of the complained of actions. This inquiry is sequential—"[a] court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the constitutional violation.'"[229]

1. Violation of Constitutional Rights

To defeat a claim of qualified immunity, a plaintiff must establish that the actions of a state official violated constitutional rights.[230] The trial court must first ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[231] If the facts as alleged do not establish a constitutional violation, no valid § 1983 claim has been stated and the case must be dismissed.[232]

The right to equal protection provided under the Fourteenth Amendment is guaranteed to all persons.[233] While a State has no af-

226. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

227. 1 NAHMOD, *supra* note 137, § 8:1, at 8-4 to -4.1.

228. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Some critics of this approach argue a public official is not entitled to defend unlawful actions on grounds of qualified immunity when the official recognizes the unlawfulness of such actions, even if a reasonable person would not be expected to. *See, e.g.*, Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989).

229. Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Conn v. Gabert, 526 U.S. 286, 290 (1999)).

230. Siegert v. Gilley, 500 U.S. 226, 232 (1991) (noting that this threshold inquiry "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits").

231. Saucier v. Katz, 533 U.S. 194, 201 (2001).

232. *See, e.g.*, *Siegert*, 500 U.S. at 232.

233. U.S. CONST. amend. XIV; *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982); Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886).

firmative duty generally to guarantee the safety of its citizens,[234] it cannot deny to certain persons services granted to all others on a neutral basis for the sole reason that a person belongs to a disfavored group.[235] The command stated by the Court in *Deshaney v. Winnebago County Social Services Department* bears repeating at this point: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[236] In the context of providing state services to gays and lesbians, *Romer* made this principle plain enough when it criticized the legislation at issue in that case on the grounds that it removed from homosexuals "protections taken for granted by most people either because they already have them or do not need them . . . ."[237] It simply does not logically follow that because the government may discriminate against homosexuals in some contexts,[238] then it can do so on every occasion.[239] When a school official deliberately withholds aid or remains indifferent to reported claims by gay students of peer harassment, there is a denial of the right to equal protection.

2. *"Clearly Established" Rights at the Time of the Constitutional Violation*

If an action by a school official violates constitutional rights, the second part of the qualified immunity inquiry focuses on whether the asserted right was "clearly established" at the time of violation.[240] For a

234. DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 195 (1989) (finding no substantive due process right under the Fourteenth Amendment that would impose upon a state an affirmative obligation "to protect the life, liberty, and property of its citizens against invasion by private actors").

235. *See, e.g.*, *Yick Wo*, 118 U.S. at 356.

236. *Deshaney*, 489 U.S. at 197 n.3 (citing *Yick Wo*, 118 U.S. at 356).

237. Romer v. Evans, 517 U.S. 620, 631 (1996).

238. *See supra* notes 82, 184.

239. That a state, under the Constitution, may not refuse to extend protective services to homosexuals was expressed by Justice Antonin Scalia during oral argument in *Romer*. Part of the oral argument dealt with whether the Amendment at issue would prevent ordinary protective services provided by the police and fire departments from being available to homosexuals. In an exchange between Justice Scalia and Timothy Tymkovich, the Solicitor General for the State of Colorado, Justice Scalia posed the following question:

> [Justice Scalia]: Mr. Tymkovich, I assume in your State you're not allowed to bash nongays either, are you?
>
> [Mr. Tymkovich]: No. The criminal law is—
>
> [Justice Scalia]: So prohibiting the bashing of gays would not be a special protection, would it? It would just be enforcing the general law.

Transcript of Oral Argument at 28, *available at* 1995 WL 605822; Audio Recording of Oral Argument, *available at* http://oyez.nwu.edu/cases/cases.cgi?command=show&case_id=653. While the written transcript does not specify the particular Justice asking the question, the voice of Justice Scalia is identifiable on the audio recording. Justice Scalia "vigorously dissent[ed]" from the majority's invalidation of Colorado's Amendment. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). While he would have upheld the constitutionality of Colorado's Amendment, Justice Scalia's comments clearly express the principle that a state, or its officials, cannot constitutionally choose to exercise its police powers in protecting only certain preferred groups.

240. Wilson v. Layne, 526 U.S. 603, 614 (1999).

right to be "clearly established," the asserted right cannot be stated broadly, but instead

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*, but it is to say that in the light of preexisting law the unlawfulness must be apparent.[241]

Precisely because the right must be clearly established, the exact dates when the complained of conduct occurred are of vital importance. The Court has concluded that to hold a government official liable, a right must be "clearly established" in light of the law at the time because "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[242] Thus, the question becomes whether it is clearly established that gay students who complain of peer harassment have the right to equal treatment by school officials.

Given the "close relationship between education and some of our most basic constitutional values,"[243] it seems appropriate that any actions on the part of school officials that have the effect of denying a student the right to a meaningful education[244] should be scrutinized carefully. Even if one does not take special consideration of "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child,"[245] it is clearly established for purposes of qualified immunity that the duties performed by school officials in this context, and in all others, must at a minimum be rationally related to a legitimate governmental objective.[246] This proposition is absolutely unimpeachable and has been so long before any gay student currently enrolled began attending school.[247] The desire on the part of a school official to "harm a politically unpopular group" can never provide the

241. Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted) (emphasis added). For a discussion of the appropriate level of specificity required in the clearly established law inquiry, see 2 NAHMOD, *supra* note 137, § 8:18, at 8-61 ("[I]t must now be approached at a fairly fact-specific level, but a case on all fours is not required. In making this inquiry, courts determine the extent to which the relevant constitutional doctrine is developed in the context of similar or analogous fact patterns.").

242. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* 2 NAHMOD, *supra* note 137, § 8:18, at 8-57 (noting that qualified immunity can be explained by the idea of "fairness to potential defendants who should not have to predict constitutional law developments").

243. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting).

244. *See supra* notes 61–63 and accompanying text discussing the adverse educational impact harassment has on gay students.

245. Plyler v. Doe, 457 U.S. 202, 221 (1982).

246. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58, 461–62 (1988); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (per curiam); *see also supra* notes 155–60 and accompanying text.

247. Romer v. Evans, 517 U.S. 620, 631–32 (1996). *Romer* is instructive in this regard, because the right of homosexuals to equal protection generally, and freedom from irrational classifications specifically, formed the basis of the majority's invalidation of the amendment at issue. *Id.* at 631–33.

needed rational basis for making a governmental classification.[248] Absent this rational basis, a reasonable person in the place of a school official would know that discrimination motivated by animus against a student based on sexual orientation is an unconstitutional infringement of that student's right to equal protection.

IV. SCHOOL OFFICIALS CAN PREVENT PERSONAL LIABILITY UNDER § 1983 BY PROTECTING GAY STUDENTS FROM PEER HARASSMENT

It seems difficult to know how best to stamp out the root causes of harassment of gay students by peers when at present harassment and homophobic insults are utilized so casually. The simple answer is that harassment of gay students can be eradicated without attempting to change any person's opinions about gays and lesbians. Intolerance of the ongoing harassment and abuse of gay students does not necessarily equate with tolerance or acceptance of homosexuality in general. Every person has the right to personal beliefs so long as those beliefs are not manifested in a violent or intimidating way toward others.

The challenge for school officials is to change the common, but ineffective, approaches to gay students' complaints of peer harassment. Officials should not dismiss these complaints as common teasing all adolescents go through, or, more perniciously, tell students to accept harassment as a necessary consequence of being gay. They must recognize that these insults do more than just injure their targets. Adults' acceptance of homophobic remarks and mistreatment of gay students upsets many students, both gay and straight, and creates a climate that breeds this sort of intolerable behavior. Not all gay students face peer harassment because, among other reasons, some choose to hide their sexuality or lie about it to others. The gay students who hide their sexuality in school often do so to avoid the catalogue of abuses and mistreatment that other gay students face.[249]

States can take the lead on this issue by passing antiharassment statutes that would prohibit harassment of or discrimination against students in school because of their sexual orientation. If these measures meet with resistance at the statewide level, as they often have,[250] school districts or school boards can be proactive and pass similar measures at the local level. However, school officials should not wait for a mandate by a governing body before deciding to take the complaints of gay students seriously. A school official potentially faces significant personal

248. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

249. *See* YOUTH SUICIDE, *supra* note 62, at 3–119 (explaining that many gay youth choose to hide their sexuality because they have "seen the negative response to homosexuality from society and the brutal treatment of gays by their peers").

250. *See, e.g.*, Stephanie Desmon, *School Board Defers Vote on Policy to Protect Gay Students*, BALT. SUN, June 27, 2002, at B2.

liability under § 1983, even absent any state or local obligation to address anti-gay harassment and discrimination in schools.

V. CONCLUSION

Harassment of gay students in America's schools is pervasive, devastating to its victims, and poisonous to the school atmosphere. Because so few avenues for legal redress are available to a gay student subjected to harassment and abuse by peers, the only way to end the abuse is to sue school officials who knowingly allow this mistreatment to continue. For a school official, the prospect of facing personal liability for deprivation of a student's constitutional right to equal protection is undoubtedly a frightening one. It is no more terrifying, however, than the reality of what school is like for a gay student.