

Safe Schools Brief Bank: Resources & Tools for Attorneys & Legal Professionals



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The **National LGBT Bar Association** is a national association of lawyers, judges and other legal professionals, law students, activists and affiliated lesbian, gay, bisexual and transgender legal organizations. It was formally founded in 1989 and became an official affiliate of the American Bar Association in 1992. The LGBT Bar now works closely with the ABA's Section on Individual Rights and Responsibilities and its Committee on Sexual Orientation and Gender Identity. For more information on the resources provided by The LGBT Bar, please visit: www.lgbtbar.org.

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ABOUT THE BRIEF BANK

This brief bank is a comprehensive compilation of recent cases dealing with school bullying. This brief bank compiles materials including briefs to educate practitioners, scholars and law students on this “life-or-death” issue. Its purpose is to inform, educate and inspire lawyers and other legal professionals working in this area of law.

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I. INTRODUCTION

The year 2010 proved to be a dark year for LGBT youth suicide. In that year, anti-gay bullying took the lives of Seth Walsh, age 13; Asher Brown, age 13; Tyler Clementi, age 18; Billy Lucas, age 15; Aiyisha Hassan, age 20; Raymond Chase, age 19 and Justin Aaberg, age 15, among others. This string of lesbian, gay, bisexual and transgender youth suicides provoked nationwide reflection about bullying on the basis of real or perceived sexual orientation and gender identity/expression as well as renewed a sense of urgency for the passage of federal anti-bullying laws. The Safe and Drug-Free Schools and Communities Act, a part of the 2001's No Child Left Behind Act, provides federal support to promote school safety, but does not specifically address bullying in schools; therefore, there is no existing federal law that addresses bullying.

"Bullying," as defined by the *Journal of the American Medical Association*, involves:

"...a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one. This asymmetry of power may be *physical* or *psychological*, and the aggressive behavior may be *verbal* (e.g., name calling, threats, taunting, malicious teasing), *physical* (e.g., hitting, kicking, spitting, pushing, taking personal belongings), or *psychological* (e.g., spreading rumors, engaging in social exclusion, extortion, or intimidation). (p. 2094, emphasis in original)."

(Tonja, et al, 2001).

Increased use of technology has presented an alternative route for potential bullying and harassment of students that extends far beyond school control. Cyberbullying, which has been defined as: *the deliberate and repeated use of information and communication technologies, such as e-mail, text messages and social networking sites, by an individual or group intending to harm others*, is proving to be an even crueler method of bullying not only because of the pervasive and hostile power it holds, but also because of the lack of personal contact with the victim, which results in the bully developing less empathy for the target of the abuse.

The U.S. Department of Education has concluded that bullying and harassment affect nearly one in every three American school children in grades six through ten. Studies have shown that LGBT students are disproportionately more likely to experience bullying and harassment at school than their heterosexual counterparts. Ten states, plus the District of Columbia, currently have established non-discrimination laws applicable to LGBT students, and three additional states cover sexual orientation without regard to gender identity. However, despite many school districts having policies in place that are intended to address bullying, the possibility still exists that school officials and administrators will not follow these procedures, or will engage in the bullying and harassment themselves, leaving students unprotected and more vulnerable to verbal, emotional and physical intimidation.

The goal of this *Safe Schools Brief Bank* is to discuss bullying and the legal aspects of corresponding school procedural policies concerning cyberbullying, propose recommendations for case litigation, report on the current status of federal legislation, discuss legislative priorities, provide sample pleadings and court opinions and offer resources to cope with school bullying and cyberbullying for attorneys, educators, school administrators and students alike.

II. SCHOOL LITIGATION: DECIDED, SETTLED & PENDING CASES

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

a) Summary of case:

Plaintiff Jamie Nabozny won this landmark lawsuit against administrators at his public high school in Ashland, Wisconsin when they refused to intervene as he was subjected to unyielding anti-gay verbal and physical abuse by his classmates. The abuse became so severe that at one point Nabozny was hospitalized and attempted suicide several times. The severity and pervasiveness of the abuse resulted in Nabozny's total withdrawal from school.

b) Verdict:

A trial court dismissed Nabozny's lawsuit, but Lambda Legal represented him in federal appeals court, which resulted in the nation's first ever judicial opinion ruling that a public school could be held accountable for not preventing anti-gay abuse. After the case went back to trial it subsequently settled for close to \$1 million in damages.

c) Significance:

This was considered by many to be the first legal challenge to anti-gay violence in the public school system. The enormous settlement amount acted as a warning for schools to protect their students.

2. Loomis v. Visalia School District, No. 1:00-CV-06616-OWW-LJO (N.D. Cal. 2001)

a) Summary of case:

The ACLU filed a federal lawsuit in 2001 on behalf of George Loomis and the statewide Gay-Straight Alliance Network. Loomis suffered emotional, physical and verbal abuse by both students and teachers resulting in his voluntary departure from high school.

b) Summary of Plaintiff Argument:

Plaintiffs alleged that the Visalia Unified School District committed constitutional and other civil rights violations either by participating in harassment and fostering a hostile environment or by being deliberately indifferent to the pervasive abuse and discriminatory acts by teachers, administrators and other students against students perceived to be gay or lesbian. The suit further alleges that the resulting hostile climate affected a wide range of the community, including heterosexual students and parents of students.

c) Settlement:

The Visalia Unified School District agreed to take up comprehensive reforms to combat anti-gay harassment.

First, the District used an outside expert, the Intergroup Clearinghouse, a nonprofit organization set up to promote tolerance, to design mandatory staff training aimed at teaching staff how to intervene and remedy acts of harassment and how to prevent them from occurring in the future. All teachers were required to participate in initial trainings and in supplemental training provided on an annual basis. The settlement specified numerous topics that must be covered in the mandatory staff trainings.

Second, the District was required to implement mandatory student trainings, conducted in a peer-to-peer format, under the supervision of the Gay-Straight Alliance Network. These mandatory student trainings were to be integrated into the District's existing training programs on the topic of preventing harassment and discrimination on the basis of actual or perceived sexual orientation, and aimed to teach staff how to intervene, remedy acts of harassment and prevent them from occurring in the future. The sessions will be supplemented with annual updates.

Third, the District agreed to adopt policies explicitly forbidding staff or student harassment or discrimination based on gender or sexual orientation and required revisions to the District's policies and student handbooks: (i) to expressly state in a conspicuous manner that harassment based on sexual orientation and gender, which includes perceptions of a person's identity, appearance and behavior, is expressly prohibited under District policies and California state law and (ii) to explain complaint procedures for reporting harassment and discrimination based on sexual orientation and gender, how the District is to investigate reports of such incidents, resources available to the victims of harassment and discrimination including the availability of Compliance Coordinators and to specify the remedies or responses that the District makes available for the victims of harassment and discrimination.

Fourth, the settlement required District support for the establishment of a Gay-Straight Alliance ("GSA") or other gay or lesbian student groups in District schools, including listing of any such clubs in the student handbooks and making faculty advisors available to assist such groups.

Fifth, the District also agreed to an injunction that prohibited it from: failing to respond promptly to reported incidents in accordance with the incident response terms of the agreement; engaging in, sanctioning or allowing harassing conduct (whether on the basis of actual or perceived sexual orientation); taking retaliatory action against students or school personnel who report incidents; and coercing students who report incidents to enroll in alternative educational programs.

Finally, the District agreed to annually report its progress in implementing of all of the terms and conditions of the settlement including statistics on harassment and discrimination incidents reported and the District's responses thereto.

d) Likely Reasons the Case Ended in Victory:

Connections to law firms in the area were a very helpful factor in terms of bringing resources and credibility to bring to the case.

The ability of an NGO to fund some of the litigation costs for the private law firm and to coordinate the media campaign was very beneficial.

The ability to extend resources locally in order to oversee consent decree programs, which the GSA Network was positioned to help with and was able to do, was essential for the success of this case.

The strength of the case for litigation was helped by the fact that a teacher was involved in harassment and several additional students were willing to submit declarations describing the harassment that they had endured and the fact that they would like to form Gay-Straight Alliance or other support groups in the schools, but were deterred from doing so by the pervasive hostile environment in the District's schools.

3. Donovan v. Poway Unified School District, 167 Cal. App. 4th 567, (2008)

a) Summary of case:

The California Court of Appeals affirmed a jury verdict against the defendant school district for \$300,000 for violations of the California Education Code's guarantee that students "participate fully in the educational process, free from discrimination and harassment." The jury found that the school officials failed to take appropriate actions to protect the plaintiffs from harm, which included anti-gay slurs, threatening notes and physical violence, all of which was reported to school officials.

b) Summary of Plaintiffs' Argument:

Plaintiffs Megan Donovan and Joey Ramelli alleged that they suffered consistent harassment and antigay treatment, despite their appeal to school officials for protection. In response, District officials placed them in an "alternative" program called "New Directions," which violated their rights under the California Education Code to fully participate in their education and encouraged further harassment. District officials were also participants in, or willfully indifferent to, the slurs, taunts and violence inflicted on Plaintiffs.

c) Jury Verdict:

After a jury trial, the Plaintiffs won a complete verdict with the jury finding: (i) the Plaintiffs were subjected to harassment on the basis of their sexual orientation by other students, (ii) Defendant Poway Unified School District failed to take immediate and appropriate corrective action, (iii) Defendant Poway Unified School District's conduct caused harm to the Plaintiffs, and (iv) the individual District officials had actual knowledge of the harassment

The jury awarded damages for Megan Donovan in the amount of \$125,000 and to Joey Ramelli in the amount of \$175,000

d) Appeal

On appeal, the California Court of Appeals affirmed the jury verdict. The court held that money damages may be available in a private right of action under the California Education Code to enforce its anti-discrimination provisions if the Plaintiff can show: (1) severe, pervasive and offensive harassment that effectively deprives the Plaintiff of equal access to educational benefits and opportunities and (2) deliberate indifference on the part of the school district to the harassment.

e) Significance:

This is the first published appellate decision ever to hold a school liable for failing to effectively address peer harassment under the California Education Code. The precedent strengthens protection for all LGBT and questioning students in California and reminds Districts of their obligations to protect, not segregate, LGBT students.

4. J.L. v. Mohawk Central School District, No. 09-CV-943 (N.D.N.Y. 2010)

a) Summary of case:

The defendant school district settled with the US Department of Justice (DOJ) after it intervened in a lawsuit, initially filed by the New York Civil Liberties Union, in which the Plaintiff claimed he was continuously bullied and harassed as school teachers and administrators acted with deliberate indifference.

b) Summary of Plaintiff Argument:

The Plaintiff alleged he was the victim of severe and pervasive harassment based on sex because he failed to conform to gender stereotypes in both behavior and appearance. After intervening, DOJ alleged that the school district had knowledge of the harassment, was deliberately indifferent and failed to take appropriate corrective action. The Defendant's actions resulted in J.L. failing to enjoy the educational opportunities and benefits of his school, in violation of the equal protection clause of the Fourteenth Amendment and Title IX of the Education Amendment of 1972, both of which prohibit discrimination based on sex and gender stereotypes.

c) Settlement:

With the help of the Anti-Defamation League, Defendant was required to begin training staff and faculty on suitable actions that address issues of harassment, including: (1) retaining an expert consultant in the area of harassment and discrimination based on sex, gender identity, gender expression and sexual orientation to review the District's policies and procedures; (2) developing and implementing a comprehensive plan for disseminating the District's harassment and discrimination policies and procedures; (3) retaining an expert consultant to conduct annual training for faculty and staff, and students as deemed appropriate by the expert, on discrimination and harassment based on sex, gender identity, gender expression and sexual orientation; (4) maintaining records of investigations and responses to allegations of harassment for five years; and (5) providing annual compliance reports to the DOJ and NYCLU.

The District also agreed to a payment of \$50,000 to J.L. and his family to reimburse them for counseling services and \$25,000 in attorneys' fees to NYCLU.

d) Significance:

Federal authorities will use Title IX and other federal laws to protect youth from harassment.

5. *Doe v. Anoka-Hennepin School District No. 11*

E.R. v. Anoka-Hennepin School District No. 11 (D. Minn. 2012)

a) Summary of case

Two lawsuits were filed by six current and former students against the Anoka-Hennepin School District of Minnesota on July 21, 2011. The District, which includes approximately 39,000 students, had implemented a policy in 2009 requiring faculty and staff to remain silent when the topic of sexual orientation came up during class. The policy read: "Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student-led discussions." Students claimed this policy was a gag order that prevented teachers from effectively protecting students from anti-gay bullying for fear of not being "neutral." This policy came under harsh criticism after eight District students who were identified as gay, or perceived to be gay, committed suicide within a two year period. A separate civil rights investigation by U.S. Departments of Justice and Education began in November 2010.

b) Litigation

DOJ determined that sex-based harassment contributed to a "hostile environment" in the District. A court filing listed 10 current or former students who it said were subjected to severe, pervasive and persistent harassment because they were gay, perceived to be gay or failed to conform to gender stereotypes. DOJ further alleged that despite complaints and reports by the students, teachers and administrators failed to protect them.

In response to the suit, Anoka-Hennepin School District's "neutrality policy" was replaced in February 2012 with a different policy voted on by the school board, which required teachers to promote a respectful learning environment for all students. This policy change set the foundation for the settlement agreed upon less than one month later.

c) Settlement

A March 5, 2012 settlement ended the two lawsuits filed in July 2011 and the separate federal investigation that began in November 2010 by DOJ and DOE. The District agreed to: (1) hiring a coordinator to ensure the District meets its obligations; (2) hiring a mental health consultant to review how it assists harassment victims; (3) ensuring counselors, or other mental health professionals, are available when bullying victims need help; (4) hiring an equity consultant; (5) hiring a Title IX coordinator and mental health consultant to review district policies and ensure the District does a better job of addressing reports of harassment and bullying; (6) conducting more student and staff training on bullying; (7) adopting a new monitoring system to track harassment.

The District must also pay a lump sum of \$270,000 to be divided among the student plaintiffs. It is estimated the changes will cost Minnesota's largest school district an additional \$500,000. DOJ is in charge of tracking the school district's compliance until 2017.

III. TYPES OF SAFE SCHOOL LAWS & PROTECTIONS

1. Anti-bullying and Harassment Laws and Policies

Anti-bullying and harassment laws and policies are educational and preventative in nature. They define bullying and harassment and require school districts to have anti-bullying policies with specific required components such as training for educators, procedures for investigation and disciplinary consequences.

The most effective anti-bullying and harassment laws and policies are those that are enumerated. Enumerated anti-bullying laws list those characteristics that are frequently the subject of bullying and harassment and identify types of individuals or things that need to be protected. Anti-bullying and harassment laws and policies are designed to address the needs of students who experience bullying and harassment in their schools. This list of enumerated characteristics should include gender identity, gender expression and sexual orientation, along with traditionally protected characteristics like race and disability. Research shows that students in school districts with enumerated anti-bullying and harassment policies feel safer in school, are more likely to report incidents of bullying and harassment when they occur and report increased levels of teacher intervention.

2. Non-Discrimination Laws and Policies

Non-discrimination laws and policies specifically protect students from discrimination on the basis of real or perceived characteristics, which should include characteristics protected under current civil rights law at the federal, state and local levels. Even though sexual orientation, gender identity and gender expression are not currently protected characteristics under federal or some state/local laws, they should be protected in non-discrimination policies. Unlike anti-bullying laws, non-discrimination laws often have a private right-of-action attached to them.

IV. CYBERBULLYING

1. Definitions of Cyberbullying

Cyberbullying is still a developing area of law. There is no universally recognized definition of bullying or harassment. Each state defines it differently and many allow Local Education Agencies (LEA's) within the state to create their own definitions. The legal description of cyberbullying is: bullying, or harassment, that occurs through the use of the Internet and/or other information and communication technologies, by an individual or group with the intent to harm others in a deliberate, repeated or hostile manner. According to the Gay, Lesbian & Straight Education Network (GLSEN), bullying is any verbal or physical conduct that adversely affects the ability of one or more students to participate in, or benefit from, the school's educational programs or activities by placing the student, or students, in reasonable fear of physical harm because the conduct is so severe, persistent and pervasive.

In 2010, Warren J. Blumenfeld and R.M. Cooper composed a comprehensive statistical survey and commentary on the effects of cyberbullying on children. The article, entitled *LGBT and Allied Youth Responses to Cyberbullying: The Policy Implications*, found that 54% of youth ages 11-22, had experienced some sort of harassment, bullying or intimidation through the use of the Internet in the prior three months before the survey was taken. Psychological effects on the LGBT population as a result of being cyberbullied are that 45% experienced feelings of depression; 38% experienced embarrassment; 28% experienced anxiety; and 26% had suicidal thoughts.

In GLSEN's 2009 National School Climate Survey, more than half (52.9%) of LGBT students reported that they were harassed or threatened by students at their school via electronic mediums (e.g. text messages, emails, instant messages or postings on Internet sites such as Facebook) and almost a sixth (14.6%) of such students had experienced it often or frequently.

2. Legislative Background

The majority of anti-bullying laws apply to grades K-12 in public schools as opposed to post-secondary education—although a few states have extended cyberbullying protections to public universities. Fourteen states currently have enumerated anti-bullying laws that include sexual orientation and gender identity as protected characteristics. The majority of states have non-enumerated anti-bullying laws, which many organizations and advocates do not consider as effective. Some states have laws that either cover cyberbullying implicitly or do not cover cyberbullying at all.

2. Privacy on the Internet

The internet is a tool used to share information and communicate with others. When dealing with cases of cyberbullying, the following list of federal internet laws may be utilized for prosecution:

- a) The Children's Online Privacy Prevention Act (COPA): a statute that deals with children under the age of 13 and the collection of personally identifiable information from children in that age group.
- b) Communications Decency Act (CDA): restricts internet service provider liability for what the its users are doing on the web.
- c) Computer Fraud and Abuse Act (CFAA): protects users against unauthorized access and trespass to computers, impacts hacking and information theft.
- d) Electronic Communications Privacy Act (ECPA): provides privacy with respect to e-mail communications.

3. How Youth Can Protect Themselves on the Internet

a) Utilize the Terms of Service

The Terms of Service, commonly referred to as ToS, are rules that govern what a service provider considers acceptable conduct on their platforms. ToS give a service provider the ability to shut down access or disable an individual user's right to their product or services if they violate these terms. Every time an individual signs on, they automatically agree to abide by the terms of service.

- Example: Facebook has a specific section defined as the "Safety Section." This section includes the assertion that a user will not bully, intimidate or harass any other users. Further in this section's text, the user agrees that if they violate the letter or spirit of the agreements, or otherwise create a possible legal exposure for Facebook, then Facebook can exercise their right to disable the user's account.

The Terms of Service provide excellent leverage for someone who is the target of harassment or some sort of bullying when seeking help. Notifying the service provider can be very effective in bringing a swift resolution to the situation.

b) Why Won't Youth Report Cyberbullying?

Online bullying is believed to be highly under reported. The factors that inhibit LGBT youth from reporting incidents of bullying or harassment are extensive:

- Small Communities/Lack of Access:
For LGBT youth living in small towns or communities, cyberspace is generally one of the only opportunities to experience a community outside of their own. They may not have community groups or a Gay Straight Alliance in their schools so cyberspace may be the place where they find other people like them who are able to offer support.
- Fear:
 - 1) of retaliation and continued cyberbullying.
 - 2) of reporting because they might have to out themselves to their families; one factor that heterosexual bully victims do not have to worry about.
 - 3) of adult(s) or guardian(s) taking away technologies, therefore, closing their window to the outside world.

4. Current & Past Cyberbullying Cases

Megan Meier Case—*United States v. Lori Drew*, 259 F.R.D. 449 (C.D. Cal. 2009)

a) Summary of case:

Lori Drew was convicted, and subsequently acquitted, of violations of the Computer Fraud and Abuse Act (CFAA) after the “cyberbullying” of 13-year-old Megan Meier, who died by suicide as a result of the alleged bullying.

Drew was a 49-year-old mother living in Missouri. Her daughter was a friend of Megan Meier, but when Megan transferred schools the friendship ended. In 2006, Lori Drew became concerned that Meier was spreading rumors about her daughter. Drew, her daughter and Drew's employee, Ashley Grills, created a plan to use a fake MySpace page under the name Josh Evans, a fictitious 16-year-old boy who was supposedly interested in Megan Meier. Soon after this cyber relationship began, Drew, posing at Josh Evans, as well as other MySpace users linked with Josh Evans' MySpace page, began to bully Meier. On October 17, 2006, Meier's mother found Megan hanging from her bedroom closet.

b) Indictment and Outcome:

Drew was indicted and convicted of violations of the Computer Fraud and Abuse Act in 2008. The jury found Drew guilty of a misdemeanor violation of the CFAA, but her conviction was set aside by the trial judge.

c) Court Ruling:

U.S. District Judge George Wu said the government's theory was unconstitutional. Allowing that interpretation to stand would ultimately have given prosecutors the power to criminally prosecute anyone for violating a website's terms of service, Wu reasoned, and “would convert a multitude of otherwise innocent internet users into misdemeanor criminals.”

d) Significance:

On May 15, 2008 both houses of the Missouri State Legislature unanimously voted to criminalize the usage of the internet to harass someone. The existing statute was expanded to prohibit abusive “communication by any means...” and is now known as “Megan's Law” which makes cyberbullying a punishable offense.

Tyler Clementi Case—*State v. Ravi* (N.J. Super. Ct. Crim. Div. 2012) & *State v. Molly Wei*

a) Summary of case:

On September 22, 2010, Rutgers University undergraduate student Tyler Clementi, 18, committed suicide after a number of incidents regarding his sexual orientation. In the days prior, Clementi's roommate, Dharun Ravi, 19, and Ravi's friend Molly Wei, 18, used a webcam set up in Clementi and Ravi's room to watch Clementi engage in two sexual encounters with another man. Ravi and Wei used Twitter and other social media outlets to publicize Clementi's sexual encounters without Clementi's knowledge or permission.

b) Prosecution:

On April 20, 2011, the Middlesex County Grand Jury indicted Dharun Ravi on 15 counts of invasion of privacy, bias intimidation, witness tampering and evidence tampering. On March 16, 2012, Dharun Ravi was found guilty on parts of all 15 counts of invasion of privacy and bias intimidation. The 15-member jury, including three alternates, reached its verdict following a three-week trial and two and a half days of deliberation.

On May 6, 2011, Molly Wei accepted a plea deal to avoid jail time. In exchange, Wei agreed to complete 300 hours of community service and cooperate with prosecution in their case against Ravi. Bruce Kaplan, the case prosecutor, has stated that he does not think there is enough evidence to charge Ravi and Wei with a hate crime.

c) Sentencing:

Sentencing has been tentatively set for May 21, 2012. Each charge of bias intimidation carries a presumptive state prison sentence. Ravi faces up to 10 years in prison. Additionally, Ravi also faces deportation because he was born in India. Since his April 2011 indictment, Ravi turned down two plea deals, including one that offered to help Ravi if immigration authorities sought to deport him.

e) Significance:

The deaths of Tyler Clementi and a number of other LGBT students resulted in a national dialogue about cyberbullying and LGBT youth suicide. Ravi's conviction shows that state invasion of privacy and anti-bullying laws can be used to criminally prosecute those who engage in such conduct.

VI. FEDERAL LEGISLATIVE PRIORITIES

1. Safe Schools Improvement Act:

In March 2011, Senator Bob Casey (D-PA) and Senator Mark Kirk (R-IL) reintroduced the Safe Schools Improvement Act in the Senate. It was reintroduced in the House by Representative Linda T. Sanchez in April 2011. With an enumerated definition of bullying and harassment, the Safe Schools Improvement Act would protect all students, including those who identify as, or are perceived to be, LGBT from bullying and harassment by requiring school districts to adopt enumerated anti-bullying policies. As introduced in the 112th Congress, the Safe Schools Improvement Act includes a new provision aimed at combating harassment of students via the internet. As of February 14, 2012, this bipartisan bill currently has 39 co-sponsors in the Senate and 139 co-sponsors in the House of Representatives.

The main goals of the bill include:

- a) Schools and districts will have comprehensive and effective student conduct policies that include clear prohibitions regarding bullying and harassment;
- b) Schools and districts will focus on effective prevention strategies and professional development designed to help school personnel meaningfully address issues associated with bullying and harassment; and
- c) States and districts will maintain and report data regarding incidents of bullying and harassment in order to inform the development of effective federal, state and local policies that address these issues.

Text of the Bill: <http://thomas.gov/cgi-bin/query/z?c112:S.506>

2. Student Non-Discrimination Act

The Student Non-Discrimination Act, introduced by Senator Al Franken (D-MN) and Congressman Jared Polis (D-CO), establishes a structure in America's public schools similar to that of Title IX, a comprehensive civil rights law that protects students from discrimination based on sex or gender. The Student Non-Discrimination Act would not only protect students from discrimination on the basis of sexual orientation and gender identity, but it would also provide LGBT students and their families with a claim of action necessary for carrying out legal recourse in discrimination cases. As of February 9, 2012, this bill currently has 155 co-sponsors in the House of Representatives and 36 co-sponsors in the Senate.

Text of the Bill: <http://thomas.loc.gov/cgi-bin/query/z?c112:s555>

VII. “NO PROMO HOMO” POLICIES

1. What is a No Promo Homo Policy?

According to GLSEN “No Promo Homo” policies are local or state educational policies that restrict or eliminate any school based instruction or activity that could be interpreted as positive about homosexuality. These policies can also include the distribution of instructional materials, counseling or other services on school grounds, or referral of a pupil to an organization that affirms a homosexual lifestyle. Sometimes the policies are phrased more bluntly and simply forbid any discussion of homosexuality at all—be it positive or negative.

2. Legal Issues with No Promo Homo Policies

- Teacher and student right to expression without viewpoint discrimination
- Students' rights to receive information and ideas
- Educators' right not to be subjected to punishment for violating an unconstitutionally vague policy
- Policy inconsistent with other state or local education policies

3. States with No Promo Homo Laws

a) Alabama

“No public funds or public facilities to be used to promote lifestyle or activities prohibited by sodomy and sexual misconduct laws. No public funds or public facilities shall be used by any college or university to, directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promoted a lifestyle or actions prohibited by the sodomy and sexual misconduct laws.”

Source: Sexuality Information and Education Council of the United States
<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1204>

b) Arizona

“No district shall include in its course of study instruction which: portrays homosexuality as a positive alternative life-style or suggests that some methods of sex are safe methods of homosexual sex.”

Source: Sexuality Information and Education Council of the United States
<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1206>

c) Louisiana

“No contraceptive or abortifacient drug, device, or other similar product shall be distributed at any public school. No sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or female homosexual activity.”

Source: Sexuality Information and Education Council of the United States
<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1301>

d) Mississippi

“Abstinence-only education shall remain the state standard for any sex-related education taught in the public schools. For purposes of this section, abstinence-only education includes any type of instruction or program which, at an appropriate age and grade: teaches the current state law related to sexual conduct, including forcible rape, statutory rape, paternity establishment, child support and homosexual activity; and teaches that a mutually faithful, monogamous relationship in the context of marriage is the only appropriate setting for sexual intercourse.”

Source: Sexuality Information and Education Council of the United States
<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1228#A1>

e) South Carolina

“Pursuant to guidelines developed by the board, each local school board shall implement the following program of instruction: The program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”

Source: Sexuality Information and Education Council of the United States
<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1245>

f) Tennessee (proposed)

“No public elementary or middle school shall provide any instruction or materials discussing sexual orientation other than heterosexuality.”

Source: Sexuality Information and Education Council of the United States
<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1326>

g) Texas

“Course materials and instruction relating to sexual education or sexually transmitted diseases should include: emphasis, provided in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code.”

Source: National Gay and Lesbian Task Force Policy Institute

<http://www.thetaskforce.org/downloads/reports/reports/EducationPolicy.pdf>

h) Utah

“That the materials adopted by a local school board under Subsection (1)(c)(ii)(B) shall be based upon recommendations of the school district’s Curriculum Materials Review Committee that comply with state law and state board rules emphasizing abstinence before marriage and fidelity after marriage, and prohibiting instruction in: the intricacies of intercourse, sexual stimulation, or erotic behavior; and the advocacy of homosexuality.”

Source: Sexuality Information and Education Council of the United States

<http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1251>

4. Repealed No Promo Homo Policy Examples

A policy enacted, but later repealed, by the Merrimack, New Hampshire School Board: “The Merrimack School District shall neither implement nor carry out any program or activity that has either the purpose or effect of encouraging or supporting homosexuality as a positive lifestyle alternative.”

A policy enacted in 2009, but repealed on March 6, 2012, by the Anoka-Hennepin, Minnesota School District: “Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student-led discussions.”

VIII. RESOURCES

1. GLSEN—Respect for All Training/Initiative and the Safe Space Campaign

The Gay, Lesbian & Straight Education Network is the leading national education organization focused on ensuring safe schools for all students, regardless of sexual orientation or gender identity/expression.

The Respect for All Training is an intensive two-day LGBT Educator Training Program. The first evaluation of this in-depth secondary school training program resulted in reports of increased staff competency at addressing name-calling, bullying and harassment on the basis of sexual orientation and gender identity/expression, which translated into creating safer school environments for LGBT (lesbian, gay, bisexual and transgender) students.

GLSEN’s Safe Space Campaign involves the distribution of Safe Space Kits to schools all around the country. The Safe Space Kit is a collection of resources for educators to create a positive learning environment for LGBT students. It contains a 42-page guide that provides concrete strategies for supporting LGBT students, including how to educate about anti-LGBT bias. It also comes with Safe Space stickers and posters to help students identify supportive educators.

GLSEN’s *Research Briefs Webpage* provides a series of short state reports produced by the GLSEN Research Department on a range of current safe school and LGBT-related education issues with findings from both GLSEN research and other sources.

2. The Trevor Project—TrevorSpace

The Trevor Project is the leading national organization providing crisis intervention and suicide prevention services to lesbian, gay, bisexual, transgender and questioning youth.

TrevorSpace is a social networking site for lesbian, gay, bisexual, transgender and questioning youth ages 13 through 24 and their friends and allies. It is a medium where LGBT or questioning youth can interact with each other in a safe space.

3. Campus Pride

Campus Pride represents the only national nonprofit 501(c)(3) organization for student leaders and campus groups working to create a safer college environment for LGBT students. The organization is a volunteer-driven network for and by student leaders. The primary objective of Campus Pride is to develop necessary resources, programs and services to support LGBT and ally students on college campuses across the United States.

4. Southern Poverty Law Center—LGBT Rights Project

The Southern Poverty Law Center has worked to ensure safe schools for all LGBT students through educational campaigns and legal action. Their Teaching Tolerance program released the anti-bullying documentary *Bullied* in 2010. The free documentary and teaching kit, designed for both classroom use and professional development for educators, tells the story of one student's landmark effort to stand up to his anti-gay tormentors. The SPLC has also taken legal action to protect LGBT students. This includes litigation against school policy that creates an atmosphere hostile to LGBT students or otherwise isolates these students for harassment. Anti-gay policies and actions that infringe on the free expression and privacy rights of LGBT students are another focus of this work. Outside the classroom, the SPLC focuses on the treatment of LGBT youth in juvenile and foster care facilities.

5. Olweus Bullying Prevention Program

The Olweus Bullying Prevention Program is a schoolwide program designed to prevent or reduce bullying throughout the school setting. The multi-component approach involves individuals, classrooms and entire schools, as well as parents and communities, that join together to successfully address bullying in schools.

Outcomes of the Program include:

- 50% or more reduction in student reports of being bullied and bullying others. Peer and teacher ratings of bullying problems have yielded similar results.
- Significant reduction in student reports of general antisocial behavior such as school bullying, vandalism, school violence, fighting, theft and truancy.
- Significant improvements in the classroom social climate as reflected in students' reports of improved order and discipline, more positive social relationships and more positive attitudes toward schoolwork and school.
- Greater support for students who are bullied and stronger, more effective interventions for students who bully.

IX. TOOLS

1. MEET THE EXPERTS

These individuals are all noted experts in anti-gay school bullying and harassment. The experts have been intimately involved in safe schools legislation, programs and resources. Each has spoken at the National LGBT Bar Association's Annual Lavender Law® Conference & Career Fair. The event, held annually, brings together noted legal professionals in the LGBT community.

Alison Gill

Alison Gill is a transgender attorney, the Public Policy Manager at the Gay, Lesbian, and Straight Education Network (GLSEN) and an experienced educational speaker on these issues.

Samuel Wolfe

Samuel Wolfe is a Staff Attorney at the Southern Poverty Law Center (SPLC) and leading team member of the LGBT Rights Project. Previously, Wolfe was a litigation associate at a leading international law firm in New York City where his pro bono practice focused on representing LGBT clients. The National LGBT Bar Association recognized Wolfe as one of the 40 Best LGBT Lawyers Under 40 in 2011.

Paula Rosenstein

Paula Rosenstein is a partner at Rosenstein Wilson & Dean who, with nineteen years of experience, practices primarily in the area of employment law. Rosenstein represents, and litigates on behalf of, domestic partners and negotiates and litigates other contract and business matters.

John Elliott Eichhorst

John Elliott Eichhorst is currently the Deputy Attorney at the USDA Office of the General Counsel, Pacific Region and a partner at the law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin. Eichhorst is based in San Francisco and has twenty-three years of experience as an attorney.

Jon W. Davidson

Jon W. Davidson is the Legal Director at Lambda Legal's Western Regional Office. Davidson joined Lambda Legal in 1995 and has extensive experience in youth and school lawsuit litigation. Previously, Davidson served as Senior Counsel in Lambda Legal's Western Regional Office. Prior to that, Davidson was head of the Lesbian and Gay Rights Project of the ACLU of Southern California, whose staff he joined in 1988.

Shawn Gaylord

Shawn Gaylord is the Director of Public Policy at the Gay, Lesbian, and Straight Education Network (GLSEN).

Michelle Deutchman

Michelle Deutchman is Western States Counsel at the Anti-Defamation League (ADL).

Elizabeth Gill

Elizabeth Gill is a Staff Attorney for the ACLU of Northern California and the ACLU's Lesbian Gay Bisexual and Transgender & AIDS Project. Gill works on cases and campaigns around the country that aim to ensure equal treatment of LGBT people by the government; equal rights and protections for LGBT couples and families; protection from discrimination in jobs, schools, housing and public accommodations; and fair treatment by the government of people living with HIV/AIDS. Prior to the ACLU, Elizabeth was a litigation associate at Morrison & Foerster in San Francisco and at WilmerHale in Washington, DC.

Andrea Khoury

Andrea Khoury is the Project Director of the *Bar-Youth Empowerment Project* of the American Bar Association's Center on Children and the Law and Commission on Youth at Risk focusing on adolescents' access to attorneys, children's right to counsel and youth involvement in court hearings. Khoury is an attorney working in the areas of child welfare, implementation of federal legislation and court improvement. She has extensive experience in representing children in child abuse and neglect proceedings.

Garry Bevel

Garry Bevel is a Staff Attorney with the American Bar Association's Center on Children and the Law: Opening Doors for LGBT Youth in Foster Care Project in Washington, DC and Staff Director of the Center's Commission on Youth-at-Risk in Washington, DC. Bevel is a former Miami-Dade prosecutor and was a litigation attorney for the Florida Guardian ad Litem Program for three years prior to joining the ABA.

Andrea Ritchie

Andrea Ritchie is a Police Misconduct Attorney and organizer in New York City. Ritchie has had extensive experience on profiling, policing and physical and sexual violence by law enforcement agents against women and LGBT people in the U.S. and Canada over the past decade. She currently coordinates Streetwise & Safe, a leadership development initiative aimed at building knowledge, community and power among LGBT youth of color with experience of gender, race, sexuality and poverty-based policing and criminalization in the context of "quality of life" initiatives and the policing of sex work.

Ilona M. Turner

Ilona M. Turner is currently the Legal Director at the Transgender Law Center. She is also a former Staff Attorney at the National Center for Lesbian Rights (NCLR), based in San Francisco. As a former Legislative Advocate for Equality California, she helped win the passage of groundbreaking LGBT-rights legislation that, among other things, significantly expanded the rights of domestic partners under California law and prohibited discrimination based on gender identity and expression in employment and housing.

Dr. Judy Chiasson

Dr. Judy Chiasson is an educator, researcher, writer and community activist. As part of Human Relations, Diversity and Equity in Los Angeles Unified School District, she is a voice of LGBT concerns for a district of 800,000 students. Dr. Chiasson is also a founder of Gays and Lesbians Initiating Dialogue for Equality (GLIDE), a speaker's bureau that conducts over 250 workshops per year about sexual orientation and gender identity.

Robert S. Salem

Robert S. Salem is a Clinical Professor of Law at the University of Toledo College of Law where he established and directs the Safe School Project at the Toledo College of Law. He has extensive experience in family law, probate, domestic violence, civil rights, political asylum, consumer protection, housing and non-profit law. Salem recently published an article co-authored with Julie Sacks entitled “*Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*,” 72 Albany L. Rev. 147 (2009).

Cathy Sakimura

Cathy Sakimura is a Staff Attorney and Director of the Family Protection Project at the National Center for Lesbian Rights (NCLR). Sakimura works to improve access to family law services for low-income LGBT parents and their children, with a focus on increasing services to families of color. The Family Protection Project provides free legal information to low-income LGBT parents and their children, trains and supports attorneys providing free and low-cost services to these families and works in coalition with organizations serving communities of color to provide culturally competent services to families of color. She also works on NCLR’s litigation docket, particularly on family-related cases.

Harper Jean Tobin

Harper Jean Tobin is a transgender attorney and Policy Counsel on all aspects of advocacy on federal administrative regulations and policies at The National Center for Transgender Equality. She previously worked at the National Senior Citizens Law Center’s Federal Rights Project. Tobin’s writing on transgender equality, and other issues, has been published in the Harvard Kennedy School’s LGBT Policy Journal, Notre Dame’s Journal of Legislation, the Yale Law Journal Pocket Part, the Columbia Journal of Gender & the Law, the Case Western Reserve Journal of International Law, Clearinghouse Review, the National Law Journal, The Nation and Roll Call.

Dr. Warren J. Blumenfeld

Dr. Warren J. Blumenfeld is an associate professor of the Department of Curriculum and Instruction at Iowa State University. Dr. Blumenfeld has extensive research experience with LGBT issues in education and specializes in multicultural education, queer studies, special education, educational psychology, social identities (race, ethnicity, gender, sexual identity, socioeconomic class, religion, physical and mental abilities) and the ways in which they affect educational outcomes.

Bridget Wilson

Bridget Wilson has been an attorney for twelve years with a civil litigation practice that has included military, employment, civil rights and personal injury law. Wilson also litigates on behalf of domestic partners, as well as employment, contracting and business matters on behalf of non-profit entity clients and risk management for business and non-profit clients.

Matt Nosanchuk

Matt Nosanchuk is the Senior Counselor to the Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice. Nosanchuk joined the Civil Rights Division in July 2009 and brings extensive experience as a civil rights attorney from his time in Congress and work in the non-profit and private sectors. He represents the Division in many capacities, including working with the LGBT community and with Congress. During the 2008 presidential election campaign, Nosanchuk was a leader of the LGBT policy committee on the Obama campaign, worked on the Obama for America campaign staff as State Research Director in Florida and was the Regional LGBT Outreach Director in South Florida.

Michael Ponto

Michael Ponto is a partner at Faegre Baker Daniels LLP. Ponto is an experienced litigator who focuses on commercial litigation and land use disputes. His practice involves appearances in federal and state courts nationwide, as well as before a variety of arbitration and mediation forums. In addition to helping clients resolve many disputes out of court, he has successfully represented clients in full litigation victories. Ponto does a significant amount of pro bono work for LGBT organizations including Lambda Legal and Southern Poverty Law Center.

Mimi Laver

Mimi Laver is currently the director of Legal Education as well as the Director of *Opening Doors: Improving the Legal System's Approach to Lesbian, Gay, Bisexual, Transgender and Questioning Youth in Foster Care Project*, assistant director of the Pennsylvania Permanency Barriers Project, and the assistant director of the National Child Welfare Resource Center on Legal and Judicial Issues at the American Bar Association Center on Children and the Law. Among her extensive writing accomplishments, Laver published a book entitled *Opening Doors for LGBT Youth in Foster Care: A Guide for Lawyers and Judges*. She also edited a book entitled *Representing Parents in Child Welfare Cases: A Basic Introduction for Attorneys*.

2. Section of Relevant Briefs

J.L. v. Mohawk Central School District:

- Settlement agreement, *J.L. v. Mohawk Central School District*, No. op-CV-943 (N.D.N.Y. Mar. 29, 2010)

Pratt v. Indian River Central School District:

- United States' Memorandum as *Amicus Curiae* in Response to Defendants' Motion to Dismiss/Motion for Summary Judgment, *Pratt v. Indian River Central School District*, No. 7:09-cv-411 (N.D.N.Y. Jan. 3, 2011)

Tehachapi Unified School District Investigation:

- Letter of Findings, U.S. Department of Education, Office for Civil Rights & U.S. Department of Justice, Civil Rights Division, OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38 (June 30, 2011)
- Resolution Agreement Between the Tehachapi Unified School District, U.S. Department of Education, Office for Civil Rights, and U.S. Department of Justice, Civil Rights Division, OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38 (June 30, 2011)

Doe v. Anoka-Hennepin School District No. 11:

- Letter to Superintendent and Principal of Anoka-Hennepin School District No. 11 from Southern Poverty Law Center (Jan. 28, 2011)
- Legal Filings for *Doe v. Anoka-Hennepin School District No. 11*
- Complaint-in-Intervention, *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-01999 (D. Minn. March 5, 2012)
- Consent Order, *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-01999 (D. Minn. March 6, 2012)

Ramirez, et al. v. Los Angeles Unified School District, et al, Case No. CVO4-8923 JFW (SSx)

- Agreement Concerning Training Program to be Implemented by Los Angeles Unified School District

Megan Donovan and Joseph Ramelli v. Poway Unified School District, Case No. GIC 823157

- First Amended Complaint for Declaratory and Injunctive Relief and for Compensatory and Punitive Damages
- Plaintiffs' Memorandum Regarding Evidentiary Issues (McGraw and Sago), (May 5, 2005)
- Plaintiffs' Memorandum of Law Regarding the Definition of "Deliberate Indifference" (May 16, 2005)
- Special Verdict Form
- Plaintiffs' Trial Brief (Feb. 25, 2005)

These briefs and other legal materials can be downloaded from the National LGBT Bar Association's official website, www.LGBTbar.org, under "Youth" in the Online CLE Section.

3. Scholarly Articles

- Blumenfeld, Warren J. and R.M. Cooper. (2010). *LGBT and Allied Youth Responses to Cyberbullying: The Policy Implications*. International Journal of Critical Pedagogy.
- D'Augelli, A. R., Pilkington, N. W., & Hersherberger, S. L. (2002). *Incidence and mental health impact of sexual orientation victimization of lesbian, gay, and bisexual youths in high school*. School Psychology Quarterly, 17, 148-167.
- Diaz, E.M. and Kosciw, J.G. (2009). *Shared Differences: The Experiences of Lesbian, Gay, Bisexual, and Transgender Students of Color in Our Nation's Schools*. New York: GLSEN.
- Ericson, N. (2001). *Addressing the Problem of Juvenile Bullying*. Washington, DC: U.S. Department of Justice.
- Gibson, P. (1989). *Report of the secretary's task force on youth suicide*. Washington, DC: U.S. Department of Health and Human Services.
- GLSEN and Harris Interactive (2008). *The Principal's Perspective: School Safety, Bullying and Harassment, A Survey of Public School Principals*. New York: GLSEN.
- GLSEN and Harris Interactive (2012). *Playgrounds and Prejudice: Elementary School Climate in the United States, A Survey of Students and Teachers*. New York: GLSEN.
- Greytak, E.A., Kosciw, J.G., and Diaz, E.M. (2009). *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*. New York: GLSEN.
- Harris Interactive and GLSEN (2005). *From Teasing to Torment: School Climate in America, A Survey of Students and Teachers*. New York: GLSEN.
- Kosciw, J.G., Greytak, E.A., Diaz, E.M., and Bartkiewicz, M.J. (2010). *The 2009 National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation's schools*. New York: GLSEN.
- Li, Q. (2007). *Bullying in the new playground: Research into cyberbullying and cyber victimization*. Australasian Journal of Educational Technology, 23(4).
- Smith, P., Mahdavi, J., Carvalho, M., Fisher, S., Russell, S., & Tippett, N. (2008). *Cyberbullying: Its nature and impact in secondary school pupils*. Journal of Child Psychology and Psychiatry, 49(4), 376-385.
- Smith, P., Mahdavi, J. Carvalho, M., and Tippett, N. (2006). *An Investigation into Cyberbullying, Its Forms, Awareness and Impact and the Relationship Between Age and Gender in Cyberbullying (Research Brief): Anti-Bullying Alliance*.
- Willard, N. (2005-2007). *Educator's Guide to Cyberbullying and Cyberthreats*. Center for Safe and Responsible Use of the Internet.

4. State Laws

States that prohibit bullying and harassment in schools based on sexual orientation and gender identity (9 states and the District of Columbia):

California (1999/2004)	Iowa (2007)	Illinois (2007)	New Jersey (2002)
Minnesota (1993)	Oregon (2007)	Maine (2005)	
Vermont (1993/2007)	Maryland (2008)	District of Columbia (1977/2006)	

States that prohibit bullying and harassment in schools based on sexual orientation (4 states):

Connecticut (1997)	Washington (2002)
Massachusetts (1993)	Wisconsin (2005)

States with school anti-bullying and harassment laws that do not list categories (24 states):

Alaska (2006)	Louisiana (2001)	Arizona (2005)
Minnesota (2005)	Arkansas (2003)	Missouri (2006)
Colorado (2000)	Ohio (2006)	Connecticut (2002)
Delaware (2007)	Oklahoma (2002)	New Hampshire (2000)
Florida (2008)	Oregon (2001)	Georgia (2000)
Rhode Island (2003)	Idaho (2006)	South Carolina (2006)
Illinois (1995)	Tennessee (2005)	Indiana (2005)
Texas (2005)	Kentucky (2008)	West Virginia (2001)

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