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THE LEGAL RIGHTS OF PUBLIC SCHOOL STUDENTS AND TEACHERS IN MASSACHUSETTS:

A Focus on Sexual Orientation Discrimination and Free Speech in Massachusetts Elementary and Secondary Schools¹

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I. THE VITAL ROLE OF PUBLIC EDUCATION IN CREATING AN INFORMED CITIZENRY

School law generally, and the rights of teachers and students in particular, are best understood with reference to the unique role of public education in our country. Common sense and our own experience tell us that public schools play a critical role in creating an informed citizenry able to uphold and defend the values of freedom and liberty espoused in the Constitutions of the United States and the Commonwealth. The United States Supreme Court has articulated this same truth by recognizing that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”² Policies curtailing intellectual inquiry or limiting free speech and expression contradict the belief that “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”³ Stated differently, “education has a fundamental role in maintaining the fabric of our society.”⁴

Everyone, including students, possesses constitutional rights.⁵ The right to free speech and to express one’s opinions, the right to choose with whom you associate, and the right to peaceful assembly, all endure as the building blocks of a free society. Despite constant pressure to censor in the name of upholding parochial values, legislation and court decisions have insured that:

- ◆ Students have the right to express political points of view, even on controversial issues. Recently in Merrimack, New Hampshire, students wore armbands⁶ to protest school policies against “promoting homosexuality.” Students in South Hadley, Mass. were successful in striking down their school’s dress code prohibiting ‘obscene, profane, lewd or vulgar’ clothing.⁷
- ◆ Because the freedom to learn (as defined by the courts), assures students access to information and ideas, areas in which schools may restrict books,

materials, or classroom discussion based on vocabulary or content are limited.⁸

- ◆ Because of both associational rights and specific legislation protecting those rights, students have the right to form Gay Straight Alliances which should receive official school recognition comparable to that afforded other non-curriculum related clubs. See Part III below.
- ◆ Students have the right to participate in extra-curricular activities on an equal basis with other students. A federal court in Rhode Island established in 1980 that a gay male student had the right to bring a male date to the senior prom. The court looked at his decision to bring a male date as "symbolic speech" and ruled that he must have the same benefits and access to student activities as all other students.⁹

This does not mean that students can do whatever they want, whenever they want, or that federal courts will serve as the arbiters of all disputes which arise in the schools around these issues. Sometimes the constitutionally protected rights of students and teachers conflict with the courts' deference to the historically broad discretion enjoyed by school committees¹⁰ to advance their own policies through the local curriculum. Hard and fast rules governing the resolution of these conflicts are few. One clear rule is that school board policies must be related to "legitimate pedagogical concerns."¹¹ More broadly, school committees and administrative personnel in a school may not impose one and only one viewpoint on a subject matter.¹² Such actions "directly and sharply implicate basic constitutional values and invite legal review."¹³ What follows is a discussion of legal controversies that may implicate those basic constitutional values.

II. THE RIGHT OF STUDENTS TO ATTEND SCHOOL IN SAFETY

A. Why More Schools Are Dealing With Gay Issues

Recognizing the needless suffering of some of their gay, lesbian, bisexual and transgender (GLBT) students, as well as the pain and isolation of students questioning or confused about their sexual orientation, along with acknowledging the violence perpetrated on gay students and the risk that these students will leave school altogether, more schools are implementing school-based programs to overcome societal discomfort and indifference to the needs of these youth.¹⁴ Statistics verify the need.

- ◆ Nearly 30 percent of youth suicides are committed by gay, lesbian and bisexual youth annually.¹⁵
- ◆ Many gay and lesbian youth drop out of school because of discomfort in the school environment, and GLBT youth comprise as much as 25 percent of all youth living on the streets in this country.¹⁶
- ◆ Many young people are infected with HIV, the virus that causes AIDS, and AIDS cases are growing most dramatically among people under age 20.¹⁷

Anti-gay taunts, like “fag” or “dyke” are the taunts most dreaded by students.¹⁸ Teachers and administrators increasingly recognize that the “presumption of heterosexuality” causes people to hide and feel desperately isolated, that homophobic name calling is rampant in schools, that the words “gay” and “lesbian” seldom appear in curriculum materials, and that openly-gay role models in public schools are scarce. There is no doubt that being subjected to harassment is hurtful, demeaning and interferes with a student’s ability to learn. Concern for young people has helped school personnel to recognize the need to educate all youth about human sexuality, including sexual orientation, in order to promote a safe environment for all students, and to help deter the transmission of HIV among young people.

B. The Law

Federal¹⁹ and state laws²⁰ and constitutional provisions²¹ should ensure the right of all students, including lesbian, gay, bisexual and transgender students (LGBT) to attend school in safety. Unlawful harassment compromises a student’s ability to take advantage of educational opportunities and often interferes both with a student’s academic performance and emotional and physical well-being. When harassment is based on the student’s sex or sexual orientation, failure to redress it properly and promptly violates the law.

SEX DISCRIMINATION--GENERAL PRINCIPLES

Unlawful harassment compromises a student’s ability to take advantage of educational opportunities and often interferes both with a student’s academic performance and emotional and physical well-being. Under federal law, sex discrimination is prohibited by both Title IX and general principles of equal protection²² of the laws. Sexual harassment can be a form of sex discrimination.

The United States Supreme Court has established that a student may file a complaint of discrimination with the Department of Education's Office of Civil Rights, and, in cases where the school has reacted with deliberate indifference, may proceed in court to seek monetary damages. The administrative remedies available through OCR also provide strong incentives for schools to promulgate and enforce anti-sexual harassment policies.²³

There is no excuse for inaction from schools when it comes to harassment. Federal regulations require federal fund recipients to adopt and publish sexual harassment grievance procedures.²⁴ The federal Department of Education ("DOE"), Office of Civil Rights ("OCR"), accepts complaints from students based on the harassing conduct of both school employees and fellow students. OCR has also issued an informative document entitled Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, which provides guidelines on a wide variety of harassment-related issues (on the web at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>).²⁵ Based on those precedents, there are good reasons to expect the Massachusetts courts to impose liability on an educational institution for sexual harassment; and, regardless of the courts' receptivity to claims, schools are well-advised to strictly enforce anti-sexual harassment policies in order to avoid OCR oversight and intervention.

Sexual Misconduct By a Teacher

Schools are vulnerable legally when a teacher or staff member engages in a sexual relationship or other sexual misconduct with a student.²⁶ These cases have often been referred to as "quid pro quo" harassment but are more accurately understood as claims of sexual misconduct by a teacher. A claim of sexual misconduct by a teacher requires an allegation that a school employee has explicitly or implicitly required the student to submit to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature as a condition of the student's education. This harassment is equally unlawful whether the student resists and suffers the threatened harm or submits to avoid the threatened harm. Such conduct may also violate other state and federal legal protections.

Harassment By Peers

Many of the cases presently working their way through the federal courts do not involve adults as the harassers. Instead, most cases involve "peer" or "student-to-student" harassment based on a claim of "hostile environment." Traditionally, harassment by peer cases has been rooted in a claim that the peer harassment creates a hostile environment for the student being harassed. Hostile environment harassment refers to the educational atmosphere created when unwelcome conduct of a sexual nature is so severe, persistent or pervasive that it unreasonably interferes with a student's educational opportunities or ability to participate in or benefit from an educational program or activity. Hostile environments can be created by school employees, but more often are created by fellow students. In this context, interference with educational opportunities means that the harassment has limited the student's ability to participate in or benefit from an educational program or activity, or that the harassment has created a hostile or abusive educational environment.

It is the position of OCR that schools are not legally responsible for the actions of sexually harassing students. But OCR does hold schools responsible for their own discrimination in failing to respond to harassment once they know harassment is happening.²⁷ When a school has notice of a hostile environment created by its students, but takes immediate and appropriate steps to remedy the harassment, it will likely avoid legal liability.

The United States Supreme Court has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX: Gebser v. Lago Vista Independent School District (Gebser), 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education (Davis), 526 U.S. 629 (1999). The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In Davis, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the school's program and the conditions of Gebser are met.

Against the general background discussed above, it will be helpful to teachers and students to understand the laws applicable to discriminatory and harassing conduct. As a matter of federal law, sexual harassment has occurred when:

- (1) a student is subjected to unwelcome verbal or physical conduct of a sexual nature
- (2) which has the purpose or effect of unreasonably interfering with an individual's education
- (3) by creating an intimidating, hostile or sexually offensive educational environment.

A few elements of this definition are worthy of further comment. Sexual conduct must be unwelcome in order to constitute harassment; that is, the student must not have requested or invited it and must regard the conduct as undesirable or offensive. If a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then generally there is no evidence that the conduct is unwelcome. However, acquiescence in the conduct or failure to complain does not mean that the conduct was welcome, since there are many reasons why a student could fail to object. Even if a student has participated in sexual banter in the past, he or she may nonetheless indicate that the same conduct is now unwelcome.

The conduct covered by the harassment laws is wide-ranging, e.g., touching, sexual talk, gesturing or innuendo, graffiti, sexual advances. It may be that sexually charged taunting and innuendo is enough for a student to claim sex discrimination, even without physical overtures or contact. It would be poor judgment for a teacher or principal to wait for a student to be sexually assaulted to decide to address harassment. Determining whether conduct is severe, persistent or pervasive should be examined both subjectively and objectively in light of all relevant circumstances.²⁸

Taken together, this means that no student should have to tolerate a school environment filled with sexual taunts and abuse simply because of his or her gender. While it does not mean that every offense or slight is the basis for a lawsuit, it does mean that students should feel safe and confident about seeking information and remedies when harassed by their peers, teachers, school staff or coaches whether on the bus, in the classroom, locker room, or bathroom or on the playing field.

Anti-Gay and Same-Gender Harassment Under Federal Law

For schools to protect themselves and their students, it is critical that they not envision “harassment” too narrowly. Most people think of boys harassing girls as the model for sexual harassment, but it may also include girls harassing boys, boys harassing boys, or girls harassing girls.²⁹ One can say with a degree of certainty that if a school responds inadequately as a general matter, or only responds to claimed harassment by boys toward girls, but does not respond in kind to harassment of boys, it is likely discriminating based on sex. One young gay man, Jamie Nabozny of Wisconsin, was recently awarded \$962,000 for the failure of his middle and high school officials after notification to resolve constant harassment, including a mock rape, students urinating on him, and physical beatings which resulted in permanent injuries.³⁰ The schools’ legal error was that they only addressed complaints of harassment when made by girls, or when made by non-gays, but not of boys, or of gays, like Nabozny.

The OCR has also clarified and explained its position on when claims of anti-gay discrimination may be addressed under federal law. It provides:

Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”) but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g. if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment, and therefore, may be prohibited by Title IX. It should also be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority.

In other words, harassment is unlawful when it is based on conduct of a sexual nature: it matters not if the student victim is of the same sex as the harasser or is gay or lesbian.

Moreover, although decided under Title VII and not Title IX, a recent Supreme Court decision made clear that same-sex sexual harassment charged under Title VII is actionable. That means that boys, in some circumstances, can be liable for sexually harassing boys and likewise for girls. Although Title VII caselaw does not determine the outcome of Title IX cases, it provides some guidance to courts and litigants in how comparable questions of law may be decided.

STATE LAWS

Massachusetts prohibits both sex and sexual orientation discrimination in its schools, whether committed by school employees or fellow students. General Laws, chapter 76, section 5. In fact, the “Guidelines to School Districts On Addressing Sexual Harassment” issued by the Massachusetts Department of Education, assume peer harassment is prohibited by state law.³¹ Based on those precedents, there are good reasons to expect the Massachusetts courts to impose liability on an educational institution for both sexual misconduct by a teacher and harassment by peers of which the school had notice but failed to remedy.

Sex Discrimination

In Massachusetts, General Laws chapter 151C (hereafter, G.L. c.151C) defines fair educational practices and specifically prohibits “sexual[] harass[ment of] students in any program or course of study in an educational institution. G.L. c. 151C, sec. 2(g).³² It also defines sexual harassment similarly to federal law with respect to both sexual misconduct by a teacher and harassment by peers.³³ Everything said above about federal law is relevant in the state context also. It is very likely that same-gender sexual harassment is within the prohibitions of chapter 151C.³⁴ This is important because claims under this law may be brought to the Massachusetts Commission Against Discrimination (MCAD), a state agency which does not require the parties to proceed with a lawyer.

Sexual Orientation Discrimination

In Massachusetts, students cannot be treated differently from other students based on their actual or perceived sexual orientation. Massachusetts General Laws chapter 76, section 5, enforced through section 16 of the same law, provides:

No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and course of study of such public school on account of race, color, sex, religion, national origin or sexual orientation.

This law applies to discrimination with respect to school admission, but more importantly will affect the administration's responsibility to make sure LGBT students are treated fairly once admitted. Massachusetts law also protects against the common occurrence of harassment of those who are perceived to be LGBT, regardless of their actual sexual orientation. The basic rule of non-discrimination is equal treatment. So, for example, if the vice-principal for discipline acts to resolve the harassment complaints of girls generally, but not when the harassment is directed at a female student because she is thought to be a lesbian, the school is engaging in sexual orientation discrimination.³⁵

C. Who Should Do What When Harassment Occurs

STUDENTS

Students should keep notes of the harassment, including the date, time, and place of harassing incidents, the names of individuals involved, and a description of the incident and circumstances. A student should never give away his or her only copy of such notes to anyone.

If the school has a policy against harassment, students should use it. Remember that under Title IX, schools are supposed to have sexual harassment grievance procedures, although some do not. If students don't understand the policy, they should ask someone in the administration, like the principal, vice-principal, a counselor, sexual harassment coordinator, for example, to explain the procedures. At the same time, they should inform these administrative personnel about their problems. Students should not hesitate to make written complaints, and should be sure to keep copies of any materials given to the administration.

If there is no policy against harassment, or the student doesn't know about the policy because it is poorly publicized the student should still notify the administration, particularly the vice principal and principal, about the harassment. Telling a teacher is important, but it is even better to notify

higher-ups who should understand their responsibilities to address the situation. Without notice, the administration will not know there is a problem. If a student is not comfortable contacting the administration individually, or with his or her parents, the student should find a supportive teacher, guidance counselor or fellow student who will assist him or her in so doing. When the student does contact the principal or vice-principal, he or she should ask what steps that person will take, when they will take those steps, and when the student can expect to hear back from them.

A United States Supreme Court decision highlights the importance of a student contacting the appropriate administrative official when reporting claims of sexual harassment. A student should make every effort to write a complaint directly to a person named in a sexual harassment policy as the person to whom complaints should be directed (likely the Title IX coordinator). In an abundance of caution, an individual asking a school to respond to a charge of sexual harassment, should contact the Title IX coordinator for the school, the school principal and the superintendent of the school district.

ADMINISTRATORS

Once notified³⁷ of possible sexual harassment of students, the school administration is legally required to take immediate and appropriate steps to investigate the situation and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. A court may also find the administration liable if an appropriate official with authority to intervene actually knew of the misconduct and, acting with deliberate indifference, failed to stop the misconduct.

Prevention, as the saying goes, is much less costly than the cure. To protect its students and itself, a school should: develop comprehensive and user-friendly policies and procedures³⁸ against harassment; review (and revise) them annually; distribute them widely; educate students, faculty, staff and parents of the need for the policies and procedures; and, finally, follow them scrupulously (without exception).

D. Remedies for Harassment

FEDERAL LAW

When a school has determined that harassment or objectionable conduct has occurred, it must remedy the harassment and take steps to prevent it from recurring. Schools are generally allowed to impose gradually increasing discipline as needed on the students who are found to have been responsible for harassing. For a severe incident, however, more serious and immediate steps may be required. Responsive measures, such as separating the students, should be designed to minimize the burden on the student who was harassed. In some cases, the school will also be responsible for remedying the effects of the harassment on the student victims, through student and staff training, class changes, developing new policies, and the provision of counseling services and/or adjustments to course work and evaluation.

If the school takes no action, or if a student or his or her parent disagrees with the actions taken by the school administration, the student and his or her parents have the right to file a complaint at the U.S. Departments of Education (“DOE”), Office of Civil Rights (“OCR”). The OCR will take complaints based on sex, and will take sexual orientation-based complaints as described above. OCR will launch an investigation which will likely include contact with school personnel. It

considers whether: (1) the school has a policy prohibiting sex discrimination under Title IX and effective Title IX grievance procedures; (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and appropriate corrective measures to address a claim of quid pro quo or hostile environment harassment. If the school has taken each of these steps, OCR will consider the case against the school resolved and take no further action other than monitoring compliance with any agreement between the school and OCR. If not, OCR will require the school to remedy its deficiencies.

The recent United States Supreme Court decision Gebser v. Lago Vista, 118 S.Ct. 1989 (1998) highlights the DOE's role in enforcing its requirement that schools have adequate policies and enforcement mechanisms. That case suggests that aggrieved students should also notify OCR where complaints to schools or school officials go unheard as it is within OCR's authority to bring a school into compliance with Title IX enforcement regulations.

STATE LAW

As under federal law, when notified of harassment, it is the job of the school authorities to investigate and remedy any unlawful harassment. The majority of the discussion about remedies under federal law is also relevant here.

In Massachusetts, students harassed because of their sex or sexual orientation may also file complaints with the state Department of Education. It has established a "Problem Resolution System" mechanism to allow students, parents and others to file complaints when they believe harassment is occurring and the problem has not been fixed by direct contact between the individual and the school. Anyone may use the system, not just the individual directly affected. No lawyer is required; the person simply needs to call the Department, talk the issues through, and then later sign and send back to the Department a written copy of the complaint which was completed by the Department after the telephone call. Department employees from the Quality Assurance Program will seek a written reply from the school, and may also personally go to the school and interview witnesses and the complainant. If they find something amiss, they will make recommendations to the school about how to correct its handling of the situation. Often the very process of being investigated by the Department motivates the school principal or superintendent to fix a previously-ignored problem. Many instances of discrimination have been resolved through this system. There is no requirement that harassed individuals file complaints with the Department; filing court complaints remains an option.

Finally, for complaints of sexual harassment in any program or course of study covered under General Laws chapter 151C, individuals can file complaints with the Massachusetts Commission Against Discrimination (MCAD) within six months of the unfair educational practice. The MCAD will investigate, and if it concludes harassment occurred, will issue an order requiring the school to cease and desist from the harassment.³⁹

OTHER REMEDIES

Students and their parents or guardians may also be able to go to criminal court and take out complaints⁴⁰ against other students for commission of hate crimes, assault, sexual assault and other crimes. For example, if a student believes his or her day-to-day safety is imperiled, in appropriate cases, he or she may be able to obtain a “civil rights injunction” ordering the harasser to stop abusing them and to refrain from any contact with them.⁴¹ Students can go to their local courthouses and seek “restraining orders,” like those obtained by battered women, when a present or former boyfriend or girlfriend or household member is the harasser.⁴²

Students may also be able to bring civil lawsuits against their schools for money damages based on any number of legal theories. These lawsuits may be premised on violations of state and federal non-discrimination laws and the school’s common law duty to protect students from foreseeable harm.⁴³ In addition, constitutional claims based on equal protection and due process may be available.

III. THE RIGHTS OF STUDENTS TO FORM GLBT GROUPS

Whether and what kinds of student groups may exist in the school community has long been a source of controversy. But for even longer, the First Amendment has been interpreted to mean that public school students have a right to associate with each other and to speak freely. While there is no federal case yet directly on point, Gay Straight Alliances and similar groups should fall within the collegiate tradition of permitting student groups to band together for support or to engage in non-curricular activities. There is particular support in Massachusetts state law and from the Department of Education strengthening the rights of students to form GSA's.

A. First Amendment and Massachusetts Declaration of Rights

The United States Supreme Court has recognized that "coming out" --- identifying oneself publicly as gay, lesbian or bisexual --- is expressive conduct protected by the First Amendment.⁴⁴ Moreover, a student group cannot be denied recognition by a school based on the expressed viewpoint of its members, such as the viewpoint that 'being gay is good,' or that 'gay people deserve full equality.' In other words, a school administration cannot pick and choose the groups it wants in its school based on its opinion of the desirability of a group's viewpoint.⁴⁵ Moreover, it is impermissible for a school to place limits on gay students' political activity which are not placed on other students.⁴⁶

A school administration remains free, however, to evaluate a student group based on neutral factors that are applied to all other groups, such as a group's unwillingness to abide by school rules. The best approach in any case is to examine whether the same rules are being applied to everyone, or whether special/ different rules are being applied to the gay student group.

The mere fact that a LGBT student group may be controversial is not sufficient justification for the administration to oppose or ban it. Even if an administration fears a group will cause others to create disturbances, courts long ago recognized that "hecklers" cannot be allowed to essentially "veto" speech with which they disagree, or which is unpopular, without jeopardizing all types of speech. Instead, the administration must show that the restriction on speech is "necessary to avoid material and substantial interference with schoolwork or discipline."⁴⁷ This requires the administration to show that there really is a reasonable probability of interference, not just discomfort with students expressing an unpopular viewpoint. If the school cannot demonstrate these factors, it is likely that the administration's banning of the group is based on no more than dislike for the group's message, thereby violating the students' rights.

B. Forming Non-Curricular Groups: The Equal Access Act

The Equal Access Act⁴⁸ ("EAA") is a federal law, enacted in 1984, applicable to all public high schools which (a) receive federal funds and (b) allow non-curriculum related groups to use the school for a meeting place (creating a "limited public forum").

This law offers additional protection for Gay Straight Alliances ("GSA's") and is a powerful tool for student expression. Under the EAA, a school cannot discriminate against student groups based on the "religious, political, philosophical or other" content of their speech. The leading case under this law, known as Mergens, permitted students to sue a school board for denying recognition of a student religious club.⁴⁹ As long as there is at least one other non-curricular

group⁵⁰ that is allowed to meet at the school, then the school must allow, for example, a GSA to form.

Under Mergens, it is not enough for a school with at least one other non-curricular group to allow a GSA to meet at the school. Because the Act prohibits denial of “equal access,” a school may not deny any of the attendant privileges of official recognition to the GSA that is accorded other groups. For example, if official recognition includes access to school facilities such as the school newspaper, public address system, or other student activity events, the GSA must similarly be provided access.

The Equal Access Act is so clear, and so specific about applying to secondary schools, that it may be an even stronger tool than the First Amendment for convincing the administration to let a GSA form. Because it is so clear, it may also be easier to seek a remedy under the EAA than under the Constitution.⁵² Of course, state law is an important source of rights in Massachusetts, too, particularly G.L. c. 76, sec. 5 (discussed above).

IV. THE RIGHT TO LEARN ABOUT LGBT ISSUES

As a corollary to building a sophisticated citizenry, the right of students to receive information and ideas has long been protected by the First Amendment. The main case on this point, known as Pico, ruled that a school board could not necessarily remove books from middle and high school libraries which it characterized as “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.”⁵³ According to the Court, “students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding” and “[t]he school library is the principal locus for such freedom.”⁵⁴

While cases involving library censorship and removal of previously-approved materials present the strongest First Amendment claims for students, censorship in the classroom is also likely to be frowned upon by the courts. Access to information and ideas as well as the opportunity to analyze and debate those ideas is the lifeblood of American schools.⁵⁵ As former Chief Justice Rehnquist explained in Pico,

There would be few champions...of the idea that our Constitution does permit the official suppression of ideas...[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school-work or discipline, is not constitutionally permissible.

Thus, even though exposure to certain ideas or materials may conflict with a school board’s own views, the freedom to learn means that students have a right to be exposed to all sides of controversial issues.⁵⁶

There is one wrinkle to these general principles in Massachusetts. Under a new law, parents must be notified and may elect to remove their children from those curricula which primarily involve human sexual education or human sexuality issues, G.L. c. 71, sec. 32A. According to draft regulations by the State Department of Education interpreting this law, the new law is not an excuse for parents to remove their children from any class discussion referencing sexuality, for example, or to prevent their children from reading works by gay authors, or studying the historical and cultural movement to obtain civil rights for gay people. Instead, the notice and opt-out provisions only apply to “courses (typically, sex education or portions of a health education or science course), school assemblies or other instructional activities and programs that focus on human sexual education, the biological mechanics of human reproduction and sexual development, or human sexuality issues...” No law requires consent from parents before students may take a course involving sex education; only notification is required. Moreover, parents may exempt their children from curriculum covered by this law by written notification to the school principal. The Department’s Guidelines further explain the responsibilities of the school committee for providing notice to parents, an opt-out mechanism, and access to materials, and a dispute resolution system. Schools should be aware that applying this law too broadly into areas of the curriculum beyond sex education could trigger complaints of unlawful censorship.

V. THE RIGHT TO EXPRESS OPINIONS ABOUT LGBT ISSUES

The rights to speak, to write and otherwise to communicate ideas outside of the classroom are also often protected by law. When a school creates a forum generally open for use by student groups, whether it be a bulletin board or publication, it cannot deny a student group access to that forum based on the content of its message. The only exception, rarely met, is when a “regulation is necessary to serve a compelling state interest and...is narrowly drawn to achieve that end.”⁵⁷ In short, the same rules which apply to other people and groups in the school about posting notices on the school bulletin board, and publishing articles in the student paper should also apply to gay, lesbian and bisexual student issues. These rights are guaranteed by both the First Amendment and even more broadly by Massachusetts state law.⁵⁸

One sticking point concerns student newspapers. As discussed above, under the Hazelwood case, school administrators have wide discretion to regulate activities that are considered part of the school's curriculum. Although this is a broad generalization, the law appears to be that anything the school is required to "sponsor" is considered curricular. In Hazelwood, the Supreme Court upheld a school's decision to delete articles on pregnancy and divorce from a student newspaper published by a school journalism class because the class was considered part of the curriculum and thus under control of school authorities. A school's ability to censor even school-sponsored publications is not unfettered: it may not engage in viewpoint discrimination, and whatever actions it takes must be motivated by a “legitimate pedagogical interest,” as discussed earlier. And for any type of publication, there is no legal protection for “low” value speech such as matters considered obscene, defamatory, fighting words or incitement.

Students' rights in Massachusetts are greater than those that exist in most states. In Massachusetts, Hazelwood is less of an issue since a specific state law prohibits schools from censoring all student newspapers -- whether or not they are part of the curriculum -- based on viewpoint.⁵⁹ If there is an editorial board for the paper, it must apply the same standards to editing submissions by a gay, lesbian or bisexual student or about gay issues as to all other submissions. The only limitations on student expression are that it may not cause disorder or disruption in the school, and it must not be “low value” as defined above.

VI. THE RIGHTS OF TEACHERS

An overview of the law would be incomplete without addressing the rights of teachers, who are primarily responsible for instructing and counseling students in the classroom and sometimes beyond.

A. Non-Discrimination

Massachusetts laws governing the employer - employee relationship prohibit job discrimination based on sexual orientation, whether in hiring, firing, or terms and conditions of employment. G.L. c. 151B, sec. 4. There are no occupational exemptions; teachers are as protected as any other employee in any other work setting. Of course, schools retain the discretion to hire whom they want and retain whom they want;⁶⁰ they just cannot make those decisions on the basis of actual or perceived sexual orientation.

When an employer discriminates by failing to hire or retain a qualified gay teacher, or allows the lesbian teacher to suffer harassment from students which is ordinarily not permitted, it rarely acknowledges doing so based on sexual orientation. A discrimination claim ultimately requires the employee to be able to prove that whatever reason was offered for the employer's adverse action was not the real reason, or was not true.⁶¹ Assuming everyone shares the goal of equal treatment, school personnel should be careful to ensure that they do not impose double standards for gay and non-gay teachers and staff.

In appropriate circumstances, gay and lesbian employees may also have additional protections from discrimination.⁶² For example, a pregnant lesbian who is discharged on that basis has claims for both sex and sexual orientation discrimination. A gay man regarded as having HIV/AIDS may have state law claims for sexual orientation and disability discrimination.

B. Teacher Statutes and Collective Bargaining Agreements

In addition to the protections afforded by the non-discrimination laws, public school teachers as well as librarians, school adjustment counselors, school social workers and school psychologists in Massachusetts are further protected under the state laws governing professional teacher status.

A teacher acquires professional teacher status ("PTS") either automatically after three consecutive years of teaching or when so designated by the Superintendent upon recommendation of the principal after one year or for a teacher who has PTS elsewhere. G.L. c. 71, sec. 41. A teacher with PTS does not have to be reappointed from year to year. Teachers without PTS must simply be notified that their services to the school will not be renewed sometime between April 15 and June 15.

While any teacher may be dismissed by the principal, subject to the review and approval of the Superintendent, teachers with PTS may only be dismissed for certain causes: "inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards" G.L. c. 71, sec. 42. Whether a teacher has PTS or not, as long as he or she has been teaching for ninety days, before dismissal, the teacher must be provided with a written notice of intent to dismiss and an

explanation which is detailed enough to permit the teacher to respond. Upon the teacher's request within ten days of receiving the written notice, he or she may review the decision with the principal or superintendent and present information pertaining to the basis for the decision and the teacher's status. At the hearing, the teacher may be represented by an attorney or other representative. Only teachers with PTS have statutory appeal rights. The teacher must file an appeal petition for arbitration within thirty days.⁶³

As noted earlier, the union contracts or collective bargaining agreements between a teachers' union and school system is also a significant source of job protection for teachers. While agreements differ, they often provide protection by: (1) limiting the substantive grounds on which a school board may discipline or discharge a teacher; (2) strengthening the procedural safeguards afforded to a teacher threatened with adverse action; and (3) establishing a grievance procedure, as a means by which a teacher may seek reversal of official action taken against him or her. Many collective bargaining agreements contain non-discrimination clauses which contain more comprehensive protections than does state law. Nothing prohibits a union from bargaining to gain protections against sexual orientation discrimination in the contract.

C. The Constitutional Right to Speak

Teachers also possess First Amendment rights and the right to speak under the Commonwealth's Constitution. Their rights are greatest the farther away they are from school, but they retain some rights in school, too.

In school, administrative authorities have the broad, general discretion to regulate the content, manner and ambiance in which education takes place. Any regulations on speech, as discussed above, must be reasonably related to "legitimate pedagogical concerns."⁶⁴ The Court identified at least three such concerns: (1) "that participants learn whatever the activity is designed to teach," (2) "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity," and (3) "that the views of the individual speaker are not erroneously attributed to the school."⁶⁵ It added that a school must retain the authority to avoid associating the school with any position other than neutrality on matters of political controversy."⁶⁶ As discussed above, there is no support for the notion that schools may engage in viewpoint discrimination; only that they may regulate the content of speech to the extent that it constitutes an inappropriate manner of presenting ideas.

These principles were applied in the case of a high school teacher who claimed her First Amendment rights to free speech were violated when a school board refused to rehire her in part because she had led a discussion of abortion of Down's Syndrome fetuses in a ninth grade biology class. The Court explained that a school committee could regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical interest; and (2) the school provided the teacher with notice of what conduct was prohibited."⁶⁷ Retaliation against a teacher for in-class speech is not permitted unless the teacher had been informed of the prohibitions based on existing regulations, policies, discussions and other forms of communication between school administrators and teachers.

In addition to the issue of fair warning, the State Supreme Judicial Court recently breathed even more life into the concept of "academic freedom." In Hosford v. School Committee of Sandwich⁶⁸, the Court ordered a School Committee to compensate and reinstate a "no-nonsense" special needs teacher who had been terminated for a class discussion regarding the meaning and use of certain vulgar terms. The Court believed what she had done was

educationally appropriate where the students had brought up the terms themselves, her discussion of the terms was factual rather than provocative, and she admonished the students to avoid using the terms.

The issue of coming out in class remains a thorny one. On the one hand, principles of equal treatment as well as free speech principles suggest that a gay teacher should be able to disclose basic facts about his or her life in the same way and subject to the same boundaries as do non-gay teachers. On the other hand, unless a teacher has developed support from the administration for coming out, it is likely to be a flash point for controversy. As a general matter, teachers should consider building support from colleagues and administrative personnel before coming out. Support can be built in any number of ways, for example, by demonstrating how an openly gay teacher fits within the school's core values or mission, the need for openly gay role models for LGBT students (and all students) and students with gay families, the elimination of hypocrisy, basic fairness, and others. It might also be helpful to develop a plan about how to come out, e.g., as an advisor to a GSA, or in the context of a particular part of the curriculum.

While the cases addressing in-school speech of teachers tend to be more deferential to school authorities, the opposite is true for speech outside of school.

First, a school should not be able to punish a teacher for his or her out-of-school associations unless the school has a compelling state interest for doing so.⁶⁹ There is no reason, for example, that a teacher should be unable to be a member of the Gay, Lesbian and Straight Education Network and still retain his or her job in a public school.

Teachers also have a right to express themselves as citizens about matters of public concern. In the Pickering case, the United States Supreme Court sided with a teacher whose school fired him for writing a letter to the editor of a local newspaper criticizing the school board's financial expenditures, finding that his speech was on a matter of public concern.⁷⁰ Where a public school is the employer of the speaker, however, the school may still have an interest in regulating its employee's speech in connection with the operation of the schools in which they work. The result is a balancing test, formulated from the Pickering case, in which a court weighs "the interests of the teacher, in commenting upon matters of public concerns and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁷¹ As a practical matter, this means a school can restrict or punish a public school teacher's speech on matters of public concern where the speech would harm the school's ability to operate efficiently or inhibit the teacher's ability to carry out her duties. It is doubtful that this standard can often be met, particularly where the speech takes place outside of the classroom.

Finally, turning to out-of-school conduct (as opposed to speech), there are specific state laws permitting schools to suspend teachers for unbecoming conduct. These laws should be applied even-handedly to gay and non-gay employees. If an action by a non-gay employee would not warrant the exercise of the suspension power, it would likely be discriminatory and unlawful to suspend a gay employee for the very same conduct. See generally, G.L. c. 268A, sec. 25.

VII. CONCLUSION

To many people, the idea of mixing education and the law is like mixing oil and water. Exactly the opposite is true. Schools are the proverbial marketplace of ideas and discussion. While pursuing legal claims can be difficult, too often schools run roughshod over teacher or student rights, or teachers self-censor in an effort to avoid controversy. It is critical that teachers, students and parents alike understand that the common good depends on protecting the freedom to teach and the freedom to learn.

NOTES

1. This overview is intended to outline the general parameters of the rights of teachers and students and is not intended to provide guidance or legal advice relating to the rights of teachers and students in specific situations. Moreover, this area of the law is rapidly developing locally and at the United States Supreme Court level given recent and upcoming decisions under Title VII and IX. For specific guidance on your situation, consult a lawyer. You may also call GLAD at (617) 426-1350 for referrals and general information. Permission is hereby granted to reprint this publication in whole or in part as long as credit is given to Gay & Lesbian Advocates & Defenders.

2. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

3. Keyishian v. Bd. of Education, 385 U.S. 589, 603 (1967).

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

5. The key case acknowledging student speech rights is Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) in which the U.S. Supreme Court ruled that suspension of students for wearing armbands to protest the Vietnam war violated their First Amendment rights.

As is always the case with constitutional protections, none of these rights is unlimited. The Massachusetts federal District Court in Pyle, discussed below, summarized speech rights under the First Amendment in general as follows:

First, 'vulgar' or plainly offensive speech (Fraser-type speech) may be prohibited without showing a showing of disruption or substantial interference with the school's work. Second, school sponsored speech (Hazelwood-type speech) may be restricted when the limitation is reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school-sponsored (Tinker-type speech) may only be prohibited if it causes a substantial and material disruption of the school's operation.

Pyle v. So. Hadley School Committee, 861 F.Supp. 157, 166 (D. Mass. 1994). The Fraser, Hazelwood and Tinker cases are discussed in other endnotes.

See also Gregory A. Clarick, Public School Teachers and the First Amendment: Protecting the Right to Teach, 65 N.Y.U. L. Rev. 693 (June 1990); Note, Nancy Tenney, The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment, 60 Brook. L. Rev. 1599 (Winter 1995).

6. The New Hampshire students relied on the Tinker case, discussed above, in which the U.S. Supreme Court ruled that suspension of students for wearing armbands to protest the Vietnam war violated their First Amendment rights.

7. In Pyle v. School Committee of South Hadley, 423 Mass. 283 (1996), the Massachusetts Supreme Judicial Court held that a state law governing student expression provides even broader protection to students than the First Amendment of the U.S. Constitution. Thus, students would be allowed to wear "vulgar" clothing unless it was "disruptive." The clothing at issue was t-shirts stating "Co-ed Naked Band: Do It To The Rhythm" and "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick." Thus an earlier federal district court ruling in the same case that the clothing could be barred even if it were not disruptive, Pyle v. South Hadley School District, 861 F. Supp. 157 (D. Mass. 1994) was vacated in part, Pyle v. South Hadley School Committee, 55 F.3d 20 (1st Cir. 1995).

8. See e.g. Board of Education v. Pico, 457 U.S. 853, 861 (1982)(plurality)("[o]ur precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom"); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969)(teacher had right to assign reading with word "mother f-----"); Right to Read Defense Committee v. School Committee of Chelsea, 454 F. Supp. 703 (D. Mass. 1978)(poetry collection with sexual and other mature content

could not be removed from library). See also Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied, 116 S.Ct. 1044 (1995)(parents' lawsuit based on objection to explicit AIDS education assembly properly dismissed on all counts; parents have no broad-based right to restrict the flow of information in public schools).

9. Fricke v. Lynch, 491 F. Supp. 381 (D. R.I. 1980). The story is told from a personal perspective in Aaron Fricke, Reflections Of A Rock Lobster: A Story About Growing Up Gay (Alyson Publications 1981).

10. For example, a school's decision to implement a condom availability program could not be overruled by parental opposition. Curtis v. School Committee of Falmouth, 420 Mass. 749, cert. denied 116 S.Ct. 753 (1996).

11. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). "Legitimate pedagogical concerns" include "that participants learn whatever the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."

12. Viewpoint discrimination, the suppression of a particular "controversial" or "dangerous" idea, is condemned by the First Amendment. See generally e.g. Rosenberger v. University of Virginia, 115 S.Ct. 2510 (1995)("government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

13. Epperson v. Arkansas, 393 U.S. 97, 104-105 (1968).

14. In recent years, resources have proliferated along with expanded commitment to the issues. An excellent overview of the problem is presented in Governor's Commission on Gay and Lesbian Youth, Making Schools Safe for Gay and Lesbian Youth: Breaking the Silence in Schools and In Families (February 25, 1993), available from State House, Room 111, Boston, MA 02133. Following publication of this Report, the Massachusetts Department of Education created gay-specific resources. Contact: Safe Schools Program, 350 Main Street, Malden, MA 02148-5023, (617) 388-3300. After study of the problems documented, the Massachusetts Board of Education voted in May, 1993 to make the following recommendations to all schools:

- (1) Schools are encouraged to develop policies protecting gay and lesbian students from harassment, violence and discrimination;
- (2) Schools are encouraged to offer training to school personnel in violence prevention and suicide prevention;
- (3) Schools are encouraged to offer school-based support groups for gay, lesbian and heterosexual students; and
- (4) Schools are encouraged to provide school-based counseling for family members of gay and lesbian students.

For other resources, see generally: Karen Harbeck, ed., Coming Out of the Classroom Closet: Gay and Lesbian Students, Teachers and Curricula, Harrington Park Press 1992; Kevin Jennings, ed., One Teacher in Ten, Alyson Publications 1994; Rita M. Kissen, The Last Closet: The Real Lives of Lesbian and Gay Teachers (Heinemann 1996); Susan Eaton, "Making School a Safe Place for Gay and Lesbian Teens," FLEducator, 15-17 (Winter 1994/1995); GLSEN/Boston, 132 Boylston Street, 4th Floor, Boston, MA 02116, 617-451-1119; glsenboston@glsenboston.org; www.glsenboston.org.

15. Centers for Disease Control, Attempted Suicide Among High-School Students -- United States, 1990, in 40 Health Objectives for the Nation 433-435 (U.S. Dep't of Health and Human Services, Sept. 20, 1991).

16. G. Kruks, Gay and Lesbian Homeless/Street Youth: Special Issues and Concerns, Journal of Adolescent Health 12.7 (1991): 515-518; G.L. Yates, R. MacKenzie & J. Pennbridge, A Risk Profile of Runaway and Non-Runaway Youth, American Journal of Public Health 78.7 (1988): 820-821.

17. Approximately 49% of youth have had sexual intercourse. Massachusetts Dep't of Education, Massachusetts 1993 Youth Risk Behavior Survey Results, June 1994 at 22. Given that an AIDS diagnosis will likely not be made for several years, statistics showing 18% of those infected with HIV in the 20-29 year old age group (Massachusetts HIV/AIDS Quarterly, Fall 1996) suggests they were infected during their adolescent years. Nationally, one-quarter of all new HIV infections in the United States are estimated to occur in young people between the ages of 13 and 20. Office of National AIDS Policy, Youth and HIV/AIDS: An American Agenda -- A Report to the President (March 1996) at i.

18. American Association of University Women Education Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools (1993)(reporting that for male students in grades 8 through 11, being called "faggot" is the most humiliating of taunts).

19. Title IX of the federal Education Amendments of 1972 applies to any program or activity receiving or benefiting from federal financial assistance from the federal Department of Education. It provides that "No person . . . 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." 20 United States Code sec. 1681 (emphasis added).

For cases arising in Massachusetts, complaints may be filed at the U.S. Dep't of Education, Office of Civil Rights, John W. McCormack Post Office and Courthouse, Room 222, Post Office Square, Boston, MA 02109.

The federal Department of Education ("DOE") through its Office for Civil Rights ("OCR") has published an enormously useful publication entitled Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (hereafter, "Sexual Harassment Guidance") 62 Federal Register 12034 (March 13, 1997). It is available by contacting DOE, at 600 Independence Avenue, S.W., Room 5412 Switzer Building, Washington, D.C. 20202-1174 or by calling Howard I. Kallem at (202) 205-9641. Even before this Guidance was issued, the OCR in this region had found a school system liable for same-gender peer harassment. See In Re Nashoba Regional School District, No. 01-92-1327. Although the recent Supreme Court case Gebser v. Lago Vista overturned much of OCR's guidance with respect to the standard for determining when damage remedies are available, other information in the publication remains instructive. See generally Gebser v. Lago Vista, 118 S.Ct. 1989 (1998).

20. There are two discrimination laws which apply in school settings. As to elementary and secondary schools, Massachusetts General Laws chapter 76, sec. 5 (commonly referred to by educators as "Chapter 622") prohibits discrimination based on sex, sexual orientation, race, color, religion and national origin. Discrimination against boys because of their "sex" is just as illegal as discrimination against girls; discrimination against gay and lesbian students is just as illegal as discrimination against non-gays. Civil lawsuits against educational institutions may be filed pursuant to General Laws chapter 76, section 16.

For elementary, secondary and post-secondary schools in Massachusetts, General Laws chapter 151C prohibits "sex" discrimination and clarifies that this also means that "sexual harassment" is forbidden. Vocational and college students can file complaints at the Mass. Commission Against Discrimination ("MCAD") within six months of the last discriminatory act. Call the MCAD at (617) 727-3990 for more information.

21. The Fourteenth Amendment of the United States Constitution secures equal protection of the laws to all citizens. There are similar protections under the Massachusetts Constitution. Mass. Decl. Rights, Pt. 1, Art. 1. In Nabozny v. Podelensy, 92 F.3d 446 (7th Cir. 1996), a young man from Wisconsin was permitted to sue his former school district and local school officials for failing to protect him from sexual and sexual orientation harassment from his peers.

22. The idea behind equal protection is that people who are similarly situated should be treated alike. Thus, boy and girl students are equally entitled to the advantages and opportunities of an education without reference to sex.

23. Franklin v. Gwinnet County Public Schools, 112 S.Ct. 1028, 1037 (1992)(where a female student complained repeatedly to school officials that a male teacher was sexually harassing her, and the school officials did nothing to stop the harassment, but instead tried to persuade her not to file a complaint with the federal department of education, she could sue the school district for money damages.) The Court made clear that victims of sexual harassment and other forms of sex

discrimination may sue their schools under Title IX for damages. See also Gebser v. Lago Vista, 118 S.Ct. 1989 (1998); but see, Davis v. Monroe County Bd. of Ed., 120 F.3d 1390, cert. granted 119 S.Ct. 29 (Eleventh Circuit, en banc, held that Title IX did not allow claim against school board for failure to remedy peer harassment).

24. See 34 C.F.R. Section 106.8(b).

25. In addition, the employment non-discrimination laws often serve as a model for interpreting educational non-discrimination laws, and it has been long-established that harassment can violate prohibitions against sex discrimination.

26. As OCR states in its Sexual Harassment Guidance, infra,

A school's liability [under federal law] for sexual harassment by its employees is determined by application of agency principles, i.e., by principles governing the delegation of authority to or authorization of another person to act on one's behalf.

Accordingly, a school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue. Under agency principles, if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee or agent.

Sexual Harassment Guidance at p. 12039. Schools may also be responsible legally for hostile environment harassment, discussed below, by its employees.

27. This See Lago Vista, 118 S.Ct. 1989 (1998).

28. The Sexual Harassment Guidance sets out a variety of factors to consider, some of which are:

- ◆ the degree to which the conduct affected the student's education (e.g. grades going down, student with physical injuries or emotional distress, student withdrawing from school);
- ◆ the type, frequency and duration of the conduct (e.g., one severe incident may be enough, and as a general matter, the more severe the conduct, the less need there will be to show a repetitive series of incidents);
- ◆ the number of individuals involved;
- ◆ the age and sex of the alleged harasser and the subject or subjects of the harassment;
- ◆ the size of the school, location of the incidents, and context in which they occurred;
- ◆ other incidents at the school; and
- ◆ incidents of gender-based, but non-sexual, harassment.

Sexual Harassment Guidance at 12041, 12042.

29. For example, in the employment context, an increasing number of state and federal courts have ruled that sex discrimination prohibitions may include complaints for same-gender harassment. The United States Supreme Court recently held that same-sex harassment may, under certain circumstances, be actionable. Oncala v. Sundowner Offshore Services, Inc., 118 S.Ct 1989 (1998).

30. Jamie Nabozny, referred to above, won \$962,000 from his former school district for failing to protect him from pervasive harassment based on his sex and sexual orientation. Shannon Tangonan, "Wisconsin district to pay for not protecting gay student," USA TODAY, November 21, 1996 at 3A.

31. These Guidelines are available from the Massachusetts Dep't of Education, at (617) 388-3300. In addition, the employment non-discrimination laws often serve as a model for interpreting educational non-discrimination laws, and these laws are aggressively enforced. See e.g.

Massachusetts General Laws chapter 151B, secs. 1(18) and 4(16) defining and prohibiting sexual harassment in the workplace.

32. In a recent case alleging peer harassment involving first graders, the Massachusetts Commission Against Discrimination ruled there was “no support for the proposition that an education institution can be vicariously liable for the behavior of one student towards another under Massachusetts General Law (sic) Chapter 151C.” Buschini v. Newburyport School District, 18 M.D.L.R. 216, 217 (1996). The Commission’s ruling flatly contradicts state statutes. As a result, it should not deter people from filing complaints based on General Laws chapter 151C with the MCAD. The Massachusetts Supreme Judicial Court has not yet addressed the issue, and its ruling would be final.

33. G.L. c. 151C sec. 1 (e) defines “sexual harassment” as follows:

any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:--(i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile, humiliating or sexually offensive educational environment.

34. This should be true for a variety of reasons. In the analogous context of sexual harassment on the job, the Massachusetts Supreme Judicial Court has ruled that a sexual harassment claim focuses on the conduct alleged, not the sex or sexual orientation of the victim or perpetrator. Melnychenko v. 84 Lumber Company, 424 Mass. 285 (1997). The Court relied on a definition of sexual harassment in the employment non-discrimination laws which, significantly in this context, parallels General Laws chapter 151C governing educational institutions. In addition, General Laws chapter 76, section 5 explicitly forbids sexual orientation discrimination, which is another way of demonstrating that same-gender harassment is forbidden in schools. The “Guidelines to School Districts on Addressing Sexual Harassment” by the Massachusetts Dep’t of Education states that same-gender peer harassment is prohibited by chapter 151C and chapter 76, section 5.

35. Mass. General Laws ch. 71, sec. 37 H also requires school districts to publish policies relating to teacher and student conduct, and to specify procedures for discipline. The student handbook must contain rules pertaining to student conduct.

37. GLAD recommends, at a minimum, direct notice to the principal or vice-principal whenever possible not because it is the only way to trigger the school’s responsibility to investigate and remedy harassment, but because it is likely the most efficacious route to such action.

38. OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the procedures provide for--

- (1) notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
- (2) application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- (3) adequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- (4) designated and reasonably prompt time frames for major stages of the complaint process;
- (5) notice to the parties of the outcome of the complaint; and
- (6) an assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. Sexual Harassment Guidance at 12044.

Many schools also provide an opportunity to appeal the finds or remedy or both. In addition, because retaliation is prohibited by Title IX, schools should include a provision in the procedures prohibiting retaliation against any individual who files a complaint or participates in an investigation.

39. The procedure is described at G.L. c. 151C, sec. 3.
40. For assistance in pursuing remedies through the criminal justice system, a student or parent can contact the Fenway Victim Recovery Program at (617) 267-0900, or a Victim/Witness Advocate at the local court house.
41. In order to obtain a civil rights injunction, the harasser must have used physical force against the victim. The Attorney General sometimes assists students in seeking injunctions. Call 617-727-2200 and ask for Civil Rights Division. Criminal complaints can be lodged by completing an application for a criminal complaint at your local district court. Call GLAD or the Fenway Victim Recovery Program (617-267-0900) for information about how to file a complaint.
42. G.L. c. 209A, secs. 1, 3 (restraining orders available when the harasser and victim are or were in a dating relationship.)
43. You should consult an attorney to evaluate these options. As a general matter, it is difficult to sue school districts and school employees for their official actions. Depending on whether you want to assert a claim against individual administrators or the school system or the city or town, there are legal hurdles which may make it difficult or impossible to pursue damages actions in particular cases. For example, there may be statutory immunities from suit for particular defendants, or limits on damages, or requirements for notice of claims. See generally G.L. c. 258 et seq.; G.L. c. 71, sec. 55A.
44. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338, 2345 (1995)(marching behind a banner identifying gay group is expressive).
45. This is explicit at the college level. See generally Healey v. James, 92 S.Ct. 2338 (1972). For gay cases, see e.g. Gay, Lesbian, Bisexual Alliance v. Sessions, 917 F. Supp. 1548, 1557 (D. Ala. 1995); Gay Students Organization of Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974). It is hard to imagine that viewpoint discrimination toward a high school group would be any more tolerable than viewpoint discrimination in the classroom.
46. This exact point was made in the Bonner case, discussed in preceding note.
47. This test is based on the Tinker case (students permitted to wear armbands to protest the Vietnam war) discussed above. But see Bethel School District v. Fraser, 478 U.S. 675 (1986) in which the United States Supreme Court ruled that a student's suspension was appropriate where the student's use of vulgar and sexually suggestive speech undermined the school's basic educational mission and transgressed "the boundaries of socially appropriate behavior." This case is often referred to as authority for schools to discipline students who engage in vulgar speech even when the speech is not disruptive. See also, Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226, 241 (1990).
48. 20 United States Code Annotated section 4071 et seq. (1992)
49. Board of Education of the Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990).
50. Although the EAA does not define the term "noncurriculum related student group," the United States Supreme Court has ruled that Congress intended a "broad reading of the Act" and a "low threshold for triggering the Act's requirements." Board of Educ. of Westside Som. Sch. v. Mergens, 496 U.S. 226, 239-240 (1990). According to the Court, a group is beyond the reach of the act if it relates directly to the body of courses offered at the school, such as: (1) if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; (2) if the subject matter of the group concerns the body of courses as a whole; (3) if participation in the group is required for a particular course; or (4) if participation in the group results in academic credit. Id. at 239. Recently, a school board in Utah took the extreme measure of dissolving all curriculum-related student groups to defeat the claim of a gay student group which wanted to form. A suit alleging First Amendment and EAA violations is ongoing.

52. Certain cases decided based on constitutional principles may be helpful as well. The U.S. Supreme Court has stated that where schools have created a forum generally open for use by student groups, then the school may not regulate those groups unless the regulation is necessary to serve a compelling state interest which is narrowly drawn to achieve that end. Widmar v. Vincent, 102 S.Ct. 269, 273-74 (1981)(school policy banning formal recognition of student religious groups violates students' First Amendment rights of free speech and association). This principle can also be applied to outside groups which wish to use school facilities, again as long as the school has a policy of allowing its property to be used for "social, civic and recreational purposes." Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 2141 (1993)(allowing church to use school facilities to show films dealing with the family and child-rearing from a religious standpoint).

53. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982). Technically, the Supreme Court issued a plurality ruling that the case should proceed to trial for a possible First Amendment violation where there was a question about the Board's motivations in removing the books. Justice Brennan acknowledged that school boards enjoy wide discretion to manage school affairs, but found that removing books from the shelves of a school library sharply implicated basic constitutional values. The First Circuit Court of Appeals in Boston has repeatedly upheld these principles.

54. Id. at 868-869.

55. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("Teachers and students must always remain free . . . to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."). See also Epperson v. Arkansas, 393 U.S. 97, 107 (1968)(striking down state law mandating teaching of creationism; the State may not prohibit the teaching of a scientific theory or doctrine where the prohibition is based upon reasons that violate the First Amendment.). A recent Ninth Circuit decision affirms this approach. In Monteiro v. Tempe Union High School Dist., the Court held that a school did not violate a students's equal protection rights in assigning an English class to read classic literary works that contained racially derogatory terms. 158 F.3d 1022 (1998).

56. See e.g. Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D. N.H. 1979)(improper for school officials to remove Ms. Magazine from school because of its "political slant.").

57. Widmar v. Vincent, 102 S. Ct. 269, 273-74 (1981). Of course, schools always retain the right to regulate the time, place and manner of speech in such open fora.

58. General Laws chapter 71, section 82 provides:

The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include, without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions....

The first case authoritatively defining the scope of this law is the Pyle case, discussed above.

59. G.L. c. 71, sec. 82.

60. See Hosford v. School Committee of Sandwich, 421 Mass. 708, 713 (1996)(discretion of public authorities "extends to decisions about initial hiring and about the retention of untenured teachers, and school authorities are fully entitled to consider intangible and subjective factors like a teacher's actual or predicted relation to her students, colleagues, parents and school authorities.").

61. This is called "proving pretext", i.e., that the employer's proffered explanation for the job decision is not the real reason. Blare v. Husky Injection Molding Systems, Inc., 419 Mass. 437 (1995). Note that this standard is more lenient than the federal standards for proving pretext, thereby persuading many people that state courts are more hospitable to job discrimination claims than federal courts.

62. There are of course federal laws forbidding discrimination based on race, religion, national origin, color, sex, age and disability. In some circumstances, employees can pursue both state and federal law claims at the same time.

63. See G.L. c. 71, sec. 42 for more details about the selection of an arbitrator, the hearing rules, the decision process and further appeal.

64. Hazelwood v. Kuhlmeier, 484 U.S. 260, 273 (1988).

65. Hazelwood, 484 U.S. at 271. In a hypothetical case of a school “no homo promo” policy forbidding any positive mention of homosexuality, for example, the policy would fail both the viewpoint discrimination test and the Hazelwood test. As to the Hazelwood subparts, an anti-gay message in itself lacks a rational connection to advancing educators’ goals that participants learn whatever the activity is designed to teach. For example, students would still be able to learn the analytical and writing skills that are typically the goals of a high school English class curriculum if they were to read and write an essay about E. M. Forster’s Maurice rather than Ernest Hemingway’s The Old Man and the Sea. The key inquiry is whether the challenged activity has any bearing on the students’ ability to learn general skills and values. With regard to the concern about age-appropriateness, policies are more vulnerable if they are across the board rather than age-specific and without making any distinctions based on maturity or sophistication. With regard to the issue of potential school endorsement, a school will be hard put to argue that it “endorses” every idea presented to students.

A recent Fourth Circuit decision affirmed, however, that the reach of the First Amendment may not extend to secure a drama teacher’s right to select a particular play for production. Boring v. Buncombe County Bd. of Ed., 136 F.3d 364(4th Cir. 1998)(en banc). In an en banc decision, the Court dismissed a teacher’s First Amendment claim holding that because selection of the play could not be characterized as presenting a matter of public concern, no First Amendment rights attached, and the conflict over its selection was nothing more than an ordinary employment dispute. Boring, 136 F.3d at 368.

66. Hazelwood, 484 U.S. at 272.

67. Ward v. Hickey, 996 F.2d 448, 452-454 (1st Cir. 1993). Ultimately, because the teacher had not specifically asked the jury about whether she should have been informed that her speech was prohibited, her claim failed.

68. Hosford v. School Com. of Sandwich, 421 Mass. 708 (1996).

69. Keyishian v. Bd of Regents, 385 U.S. 589, 606 (1967); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-461, 463 (1958)(“state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny” and an “interest of the State must be compelling” to subordinate that freedom). A federal district court in Utah recently struck a gag order issued by a school district that attempted to bar a teacher from making any comments about her “homosexual orientation and lifestyle” to students, staff members, or parents. Wendy Weaver v. Nebo School Dist. et al., No. 2:97-CV-819J (D. Utah 1998).

70. Pickering v. Board of Education, 391 U.S. 563 (1968). In contrast, see Connick v. Myers, 461 U.S. 138 (1983) (circulating a memo to co-workers soliciting complaints about the work environment are NOT matters of public concern).

71. Pickering, 391 U.S. at 568.