



October 8, 2015

Dear Superintendent:

The American Civil Liberties Union of Virginia (ACLU-VA) has received disturbing reports of harassment against students in Virginia schools who are, or are perceived to be, lesbian, gay, bisexual or transgender (LGBT). These incidents of anti-LGBT harassment have been ignored or discounted by some teachers, guidance counselors, and school administrators. As the new school year begins, we are writing to every public school division superintendent in Virginia to underscore that it is the school division's legal responsibility to investigate every alleged case of bullying, both physical and verbal, and to take appropriate action to prevent such bullying and assure that every child has the opportunity to be educated in a school free from discriminatory harassment.

This is not just the opinion of the ACLU of Virginia; it is clearly established law. Federal courts throughout the United States, including trial courts and appeals courts, have recognized the Constitutional requirement of equal protection of gays and lesbians for decades, including in public schools. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) ("Reasonable persons in the defendants' positions . . . would have concluded that discrimination against [public school student] Nabozny based on his sexual orientation was unconstitutional."); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134–35 (9th Cir. 2003) ("The plaintiffs are members of an identifiable class for equal protection purposes because they allege discrimination on the basis of sexual orientation."). It is therefore incumbent on school officials to take seriously claims of LGBT-related harassment and fully and effectively resolve them. *See Flores* at 1135–36 ("Failure to take any further steps once he knew his remedial measures were inadequate supports a finding of deliberate indifference"); *Martin v. Swartz Creek Cmty. Schools*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006) (finding "that the school district's efforts . . . did not abate the frequency or severity of [anti-gay bullying], might alone create a jury question of whether the school was deliberately indifferent").

Public schools that ignore or inadequately respond to harassment and bullying of LGBT students pay significantly for such discriminatory treatment. Cases challenging a school district's deliberate indifference to bullying against students because of actual or perceived LGBT status have led to damages awards or settlements as high as \$1.1 million. *See, e.g., Flores*, 324 F.3d 1130 (\$1.1 million in damages and attorneys' fees); *Nabozny*, 92 F.3d 446 (\$962,000 in damages); *Dickerson v. Aberdeen School Dist. No. 5*, No. 3:10-cv-5886 (W.D. Wash. 2010) (\$100,000 in damages); *Theno v. Tonganoxie Unified School Dist. No. 464*, 404 F.Supp.2d 1281 (D. Kan. 2005) (\$440,000 in damages and attorneys' fees); *Henkle v. Gregory*, 150 F.Supp.2d 1067 (D. Nev. 2001) (\$451,000 in damages); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (\$220,000 in damages); *Putman v. Bd. of Educ. of Somerset Ind. Schools*, No. 6:00-cv-00145 (E.D. Ky. 2000) (\$135,000 in damages).

In addition to cases applying clearly established constitutional law, the U.S. Department of Education issued guidelines on bullying in 2010 that further confirm the

responsibility of public schools to take seriously harassment of students on the basis of their actual or perceived LGBT status and to prevent such harassment from occurring. The guidelines issued pursuant to Title IX of the Education Amendments of 1972 (Title IX) state, “When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. Asst. Sec’y of Educ. Russlynn Ali, Dep’t of Educ. Office of Civ. Rights, Guidance on Combating Bullying (October 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

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The Department of Education released additional guidance in 2014 clarifying schools’ obligations to protect transgender and gender nonconforming students from gender-based harassment and bullying. Dep’t of Educ. Office of Civ. Rights, Questions and Answers on Title IX and Sexual Violence (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. Gender-based harassment is a form of sex-based harassment and refers to unwelcome conduct based on an individual’s actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature. It is the responsibility of each school and school district to ensure that transgender and gender-expansive students have a safe school environment, which includes ensuring that any incident of discrimination, harassment or violence is thoroughly investigated, appropriate corrective action is taken, and students and staff have access to appropriate resources. Complaints alleging discrimination or harassment based on a person’s actual or perceived transgender status or gender expression should be handled in the same manner as any other discrimination or harassment complaints.

With this information in mind, we urge you to investigate and respond appropriately to the LGBT-related harassment that may occur in your school. We further encourage you to make sure everyone in the school community understands that anti-LGBT harassment will not be tolerated. To send that message and avoid legal liability, we encourage your district to ensure that its anti-harassment policies include sexual orientation and gender identity, and diligently enforce them. As you know, Virginia Attorney General Mark Herring recently affirmed that public schools in Virginia may prohibit discrimination based on sexual orientation and/or gender identity. *See Op. Va. Att’y Gen. 14-080.*

Please do not hesitate to contact the ACLU of Virginia if you have any questions about this letter or if we can be of any assistance to you.

Very truly yours,



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