

Laws, Policies and Procedures ¹

Administrators have the important responsibility of making sure programs under their responsibility comply with all applicable laws and school district or institution policies. Administrators, coaches, athletes, and parents should be aware of the ethical, professional and legal obligations of the educational institution and the rights of students and staff. The following information is presented to assist educators in reviewing existing policies and procedures or developing new policies where none exist.

Legal Requirements

Schools have a legal obligation to protect lesbian, gay, bisexual and transgender (“LGBT”) athletes and staff from harassment and discrimination. This obligation may flow from several different sources and exists whether or not a school has a policy specifically prohibiting this conduct. Allowing harassment and discrimination on the basis of sexual orientation or gender identity to go unchecked can expose schools and employers to serious legal and financial liability. Adopting and effectively implementing an anti-discrimination and anti-harassment policy that explicitly includes sexual orientation and gender identity helps schools protect against such potential liability, while, at the same time, ensuring that all athletes can participate without free of harassment and discrimination.

State Law ²

Currently nine states plus the District of Columbia have statutes prohibiting discrimination or harassment on the basis of sexual orientation in educational facilities. ³ The nine states are: California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, Vermont, Washington, and Wisconsin. In addition, California, Maine, Minnesota, and New Jersey also explicitly prohibit discrimination or harassment on the basis of gender identity.

In addition, 16 states and the District of Columbia, as well as hundreds of municipalities prohibit discrimination on the basis of sexual orientation in employment. ⁴ The 16 states are: California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New

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Appreciation is extended to Legal Director Shannon Minter and Staff Attorney Courtney Joslin of the National Center for Lesbian Rights for the development of this section. For more information and assistance in drafting and implementing a non-discrimination policy, contact NCLR at National Center for Lesbian Rights, 870 Market St., Ste. 370, San Francisco, CA 94102, (415) 392-6257, www.nclrights.org

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See CONN. GEN. STAT. § 10-15c; D.C. CODE 1981 § 1-2520; Me. Rev. Stat. Ann., Tit. 5, § 4591-94F; Me. Rev. Stat. Ann., Tit. 5, § 4553; MASS. GEN. LAWS Chp. 76, § 5; MINN. STAT. § 363.03, subd. 5; N.J. STAT. 10:5-12f(1); N.J. STAT. 10:5-5(l); N.J. Stat. § 18A:37-14; 16 VT. STAT. § 11(a)(26); 16 VT. STAT. § 565; WASH. REV. CODE §§ 28A.320; 28A.600; WIS. STAT. 118.13.

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See CAL. GOVT. CODE §§ 12926, 12940, 12949; CONN. GEN. STAT. § 46a-81c; D.C. CODE ANN. § 1-2512; HAW. REV. STAT. §§ 368-1, 378-2; 775 ILCS 5/1-102; Me. Rev. Stat. Ann., Tit. 5, § 4571-76; Me. Rev. Stat. Ann. Tit. 5, § 4553; MD. CODE, Art. 49B, § 16; MASS. GEN. LAWS ch. 151B, § 4; MINN. STAT. §§ 363.03, 363.12; NEV. REV. STAT. ANN. 610.020, 613.340; N.H. REV. STAT. ANN. §§ 354-A:7, 354-A:8; N.J. REV. STAT. §§ 10:2-1, 10:5-4, 10:5-12; N.M. Ann. §§ 28-1-2, 28-1-7, 28-1-9; N.Y. Exec. Law §§ 296, 296-a; R.I. GEN. LAWS §§ 28-5-2, 28-5-7; VT. STAT. ANN. tit. 21, § 495; WIS. STAT. § 111.36.

Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin. California, Hawaii, Illinois, Maine, Minnesota, and Rhode Island also explicitly prohibit discrimination on the basis of gender identity.

Federal Law²

Even in states that do not have specific non-discrimination laws dealing with sexual orientation or gender identity, courts increasingly have been willing to step in where necessary to protect students and employees who are harassed or otherwise discriminated against on the basis of sexual orientation, gender stereotypes, or gender identity.

The Equal Protection Clause of the 14th Amendment (applies to *public* schools and colleges). All athletes and staff at public schools have a federal constitutional right to equal protection under the law. This means that schools have a duty to protect LGBT athletes and staff from harassment on an equal basis with all other athletes and staff. If school officials fail to take action against anti-LGBT harassment because they believe that an LGBT athlete should expect to be harassed, because they believe an LGBT athlete brought the harassment upon him or herself simply by being openly LGBT, or because the school is uneducated about LGBT issues or uncomfortable addressing the situation, then the school has failed to provide equal protection to the student.⁵

Title IX (applies to all schools and colleges that receive federal financial assistance). Title IX⁶ of the Education Amendment Acts of 1972 prohibits discrimination based on sex in education programs and activities receiving federal financial assistance, this includes athletic programs. Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at an LGBT student is prohibited by Title IX if it is sufficiently severe and pervasive that it results in denial or limitation of the victim's ability to participate in or benefit from the program.⁷ Title IX also prohibits gender-based harassment, including harassment on

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5 See *Flores v. Morgan High School District*, 324 F.3d 1130 (9th Cir. 2003) (holding that students could maintain claims alleging discrimination on the basis of sexual orientation under the Equal Protection Clause where school district failed to protect the students to the same extent that other students were protected from harassment and discrimination); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding student could maintain claims alleging discrimination on the basis of gender and sexual orientation under the Equal Protection Clause where school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

In *Nabozny*, after the student and his parents reported the incidents of physical violence to the appropriate school administrator, the administrator told the student and his parents that such acts should be expected because the student was openly gay. *Id.* at 451. See also *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000) ("We 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.") (citing *Nabozny*, 92 F.3d at 458).

The school district eventually settled the *Flores* case for over \$1.1 million, in addition to mandatory training for all school staff and all 7th and 9th grade students. For more information about this case, see www.nclrights.org. The school district in *Nabozny* eventually settled the case for almost \$1 million in damages. For an overview of 15 lawsuits against school districts, see *Fifteen Expensive Reasons Why Safe Schools Legislation Is In Your State's Best Interest*, available at <http://www.nclrights.org/publications/15reasons.htm>.

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20 U.S.C. § 1681(a). Title IX provides, in relevant part: —No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.“

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See Office of Civil Rights, Revised Sexual Harassment Guidance, § III (Jan. 2001) (“OCR Revised Guidance”) (“Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual.”). See also *Montgomery*, 109 F. Supp. 2d 1081.

the basis of a student’s failure to conform to stereotyped notions of masculinity and femininity.⁸ This would include things like harassment against a female wrestler because she is perceived to be too masculine or harassment of a male figure skater because he is perceived to be too feminine.

As described above, schools have a legal obligation to respond to harassment and discrimination of LGBT athletes whether or not they have a policy prohibiting such conduct. A comprehensive anti-harassment policy that makes clear that harassment and discrimination on the basis of sexual orientation is prohibited – and ensuring that all staff and athletes are aware of and trained about this policy – is an effective way for schools to ensure they are fulfilling their legal obligations and avoiding potential liability.

Educational Institution Non-Discrimination Policy Statements

Policies prohibiting discrimination and harassment based on actual or perceived sexual orientation and gender identity should be added to existing non-discrimination policies dealing with race, color, gender, etc. The following statements provide some models.

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See OCR Revised Guidance, § III (“Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to the level that denies or limits a student’s ability to participate in or benefit from the educational program. . . . A school must respond to such harassment in accordance with the standards and procedures described in this guidance. In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.”) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding sex-stereotyping is a form of sex discrimination prohibited by Title VII) (emphasis added). See also *Montgomery*, 109 F. Supp. 2d 1081; *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

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See *Franklin v. Gwinnett Co. Public Schs.*, 503 U.S. 60 (1992).

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34 C.F.R. 106.9.

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34 C.F.R. 106.8(b).

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34 C.F.R. 106.8(a).

American University Non-Discrimination Policy

American University provides equal opportunity for all qualified persons in its educational programs and activities. It also seeks to be a community in which freedom of expression and vigorous debate are valued and provided to all its members free of all forms of discrimination or harassment,

including but not limited to exploitation, coercion, and intimidation. To achieve these goals, the university has adopted a policy prohibiting discrimination and discriminatory harassment on the basis of race, color, religion, national origin, sex, age, sexual orientation, gender identity and expression, disability and any other bases protected under federal or local laws (“Protected Bases”). The policy of non-discrimination and equal opportunity applies to every aspect of the operations and activities of the university, including admissions and employment.

National Collegiate Athletic Association

The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies, including on the basis of age, color, disability, gender, national origin, race, religion, creed, or sexual orientation.

University of Texas Athletics Departments

No person shall be excluded from participation in, denied the benefits of, or be subject to discrimination under any program or activity sponsored or conducted by the Athletics Departments on the basis of race, color, national origin, religion, sex, sexual orientation, age, veteran status, or disability.

Anti-Harassment Policies

Increasingly, schools and colleges are adopting broad policies protecting all students from bullying, harassment, and intimidation – treatments commonly experienced by students who are gay, lesbian, transgender, or bisexual. Following is a model policy of this type.

Washington State Model Anti-Harassment Policy¹³

Prohibition of Harassment, Intimidation, and Bullying

The District is committed to a safe and civil educational environment for all students, employees, volunteers, and patrons, free from harassment, intimidation, or bullying. —Harassment, intimidation, or bullying“ means any intentional written, verbal, or physical act, including but not limited to one shown to be motivated by any characteristic in RCW 9A.36.080(3), (race, color, religion, ancestry, national origin, gender, sexual orientation, or mental or physical disability), or other distinguishing characteristics, when the intentional written, verbal, or physical act:

- Physically harms a student or damages the student’s property; or
- Has the effect of substantially interfering with a student’s education; or
- Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
- Has the effect of substantially disrupting the orderly operation of the school.

Pursuant to the mandate under the new Washington law, see WASH. REV. CODE § 28A.320(4), this model policy was adopted by the Superintendent of Public Instruction to assist local school districts in complying with the requirements of the new law regarding harassment, intimidation, or bullying of students. The model policy is available at <<http://www.k12.wa.us/safetycenter/pubdoc/WSSDABullyPolicy.pdf>>.

Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying. —Other distinguishing characteristics“ can include, but are not limited to: physical appearance, clothing or other apparel, socioeconomic status, gender identity, and marital status. Harassment, intimidation, or bullying can take many forms including: slurs, rumors, jokes, innuendos, demeaning comments, drawings, cartoons, pranks, gestures, physical attacks, threats, or other written, oral or physical actions. —Intentional acts“ refers to the individual’s choice to engage in the act rather than the ultimate impact of the action(s).

This policy is not intended to prohibit expression of religious, philosophical, or political views, provided that the expression does not substantially disrupt the educational environment. Many behaviors that do not rise to the level of harassment, intimidation, or bullying may still be prohibited by other district policies or building, classroom, or program rules.

This policy is a component of the district's responsibility to create and maintain a safe, civil, respectful, and inclusive learning community and is to be implemented in conjunction with comprehensive training of staff and volunteers, including the education of students in partnership with families and the community. The policy is to be implemented in conjunction with the Comprehensive Safe Schools Plan that includes prevention, intervention, crisis response, recovery, and annual review. Employees, in particular, are expected to support the dignity and safety of all members of the school community.

Depending upon the frequency and severity of the conduct, intervention, counseling, correction, discipline, and/or referral to law enforcement will be used to remediate the impact on the victim and the climate and change the behavior of the perpetrator. This includes appropriate intervention, restoration of a positive climate, and support for victims and others impacted by the violation. False reports or retaliation for harassment, intimidation, or bullying also constitute violations of this policy.

The superintendent is authorized to direct the development and implementation of procedures addressing the elements of this policy, consistent with the complaint and investigation components of procedure 6590, Sexual Harassment.

Procedures to Handle Discrimination, Harassment, Intimidation and Bullying

Procedural policies instruct employees, students, and parents how to handle situations or complaints related to discrimination, harassment, intimidation, and bullying that may be based on discrimination. Following is a model policy of this type.

Washington State Model Anti-Harassment Procedures¹⁴

Informal Complaint Process: Anyone may use informal procedures to report and resolve complaints of harassment, intimidation or bullying. At the building level, programs may

These model procedures, adopted by the Washington Superintendent of Public Instruction pursuant to WASH. REV. CODE § 28A.320(4), is available at
<<http://www.k12.wa.us/safetycenter/pubdoc/WSSDABullyProcedures.pdf>>.

be established for receiving anonymous complaints. Such complaints must be appropriately investigated and handled consistent with due process requirements. Informal reports may be made to any staff member, although staff shall always inform complainants of their right to, and the process for, filing a formal complaint. Staff shall also direct potential complainants to an appropriate staff member who can explain the informal and formal complaint processes and what a complainant can expect. Staff shall also inform an appropriate supervisor or designated staff person when they receive complaints of harassment, intimidation, or bullying, especially when the complaint is beyond their training to resolve or alleges serious misconduct.

Informal remedies include an opportunity for the complainant to explain to the alleged perpetrator that the conduct is unwelcome, disruptive, or inappropriate, either in writing or face-to-face; a statement from a staff member to the alleged perpetrator that the alleged conduct is not appropriate and could lead to discipline if proven or repeated; or a general public statement from an administrator in a building reviewing the district harassment, intimidation, and bullying policy without identifying the complainant. Informal complaints may become formal complaints at the request of the complainant, parent, guardian,

or because the district believes the complaint needs to be more thoroughly investigated.

Formal Complaint Process: Anyone may initiate a formal complaint of harassment, intimidation, or bullying, even if the informal complaint process is being utilized. Complainants should not be promised confidentiality at the onset of an investigation. It cannot be predicted what will be discovered or what kind of hearings may result. Efforts should be made to increase the confidence and trust of the person making the complaint.

The district will fully implement the anti-retaliation provisions of this policy to protect complainant(s) and witness(es). Student complainants and witnesses may have a parent or trusted adult with them, if requested, during any district-initiated investigation activities. The superintendent or designated compliance officer (hereinafter referred to as the compliance officer) may conclude that the district needs to conduct an investigation based on information in their possession regardless of the complainant's interest in filing a formal complaint. The following process shall be followed:

- A. All formal complaints shall be in writing. Formal complaints shall set forth the specific acts, conditions, or circumstances alleged to have occurred that may constitute harassment, intimidation, or bullying. The compliance officer may draft the complaint based on the report of the complainant, for the complainant to review and sign.
- B. Regardless of the complainant's interest in filing a formal complaint, the compliance officer may conclude that the district needs to draft a formal complaint based upon the information in the officer's possession.
- C. The compliance officer shall investigate all formal, written complaints of harassment, intimidation, or bullying, and other information in the compliance officer's possession that the officer believes requires further investigation.
- D. When the investigation is completed the compliance officer shall compile a full written report of the complaint and the results of the investigation. If the matter has not been resolved to the complainant's satisfaction, the superintendent shall take further action on the report.
- E. The superintendent or designee, who is not the compliance officer, shall respond in writing to the complainant and the accused within thirty days, stating:
 - 1 That the district intends to take corrective action; or
 - 2 That the investigation is incomplete to date and will be continuing; or
 - 3 That the district does not have adequate evidence to conclude that bullying, harassment, or intimidation occurred.
- F. Corrective measures deemed necessary will be instituted as quickly as possible, but in no event more than 30 days after the superintendent's written response, unless the accused is appealing the imposition of discipline and the district is barred by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded.
- G. If a student remains aggrieved by the superintendent's response, the student may pursue the complaint as one of discrimination pursuant to Policy 3210, Nondiscrimination or a complaint pursuant to Policy 4220, Complaints Concerning Staff or Programs.

A fixed component of all district orientation sessions for employees, students, and regular volunteers shall introduce the elements of this policy. Staff will be provided information on recognizing and preventing harassment, intimidation, or bullying. Staff shall be fully informed of the formal and informal complaint processes and their roles and responsibilities under the policy and procedure. Certificated or professionally licensed staff shall be reminded of their legal

responsibility to report suspected child abuse, and how that responsibility may be implicated by some allegations of harassment, intimidation or bullying. Classified employees and regular volunteers shall get the portions of this component of orientation relevant to their rights and responsibilities.

Students will be provided with age-appropriate information on the recognition and prevention of harassment, intimidation, and bullying, and their rights and responsibilities under this and other district policies and rules at student orientation sessions and on other appropriate occasions, which may include parents. Parents shall be provided with copies of this policy and procedure and appropriate materials on the recognition and prevention of harassment, intimidation, and bullying.

Statements of Professional Obligation

A statement of professional obligation or position provides the philosophical rationale for educational initiatives addressing issues related to sexual orientation. Every organization should have such a position statement. The following statements are excellent models.

American School Counselor Association

The professional school counselor is committed to the inclusion and affirmation of youths of all sexual orientation. The professional school counselor supports consciousness-raising among school counselors and increased modeling of inclusive language, advocacy, and equal opportunity for participation for all. This is done to break through individual, social, and institutional behaviors and expectations limiting the development of human potential in all populations.

National Association of School Nurses

Gay and lesbian youth often experience harassment and ostracism, and sometimes violence. They suffer increased rates of suicide. Gay and lesbian youth, as well as other high-risk students, have increased exposure to HIV infection and other sexually transmitted diseases, as well as substance abuse. All individuals are equally deserving of respect and fair treatment. Discrimination based on sexual orientation is difficult to eradicate and all students are entitled to a safe and supportive environment. It is the position of the National Association of School Nurses that all students, regardless of sexual orientation, are entitled to equal opportunities in the educational system. The school health nurse should be involved in fostering a safe environment, demonstrating an acceptance of diversity.

National Association of School Psychologists

The National Association of School Psychologists recognizes that students who are of a minority sexual orientation, or are perceived to be, are at risk of a number of dangerous and destructive behaviors as well as harassment, discrimination, and low self-esteem. A successful program to address these issues educates both those who discriminate and those who are discriminated against because of sexual orientation. This education can occur on a number of levels: intervention with individual students, schoolwide in-service training, and modeling behaviors attitudes and behaviors by school psychologists in daily interactions with all students and staff. Any program designed to address the needs of sexual minority youth should also include efforts to educate parents and the community through involvement with other organizations committed to equal opportunity for education and mental health services for all youth. Schools can only be truly safe when every student, regardless of sexual orientation, is assured of access to an education without fear of harassment or violence.

The School Social Work Association of America

Gay, lesbian, bisexual, and questioning youth (GLBQ) are at greater risk for suicide; physical and verbal harassment; exposure to sexually transmitted diseases, including HIV/AIDS; and substance abuse.

GLBQ youth also often experience emotional and physical rejection by family and community, increasing their feelings of inadequacy and low self-esteem. GLBQ youth require strong and caring advocates within the school setting to cope with these situations and to assist them in developing strong personal identities. SSWAA believes that a safe school environment should be provided to all students. Students should be able to attend school without fear of threat, harassment, or denial of rights. To achieve this positive school climate, SSWAA supports educating both students and staff regarding misconceptions about GLBQ youth, appropriate ways to address discrimination and harassment, and the importance of mutual respect.

Terms and Definitions: Sexual Orientation and Gender Identity

Sexual Orientation The direction of one's sexual attraction toward the same sex (homosexual), the opposite sex (heterosexual), or both sexes (bisexual). Sexual orientation is a continuum, not a set of different categories.

Gay An adjective describing an individual whose primary romantic, emotional, and sexual attractions and connections are with someone of the same sex.

Lesbian A more specific term to describe a gay woman.

Bisexual An individual whose romantic, emotional, and sexual attractions and connections are with persons of different sexes.

Gender Identity A person's internal sense of themselves as a man, a woman, or something in between.

Transgender An umbrella term describing individuals whose gender identity or gender expression do not conform to stereotypical masculine or feminine norms. Transgender people are often assumed to be gay or lesbian, but transgender people may be heterosexual, gay/lesbian, or bisexual.

Transsexual An individual who experiences a conflict between their physical sex and their gender identity as a man or woman. The body they were born with does not match their own sense of who they are or want to be. Many transsexuals undergo medical treatment to change their physical body through hormone therapy or sex reassignment surgery. Transsexual people are often assumed to be gay or lesbian, but are heterosexual, gay/lesbian, or bisexual.

Questioning A term used to describe individuals who are unsure of their sexual orientation.

LGBT An acronym for lesbian, gay, bisexual, and transgender.

Queer Historically, a term that has been used to put down LGBT people, queer has now been reclaimed by some people as a positive umbrella term to refer to LGBT people.

Homophobia Fear or hatred of LGBT people.

Heterosexism Cultural and institutional laws, norms, and policies that discriminate against LGBT people.

In the Closet	Keeping one's sexual orientation a secret.
Coming out (of the Closet)	The process of becoming aware of one's sexual orientation, accepting it, and telling others about it.
Being Outed	When someone else reveals a closeted LGBT person's sexual orientation without his or her permission.
Straight Ally	A heterosexual individual who supports LGBT people and speaks and acts against homophobia and heterosexism.