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Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment

Vanessa H. Eisemann†

My parents kept calling and meeting with the school officials, but the response was that if I was gay that I should expect this kind of treatment. The school took no meaningful actions against the boys who were harassing me, which sent the message that it was okay to keep harassing me . . . . Instead of teaching the value of respect for others, the school taught that if you are different you are the problem, and you are the one that has to be separated out and hidden.
— Jamie Nabozny1

INTRODUCTION

In recent years, anti-gay harassment and violence in schools has received much national attention,2 with the media reporting incidents, each

1. Prepared testimony submitted to Congress, reprinted in David Buckel, Stopping Anti-Gay Abuse of Students in Public Schools: A Legal Perspective 2-3 (1998) (also available at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=124>). Jamie Nabozny was the plaintiff in the groundbreaking case, Nabozny v. Podelesny, 92 F.3d 446 (7th Cir. 1996), in which the Seventh Circuit held that public school officials could be liable for ignoring a gay student's pleas for help. See id. at 455-56. After the trial court found three school officials liable for discrimination, the school settled the case for nearly one million dollars. See Buckel, supra, at 12.

2. After the gruesome murder of University of Wyoming student Matthew Shepard, who died on October 12, 1998, violence perpetrated against sexual minorities began to make headlines. Twenty-six state legislatures considered adding sexual orientation to hate crime legislation. Many of the proposals carried Matthew's name on them. See Benoit Denizet-Lewis, Gay Rights Advo-
more terrifying than the last. For example, Alana Flores, a student in Northern California, received a barrage of death threats in her school locker because a fellow student thought she was a lesbian.\(^3\) Included among these threats was a pornographic picture of a woman bound and gagged with her throat slit.\(^4\) Several Washington state students raped and then urinated on a lesbian student on school grounds, forcing another female student, the girlfriend of one of the perpetrators, to watch because the two girls had kissed.\(^5\) Another California student was beaten unconscious in his high school, and his attackers carved the word “fag” into his skin.\(^6\) It is no wonder that many gay, lesbian, bisexual and transgendered\(^7\) students live in constant fear of their classmates, unable to fully partake of the educational opportunities to which they are entitled.\(^8\)

Consider a scenario of a public school administrator who must read through all the complaints submitted by students alleging that they are the victims of harassment perpetrated by their classmates. The allegations include being subjected to: genital groping, sexually offensive epithets, shoving, spitting, bra snapping, underwear stealing, being stripped and tied up naked, and mock rape. The complaining students are both male and female and represent the diversity of the student bodies of American public schools in all other ways. The hypothetical school administrator must, by law, take meaningful action to prevent repeat occurrences of the offending conduct if the conduct meets the definition of “peer sexual har-

\(^3\) See Boxall & Noriyuki, supra note 2.
\(^4\) See id.
\(^5\) See id.
\(^7\) Throughout the remainder of this article I condense the many labels used by sexual minorities into the word “gay.” I use the word in the most all-encompassing manner to refer to individuals who identify as or are perceived to be gay males, lesbians, bisexuals, or transgendered people. My word choice is solely for convenience and not meant to exclude anyone who may fit into the category of sexual minority, given the murky delineations of that category. See Martha M. Ertman, Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either, 73 DENV. U. L. REV. 1107, 1108-09 (1996) (using the term “marginority” to describe groups generally associated with the gay rights movement—gay men, lesbians, bisexuals, and transgendered people).
\(^8\) One study estimates that gay youth are five times more likely than those who do not identify as gay to skip school at least once a month in order to avoid humiliation, verbal abuse, and physical violence. See BUCKEL, supra note 1, at 1-2. An Iowa-based study showed that the average high-school student hears homophobic slurs 25 times daily. See Ann Rostow, Hostile Hallways: As Schools Ignore Antigay Harassment, Some Lesbians are Fighting Back, GIRLFRIENDS, June 1999, at 30, 31.
If the school is "deliberately indifferent" to complaints of "peer sexual harassment," it can be held liable to the complaining student. The problem for gay students is that school administrators and the courts that review administrators' decisions are likely to conclude that "peer sexual harassment" or "student-on-student sexual harassment" does not include anti-gay harassment, because the Supreme Court has defined the term in the context of a male perpetrator harassing a female victim.

In reality, school administrators do pick and choose when to take action in response to complaints of student-on-student abuse that is sexually offensive depending on whether they believe that the student is gay. In some instances, school officials have even participated in verbal harassment or told gay students that they deserved to be harassed. One researcher of anti-gay harassment in Washington state public schools remarked: "It [is] distressing how many educators [stand] by in silence or"

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9. See Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) [hereinafter Davis IV], which held that a school violates Title IX when it does not respond to known acts of harassment perpetrated by third parties, including students. In Davis v. Monroe County Board of Education, 862 F. Supp. 363 (M.D. Ga. 1994) [hereinafter Davis I], a federal district court held that the plaintiff had no right of action against the school board under Title IX. That ruling was reversed in relevant part in 1996, when the Eleventh Circuit found that Title IX does provide students with a private right of action against a school board for failure to eliminate a sexually hostile educational environment created by other students when supervising authorities are aware of the harassment. See Davis v. Monroe County Bd. Of Educ., 74 F.3d 1186 (11th Cir. 1996) [hereinafter Davis II]. While this decision was then vacated and reversed en banc, see Davis v. Monroe County Board of Education, 1120 F.3d 1390 (11th Cir. 1997) [hereinafter Davis III], the decision to allow a private right of action against a school board for failure to remedy student-on-student harassment was reinstated by the Supreme Court. See Davis IV, supra.

10. Davis IV held that schools "may be liable for their deliberate indifference to known acts of peer sexual harassment" under Title IX of the Education Amendments, 20 U.S.C. § 1681(a) (1999). See Davis IV, supra note 9, at 648.

11. See id. at 633.

12. The Supreme Court used the terms "student-on-student harassment" and "peer sexual harassment" interchangeably in Davis IV. See Davis IV, supra note 9.

13. See Davis IV, supra note 9.

14. See Ruth Teichroeb, Gay Kids Often Abused While Adults Stand By, Report Says, SEATTLE POST- INTELLIGENCER, Nov. 13, 1997, at B2 (discussing an annual report of the Safe Schools Coalition, which documented incidents of anti-gay harassment and violence in schools that were witnessed by adults who then declined to intervene). The facts of Nabozny v. Podelesny illustrate one school's very obvious decision to respond to female students' complaints of peer sexual harassment while ignoring the complaints of the plaintiff, a gay male student. The widespread indifference to anti-gay slurs, see text accompanying notes 15-18, indicates that Jamie Nabozny's school district is not alone in affording presumed heterosexual students greater protection from sexually offensive harassment than presumed or openly gay students.

15. See The Governor's Comm'n on Gay and Lesbian Youth, Making Schools Safe For Gay and Lesbian Youth: Breaking the Silence in Schools and in Families (1993) [hereinafter Making Schools Safe] (citing a study which found that 53% of students report hearing homophobic comments made by school staff); see also James Sears, Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs?, in Coming Out of the Classroom Closet (Karen Harbeck ed., 1992) (reporting that 80% of prospective teachers reported negative attitudes toward gay and lesbian people and that a third of prospective teachers can be classified as "high-grade homophobes").

16. See, e.g., Nabozny, 92 F.3d at 456 (describing alleged remarks by school official).
While "authorities react instantly to racist terms" and profanity, 97% of anti-gay slurs go unchallenged. This discrepancy creates an environment where gay students' educational experiences are drastically different from those of their classmates, hampering their educational opportunities. In addition, the difference in the way school officials react to different forms of harassment gives students the impression that homophobic insults are more acceptable than other insults, fostering yet another generation of Americans who condone anti-gay bigotry and violence.

This Article argues that, although current law does not afford it, gay students who are sexually harassed should have a private right of action under Title IX of the 1972 Education Amendments (amended 1990) (Title IX), against schools and school officials that ignore their complaints, just as straight students do. This Article further contends that school administrators are engaging in sex stereotyping, and hence, sex discrimination prohibited under Title IX, when they base their decisions about whether to respond to student complaints of harassment on the real or perceived sexual orientation of the complaining student.

This Article begins with an overview of the types of harassment Title IX currently prohibits. Part I sets out the current scope and limitations of the ban on "peer sexual harassment" in schools. Part II explains why current efforts to protect students from anti-gay harassment are not adequate to remedy the situation, arguing that only protection under Title IX would be sufficient to ensure that school administrators will respond appropriately and consistently to sexually demeaning peer harassment. Because the concept of sexual harassment developed in the context of lawsuits alleging employment discrimination, courts have traditionally

18. See Rostow, supra note 8, at 31 (citing the Iowa study).
19. See BUCKEL, supra note 1, at 1-2 ("[Gay students'] suffering leads to increased risks of dropping grades, dropping out of school, abusing drugs, participating in unsafe sex, and ... attempting suicide.").
20. The lack of response by school officials to anti-gay comments implicitly condones anti-gay attitudes. Cf. Connie C. Flores, Comment, The Fourteenth Amendment and Title IX: A Solution to Peer Sexual Harassment, 29 ST. MARY's L.J. 153, 203 (1997) ("[I]t is apparent that when a school does not prevent peer harassment, it sends a message that harassment is appropriate behavior. Essentially, schools are reinforcing the notion that girls do not deserve respect."). Furthermore, schools that actually teach that homosexuality is wrong, criminal, or immoral may very well give the message to perpetrators of sexual orientation harassment that their behavior is acceptable. See GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 172 (1991) (explaining how society, the church and the Bible's message that homosexuality is wrong gives perpetrators of anti-gay violence a sense that they have permission to "punish" gay people); Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431 (1992) (arguing that sodomy laws implicitly condone violence against gay people).
21. The statute provides: "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." 20 U.S.C.A. § 1681(a) (West, WESTLAW through P.L. 106-170, approved Dec. 17, 1999).
looked to case law interpreting Title VII for guidance in interpreting and applying Title IX to discrimination in schools. Part III provides an overview and a critique of the application of Title VII of the Civil Rights Act of 1964 (Title VII) to gay victims of harassment in the workplace. It argues that courts should not blindly repeat the same mistakes made in interpreting Title VII when applying Title IX to gay students. Part IV provides further rationales for giving student victims of anti-gay harassment the same rights as victims of "peer sexual harassment." It explains how anti-gay harassment is rooted in sexist attitudes, and it addresses why the similarities between anti-gay harassment and "peer sexual harassment" justify a common solution to both problems. Finally, Part V concludes that while the application of Title IX is the most effective way to protect students from the most vicious forms of anti-gay harassment, schools must teach a broader understanding of homophobia and heterosexism before gay students can truly have equal opportunities in the public education system.

II. "Peer Sexual Harassment" Under Title IX

In the midst of the women’s movement of the 1970s, Congress enacted Title IX to prohibit the disparate treatment of women and men who worked in the educational field, as well as to prohibit the disparate treatment of female and male students. With the passage of Title IX, Congress sought to remedy discrimination in school admissions policies, hiring and promotion policies, and the allocation of federal funds in school athletic programs, and generally to assure that girls and boys have the same educational opportunities.

After Professor Anita Hill’s televised testimony in Clarence Thomas’ Supreme Court confirmation hearings, sexual harassment became more commonly recognized as yet another form of sexual discrimination. Women and girls soon began to pursue sexual harassment claims in

23. See H.R. REP. No. 92-554 (1972), reprinted in 1972 U.S.C.C.A.N., LEGISLATIVE HISTORY 2462, 2511-12 (stating that a prohibition of sex discrimination in education was necessary because of the higher standards placed on female applicants to education institutions and the lower salaries offered to female professors in comparison to male professors); 118 CONG. REC. 5, 5803 (1972) (statement of Sen. Bayh) (stating that the crux of Title IX is to ban sex discrimination in areas such as admission policies and scholarships associated with federally-funded educational programs); see also Mark Blais, Comment, The Department of Education Clarifies Its Position Concerning Peer Sexual Harassment: But Will Federal Courts Take Notice?, 47 CATH. U. L. REV. 1363, 1363-64 (1998) (indicating that the lack of a federal statute addressing sex discrimination in schools motivated Congress to enact Title IX).
24. The term "peer sexual harassment" did not exist until after the 1991 Clarence Thomas-Anita Hill hearings, when a few cases began to surface in which students sought money from school districts for the failure of school administrators to stop sexual harassment. See Kristina Sauerwein, Districts Get Word; Control Sex Behavior, St. Louis Post-Dispatch, Nov. 26, 1999, at 1A. In 1993, a much-publicized study conducted by the American Association of University Women
the context of education in far greater numbers than they had before. People began to see that Title IX and other federal statutes might be used to force educators to stop sexually offensive or demeaning harassment in schools. Though the first sexual harassment lawsuits against schools usually involved a female student alleging that a male teacher either demanded sexual favors or created a sexually "hostile environment," student plaintiffs soon began to argue that schools have a duty to protect them from a sexually "hostile environment" created by other students. Plaintiffs brought claims under several federal statutes, using a variety of theories of liability: they filed claims pursuant to 42 U.S.C. § 1983 under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution, as well as under Title IX.

Although the outcome of these cases, termed "peer sexual harassment" cases, varied widely, they helped to change public sentiment. The cases revealed that, for some students, going to school is a daily ritual of humiliation accompanied by physical and verbal torture. For example, LaShonda Davis, whose case appeared before the Supreme Court, suffered for a year while a fellow fifth grader grabbed her breasts and crotch and sexually threatened her. In another case, a male student on a school trip raped a fellow female student at knifepoint after the girl and her mother made several complaints, in vain, that the boy was sexually harassing her. Still other victims alleged that they had repeatedly been the victims of sexually offensive insults, and had been spit on, shoved, hit, and kicked, all with the knowledge of school officials.

In 1988, the First Circuit was the first court to recognize a "hostile environment" sexual harassment claim under Title IX in the context of a surgical residency program. In Lipsett v. University of Puerto Rico, the circuit court applied the Title VII standard for proving discriminatory treatment by a supervisor to this specific situation because the plaintiff was an employee as well as a student of the program. For the next eleven years, the circuit courts struggled with whether schools had a duty under any federal statute to protect students from a sexually "hostile en-

33. A California court was the first to describe such a case as "peer sexual harassment" in Doe v. Petaluma City School District, 830 F. Supp. 1560 (N.D. Cal. 1993). The term probably originated in the media, however. For an example of an early media use of the term, see Susan Swartz, My 2 Cents Commentary, THE SALT LAKE TRIB., Feb. 23, 1992, at F7 ("[M]ore people are recognizing an offense called peer sexual harassment, student to student, as prevalent in elementary and secondary schools.").

34. See Blais, supra note 2, at 1387-99 (describing the various theories of liability or non-liability proposed by the circuit courts).


36. See Davis IV, supra note 9, at 633-34.

37. See Blais v. Kentucky Sch. for the Deaf, 142 F.3d 360, 361 (6th Cir. 1998).

38. See, e.g., D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (involving allegations by two female students that they were physically, verbally, and sexually molested on a regular basis by several male students); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp 162, 166-67 (N.D.N.Y. 1996) (involving claim that plaintiff and other girls were subjected to sexual slurs; had their bras snapped, hair cut, breasts grabbed; and were spit on, shoved, hit, and kicked by their classmates over a six-month period).

39. See Blais, supra note 23, at 1383-84 (discussing Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), which held that a university can be held liable under Title IX because university officials knew or should have known of sexual harassment creating a hostile environment).

40. 864 F.2d 881 (1st Cir. 1988).

41. See id. at 897.
environment” created by other students. In 1999, the Supreme Court finally settled the matter in *Davis v. Monroe County Board of Education*.

The plaintiff in *Davis* was LaShonda Davis, a fifth grade student from Georgia, who brought suit under Title IX, claiming that her school had a duty to stop a male classmate from sexually harassing her after she and her mother complained to school officials. The trial court dismissed LaShonda’s case for failure to state a claim upon which relief could be granted. The Eleventh Circuit initially reversed the decision, but it reheard the case *en banc* and subsequently affirmed the dismissal. However, the Supreme Court reversed the circuit court’s holding and set the standard of school liability for “peer sexual harassment.” The Court held that a school can be liable to a student under Title IX if school officials remained “deliberately indifferent” despite having actual knowledge that the student was being sexually harassed by other students. The Supreme Court reasoned that school officials engage in sex discrimination when they sit idly by and knowingly allow a student to suffer in a sexually abusive environment.

Although the facts of *Davis* involved a female victim of harassment perpetrated by males, the Supreme Court did not specifically limit its holding to situations where a male student has harassed a female student. The Court simply defined actionable “peer sexual harassment” as harassment “that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” This definition leaves open the possibility that students may bring successful claims arising from a variety of scenarios, including ones involving students who have had to endure harassment because they do not conform to gender norms. Lower courts will soon have to decide whether the Supreme Court’s definition of “peer sexual harassment,” defined within a presumption of heterosexuality, applies to students whose schools have ignored known instances of anti-gay harassment.

42. See Blais, *supra* note 23, at 1386-99 (detailing the various and conflicting approaches federal courts have used when ruling on school liability for “peer sexual harassment” before the Supreme Court ruled on the issue in *Davis IV*).
43. *Davis IV*, *supra* note 9.
44. See *Davis IV*, *supra* note 9, at 635, 636.
45. See *Davis I*, *supra* note 9.
46. See *Davis II*, *supra* note 9.
47. See *Davis III*, *supra* note 9.
48. See *Davis IV*, *supra* note 9.
49. See id. at 647.
50. See id. at 650 (“[S]chool officials are properly held liable . . . where they are deliberately indifferent to sexual harassment, of which they have actual knowledge.”).
51. See id. at 650.
II. THE INSUFFICIENCY OF CURRENT EFFORTS TO AMELIORATE
THE PROBLEM OF ANTI-GAY HARASSMENT IN SCHOOLS.

Gay students have the greatest likelihood of being protected from
harassment if they are treated as victims of "peer sexual harassment" who
have a cause of action under Title IX. Unfortunately, no federal court has
yet afforded them that right. Some states and communities have made
efforts to address anti-gay harassment, but these efforts are few and far
between, and they fall short of ensuring uniform protection to all gay stu-
dents in schools across the nation. Although many states have statutes
prohibiting sex discrimination in schools, few of these state statutes iden-
tify sexual orientation as a protected classification. Unless the state
statute explicitly prohibits discrimination in education on the basis of
sexual orientation, a court is likely to refuse to hold that a statute pro-
hibiting sex discrimination encompasses anti-gay harassment.

In reaction to the wave of sexual harassment lawsuits against
schools, a limited number of states have passed statutes that prohibit stu-
dent-on-student sexual harassment in schools. A smaller number of

52. While one victim of anti-gay harassment was able to convince a circuit court that his school did
not afford him equal protection because of his sex, to date, no court has considered a Title IX
claim under similar circumstances. In Nabozny v. Podelesny, the Seventh Circuit upheld an equal
protection claim that Jamie Nabozny's sex was the reason school administrators failed to protect
him from harassment and abuse because the school had previously taken action when female
victims complained. See 92 F.2d 446 (7th Cir. 1996). However, had the school also ignored the
complaints of a lesbian student, the court might have been less willing to acknowledge that the
school had engaged in discriminatory conduct. The same is true if a school ignores all students'
complaints of peer harassment, regardless of the complainant's sex. See, for example, Seamon
v. Snow, 84 F.3d 1226 (10th Cir. 1996), in which the court held that defendant school did not dis-
criminate against male plaintiff when it ignored his complaints of sexual harassment because the
school took no action when female students were hazed. For a further discussion of the "equal
opportunity harasser," see infra note 119 and accompanying text.

53. See infra notes 58-59, 68-71 and accompanying text (discussing the few state statutes that spe-
cifically prohibit discrimination on the basis of sexual orientation and school districts that have
created policies and programs in order to better serve the needs of gay students).

54. Only Connecticut, the District of Columbia, Massachusetts, Vermont, and Wisconsin prohibit dis-
crimination on the basis of sexual orientation in schools. Connecticut guarantees all children
"equal opportunity to participate in the activities, programs and courses of study offered in such
public schools . . . without discrimination on account of . . . sexual orientation." CONN. GEN. STAT.
ANN. § 1-15(c) (West, WESTLAW through 2000). See also D.C. CODE ANN. § 1-2520
(WESTLAW through 1999-1998 Dist. Council Sess.); MASS. GEN. LAWS ANN. ch. 76, § 5 (West,
WESTLAW through 1999 First Annual Sess.); VT. STAT. ANN. tit. 16, § 11(a)(26) (WESTLAW
through 1999 Legis. Sess.); WIS. STAT. ANN. § 118.113(1) (West, WESTLAW through 1999 Act

55. See infra Part III (discussing the courts' refusal to include anti-gay harassment within the scope
of Title VII, the federal statute prohibiting sex discrimination in employment).

56. Minnesota was the first state to pass a statute prohibiting peer sexual harassment. See MING.
STAT. ANN. § 363.01(41) (West, WESTLAW through 1999 First Legis. Sess.) (effective 1982);
Monica L. Sherer, Comment, No Longer Just Child's Play: School Liability Under Title IX for
Peer Sexual Harassment, 141 U. PA. L. REV. 2119, 2139 (1993). Other states have followed Min-
nesota's lead. See, e.g., CAL. EDUC. CODE § 212.5 (West, WESTLAW through 1999 portion of
1999-2000 Sess. and First Ex. Sess.); CAL. EDUC. CODE § 231.5 (West, WESTLAW through 1999
portion of 1999-2000 Sess. and First Ex. Sess.); FLA. STAT. ANN. § 230.23(6)(d)(8) (West,
WESTLAW through 1999 First Legis. Sess.); WASH. REV. CODE ANN. § 28A.640.020(2) (West,
WESTLAW through 1999 First Special Sess.). For a discussion of these state statutes, see Lisa M.
states have enacted statutes prohibiting peer harassment of gay students in particular. For example, the Vermont legislature defines "unlawful harassment which constitutes a form of discrimination" as "verbal or physical conduct based on a student's race, creed, color, national origin, marital status, sex, sexual orientation or disability and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."57

California recently enacted a statute that specifically prohibits harassment in schools based on sexual orientation.58 In addition, a few states have non-discrimination educational statutes that include sexual orientation as well as hate crime statutes that could protect gay students from violence in schools.59 Nevertheless, most states do not specifically protect gay students from harassment in their schools. In those states, gay students have no choice but to convince a court that their school's "deliberate indifference" to anti-gay harassment should be treated the same as indifference toward "peer sexual harassment" under Title IX.

Although gay students living in the few states that explicitly prohibit sexual orientation discrimination in education certainly have more protection than students in other states, even the statutes that include sexual orientation may be inadequate. Plaintiffs still must prove that their sexual orientation was the motivating factor for the school's action or inaction: "[c]urrent laws afford relief only when the victim of harassment is able to demonstrate that the school and/or harasser acted or failed to act specifi-
cally by referring to the victim’s sexual orientation and making a decision based on that sexual orientation. 61

In addition, even states that have policies to handle gay students’ complaints of harassment may not always enforce those policies to the benefit of the complaining students. Instead of actually dealing with the harassment, school officials may opt to “pass the buck” by allowing the complaining student to leave the school by transferring, dropping out of school completely, 62 or doing a “home study.” 63 This approach treats the student victims as the problem, shuffling them from school to school until they finally drop out of the public educational system altogether. For example, in Wisconsin, where both a statute and school policy prohibiting discrimination on the basis of sexual orientation are in place, 64 Jamie Nabozny’s school took little action to protect him. 65 School officials rearranged Jamie’s schedule to avoid the harassing students, rather than suspending the perpetrators until they learned not to abuse their classmate. 66 As a result, Jamie, like many other gay students, transferred and eventually dropped out of school in fear for his life. 67 While a few cities may offer gay students who cannot attend regular public schools because they fear for their physical safety an opportunity to attend a school specifically for gay students, 68 most do not provide such an alternative.

Despite the obvious problems with these statutes, state and local laws that prohibit sexual orientation discrimination are particularly useful in


62. See Interview with employees of the Los Angeles Gay and Lesbian Center’s Safe Haven Project, in Los Angeles, Cal. (Dec. 1999) [hereinafter Interview with Safe Haven]; see also Boxall & Noriyuki, supra note 2.

63. For example, in the fall of 1998, a student in Lancaster, California was allowed to do an independent study project rather than attend classes because his safety was in jeopardy due to sexual orientation harassment. His perpetrators were given a mere two-day suspension. See Interview with Safe Haven, supra note 62. See also Boxall & Noriyuki, supra note 2 (quoting the founder of a gay-straight student group in a California high school who dropped out and took up independent studies as saying "[t]he crap they put me through was not worth a high school education").

64. See Nabozny, 92 F.3d at 453 (citing Wis. STAT. ANN. § 118.13(1) (West, WESTLAW through 1999 Act 25, published Dec. 31, 1999)).

65. See id. at 451-52.

66. See id. at 452.

67. Jaime Nabozny attended a Catholic school for part of his eighth grade year in order to avoid the torment, but apparently no private school was available to him for high school. See id. at 452. The Wisconsin Department of Social Services ordered Nabozny to return to his high school when his parents allowed him to stay home rather than face daily brutality at school. See id.

68. The EAGLES Center is a school operated by the Los Angeles Unified School District for gay students, all of whom felt that it was impossible for them to continue attending the regular public schools because of the violence and harassment inflicted upon them. See Bettina Boxall & Tammerlin Drummond, Teens Find Haven in L.A. Program: For Gay Students Who Have Been Harassed or Isolated in Regular Schools, EAGLES Center Offers Alternative to Dropping Out, L.A. TIMES, Jan. 10, 1994, at A16. A similar public school operates in Manhattan. See Jessica Kowal, Is Separation the Best Answer?, NEWSWEEK, Apr. 24, 1998, at A35; Margaret Ramirez, Harvey Milk School: Gay Students Learn at Their Own Place, NEWSWEEK, May 7, 1998, at B25. A private school serving the same purpose operates in Dallas. See Liz Stevens, Academic Acceptance: Dallas Private School for Gays Lets Teens Be Themselves, FORT WORTH STAR-TELEGRAM, Oct. 6, 1998, at 1.
that they specifically target homophobia and heterosexism as problems in their own right rather than only tangents to sex discrimination. Such statutes are sometimes complimented by affirmative efforts to make schools safer and less alienating for gay students. Some school districts, individual schools, and individual teachers have created and implemented educational programs that emphasize the value of diversity. Some of these programs use films or local speakers bureaus to address misinformation, confusion, and even hostility toward gay issues and people. Other programs teach students about the contributions of gay people and the discrimination gay people face. Despite the beneficial effects these programs may have for gay and non-gay students alike, the programs are usually labeled "controversial" and are subject to the opposition of parents and the community at large. Some states even have anti-gay educational statutes that ban teachers from addressing homosexuality in schools or from expressing the view that homosexuality is acceptable. Even when school board of-

69. See, e.g., Gary Putka, Uncharted Course: Effort to Teach Teens About Homosexuality Advances in Schools: Tolerance, AIDS Prevention are Goals; Critics Say This 'Promotes' Gay Lifestyle, Students Tell of Harassment, WALL ST. J., June 12, 1990, at A1; Michael Chiusano, Valueless Sex Education Sneaks Into Schools, Bypasses Parents, ARIZ. REPUBLIC, Sept. 29, 1996, at H1.


71. See Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1149-51 (C.D. Cal. 2000) (holding that students would be irreparably injured if the school board continues to prohibit a Gay-Straight Alliance from meeting because the prohibition prevents the school from effectively addressing homophobia).

72. See RUTHANN ROBSON, GAY MEN, LESBIANS AND THE LAW 55-69 (1997) (discussing lawsuits where educators' efforts to promote tolerance for gay people were challenged); Rene Sanchez, Educators Under Pressure on Gay Issues: Activists Attempting to Quash Any Talk of Homosexuality, WASH. POST, May 11, 1996, at A1 (discussing attacks in legislatures nationwide on teachers and curricula that mention gay people or homosexuality).

73. See, e.g., ALA. CODE 1975 § 16-1-28 (WESTLAW through 1999 Second Special Sess.) (Alabama law requiring that "no public funds or public facilities to be used to promote lifestyles or activities prohibited by sodomy and sexual misconduct laws"); ARIZ. REV. STAT. ANN. § 15-716(C) (West, WESTLAW through 1999 First Reg. Sess. and Second Special Sess.) (Arizona statute prohibiting any educational material which "promotes a homosexual life-style" or "portrays homosexuality as a positive alternative life-style"); MISS. CODE ANN. § 37-13-171(1)(c) (West, WESTLAW through 1999 Reg. Sess.) (Mississippi statute requiring that sex education programs teach current Mississippi law regarding homosexual activity, which criminalizes sodomy (MISS. CODE ANN. 97-29-59 (West, WESTLAW through 1999 Reg. Sess.))); S.C. CODE ANN. § 59-32-30(A)(5) (WESTLAW through 1999 Reg. Sess.) (South Carolina statute requiring that health education programs "may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases"); TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2) (West, WESTLAW through 1999 Reg. Sess.) (Texas statute mandating that materials in education programs for minors must "state that homosexual conduct is not an acceptable lifestyle and is a criminal offense under § 21.06, Penal Code," even through an intermediate court of appeals found that statute unconstitutional in City of Dallas v. England, 846 S.W.2d 957, 959 (Tex. App. 1993)); cf. MICH. STAT. ANN. § 363.021(1)&(2) (West, WESTLAW through 1999 Reg. Sess.) (Michigan statute mandating that nothing in the Michigan Human Rights statutes shall "be construed to mean that the state condones homosexuality or bisexuality or any equivalent lifestyle" or "authorize or permit the promotion of homosexuality or bisexuality in education institutions or require the teaching in education institutions of homosexuality or bisexuality as an acceptable lifestyle").
ficials or members of state legislatures win the uphill battle of gaining approval for a program, they run the risk of being voted out of office and replaced by people who will promptly remove the program from school curricula. Elected public officials are likely to give in to the demands of their constituents, even to the point of firing school officials who work to support gay students.

Other schools have formed support groups and gay-straight alliances in an attempt to help gay students. Some of these support groups have been successful but, again, there is always the threat of opposition from elected officials and community members. In addition, students who attempt to start such organizations, or who are actively involved with them, risk being martyred for the cause. Even when the school district forms the group, gay students may be too afraid to attend meetings out of fear of “outing” themselves and being subjected to harassment.

74. For example, in 1989, New York City’s school chancellor implemented the “Children of the Rainbow” program, which taught students to appreciate the diversity of their community. The program included independent speakers from the Hetrick Martin Institute for Gay and Lesbian Youth, a resource and educational center for gay youth, who spoke at school assemblies to educate students about what it means to be gay. The program also provided teachers with a list of recommended books that included two children’s books featuring children with gay parents. This resulted in public uproar led by parents’ groups tied to right-wing and religious organizations. The school chancellor was soon replaced, and nearly all acknowledgement of gay people and families was removed from the program. See Liz Willen, ‘Rainbow’ Lite: New Version Drops Mention of Gays, AIDS, NEWSDAY, Jan. 26, 1993, at 3; Weekend Edition (National Public Radio, Nov. 8, 1992) (Maria Hinojosa reporting, interview with Reverend Michael Walker and Frances Kunrotyer, director of the Hetrick Martin Institute).

75. See generally, RITA M. KISSEN, THE LAST CLOSET: THE REAL LIVES OF LESBIAN AND GAY TEACHERS (1997), for a discussion of teachers’ fears that they will be either “out” themselves or be perceived as gay if they support a gay student. Either could put the teacher at risk of losing his or her job.

76. See David Kirby, Teaching Schools a Lesson: Undaunted By the Opposition, Gay Students are Giving Their Schools a Lesson in Tolerance, THE ADVOCATE, Apr. 11, 2000, at 29.

77. Of course, extracurricular clubs for gay students face the same opposition and risk of termination that academic programs do. See, for example, Colin, 83 F. Supp. 2d at 1137, in which students were forced to seek a preliminary injunction in order to be able to form a “Gay-Straight Alliance Club.” In 1996, the Utah state legislature went so far as to ban all school clubs in order to prevent school recognition of a Gay-Straight Alliance at one school. In a strong show of support, students, parents and other supporters stormed the Salt Lake City school board meeting in protest of the ban. However, a district court ruled that the school board may ban clubs not directly linked to curriculum, and a Utah appellate court affirmed. See East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist., CIV.2:98-CV-193J, 1999 WL 1390288 (D. Utah Jan. 8, 1999); see also Hilary Groulage, 300 Students Prod Board to Reinststate Clubs, THE SALT LAKE TRIB., Oct. 21, 1998, at B2; Rights Suit Seeks Club for Gay Students, S.F. EXAMINER, Mar. 20, 1998, at A12. For a discussion of more recent attacks on gay clubs, see Kelly Pearce, School Gay Club Allowed to Stay; Gilbert Organization Unique in Valley, THE ARIZ. REPUBLIC, Feb. 25, 1999, at B1, which describes the attempts of students and elected officials to ban a club for gay students. Another way school officials have tried to prevent the formation of gay clubs is by requiring parental permission. This tactic was attempted and defeated in one Los Angeles high school. See Steve Ryffe, School Board Rejects Parental Oks for Clubs; Education: Some Say Proposal Was Designed to Prevent Establishment of Hoover High’s First Official Homosexual Club, L.A. TIMES, May 8, 1996, at B1.

78. See Pearce, supra note 75 (reporting that students spit on, threw trash at, and verbally attacked a student who formed a gay club). See also Boxall & Noriyuki, supra note 2.

79. See Telephone Interview with Rob Woronoff, Boston Department of Public Health and former workshop facilitator of the Hetrick Martin Institute (Oct. 1998). Woronoff reports that in Boston
the Los Angeles Unified School District took a different approach to gay student groups. The district initially founded Project 10 in one high school to provide mentoring for gay students, and it has since expanded the program to several schools as a somewhat underground support group. Project 10's existence is not publicly announced at school assemblies with other school clubs. To find out the time and place of meetings, students must ask around. This low-profile approach allows the Project 10 students to maintain confidentiality while still finding support among classmates and adult mentors. Project 10 students believe that the program dramatically reduces their feeling of isolation and helplessness, but it does nothing to reduce the harassment they experience; and even Project 10 has its share of opponents.

Despite the benefits that school programs offer by decreasing homophobia and increasing support, understanding and tolerance, they alone are not an adequate solution to anti-gay harassment among students. First, the programs provide only a piecemeal solution to a national problem. Such school programs are few and far between, and each reaches only the students in a specific school or school district. Second, school programs are vulnerable to right-wing opposition and the whims of the voting public. Every time the membership of a school board changes, there is the potential that the continuation of a gay-friendly program will be jeopardized. Finally, in states with anti-gay education statutes, school officials may face the possibility of lawsuits or other repercussions if they attempt to create an environment that is conducive to gay students' education.

To combat these problems, there must be a federal law that supersedes state law and local politics, to ensure that school officials will not only be allowed to address the needs of gay students, but will be required
to do so. Even though liability under Title IX would not go so far as to require tolerance training for students and teachers, it would at least impose a duty on school officials to respond to complaints of sexual harassment from gay students, regardless of the school officials' own homophobia and belief that gay students deserve the mistreatment.

III. SEXUAL HARASSMENT LAW IN THE WORKPLACE AS AN OBSTACLE TO LEGAL PROTECTION FOR GAY STUDENTS

Although Title IX guarantees students a private right of action against their schools if their schools maintain a "deliberate indifference to known acts of peer sexual harassment," gay students will not automatically be afforded that same right. This is because courts have consistently looked to Title VII standards for workplace harassment to determine what behavior constitutes sexual harassment under Title IX, and gays have had no success in gaining protection under Title VII. Specifically, because federal courts have refused to hold that Title VII protects employees from anti-gay harassment, they are likely to hold that student victims of anti-gay harassment cannot recover under Title IX. Nevertheless, several commentators have argued that the courts' categorical exclusion of victims of anti-gay harassment from the protections of Title VII is based on logical fallacies. Their arguments for expanding the scope of Title VII

90. See Davis IV, supra note 9, at 648 (holding that schools can be held liable under Title IX "only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school").

91. See Davis IV, supra note 9, at 647-48 (explaining that the defendant school could have had notice of potential liability based on a National School Boards Association Council of School Attorneys publication which, "[d]rawing upon Equal Employment Opportunity Commission guidelines interpreting Title VII," indicated the possibility of such an interpretation by courts); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (applying the Title VII principles elucidated in Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986), to find that a teacher sexually discriminated against a student when he sexually harassed her); Davis II, supra note 9, at 1193-95 (applying Title VII definitions of sexual harassment to find that plaintiff stated a claim for sexual harassment by another student at her school); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (applying Title VII principles to define "hostile environment sexual harassment" by a teacher in a school under Title IX), rev'd on other grounds, 171 F.3d 607 (8th Cir. 1999); Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 749-50 (E.D. Va. 1995) (concluding that Title VII case law provides guidance in interpreting sexual harassment in the schools under Title IX); Doe v. Petaluma Sch. Dist., 830 F. Supp. 1560, 1571-72, 1575-76 (N.D. Cal. 1993) (discussing use of "hostile environment sexual harassment" under Title VII to interpret peer sexual harassment claim brought under Title IX), rev'd on other grounds, 54 F.3d 1447 (9th Cir. 1995). However, the Supreme Court has recently distinguished the standards for employer liability for harassment in the workplace from school liability for sexual harassment of a student. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277, 281-83 (1998) (distinguishing Title VII and Title IX standards to find that a school district is not liable for a teacher's sexual harassment of a student unless the district had actual notice and was "deliberately indifferent"). The content of sexual harassment is likely to be construed by the courts in the same way in Title VII and Title IX cases, even if the requirements for school and employer liability are different. See cases cited supra note 90.

92. See cases cited infra note 108.
to protect gay employees are equally valid in the context of schools and claims brought under Title IX.

Among other things, Title VII prohibits discrimination on the basis of sex in the workplace. Congress's intent in enacting Title VII was to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." In the thirty-five years since its enactment, courts have expanded the scope of Title VII to prohibit various forms of discrimination beyond a simple refusal to hire women. Two of the most influential decisions in this respect have been *Meritor Savings Bank v. Vinson* and *Oncale v. Sundowner Services*.

In *Meritor*, the Court held that two types of sexual harassment fall within the scope of Title VII: "quid pro quo sexual harassment" (where an employee is forced to submit to sexual requests as a condition of employment) and "hostile environment sexual harassment" (where an employee has to tolerate a sexually demeaning environment as a condition of employment). The Court defined "hostile environment sexual harassment" as a situation in which the victim suffers "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Such unwelcome and offensive conduct is illegal regardless of whether it is inflicted by a superior or by a co-worker.

In *Oncale*, the Supreme Court again widened the scope of Title VII when it held that a claim of sexual harassment is cognizable even if the perpetrator and the victim are the same sex. However, despite the fact that Joseph Oncale, the plaintiff in the case, was the victim of anti-gay epithets and physical anti-gay harassment, the Court completely skirted the question of whether Title VII encompasses harassment based on actual or perceived sexual orientation. The Court held simply that the sexes

93. *Meritor*, 477 U.S. at 64.
96. *See Meritor*, 477 U.S. at 73.
97. *Id.* at 65, 67.
99. *See, e.g., Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 62 (2d Cir. 1998) (stating that a plaintiff can seek relief against an employer for harassment by a co-worker provided that the plaintiff can show both a hostile work environment and a specific basis for holding the employer responsible for the conduct that created the hostile environment); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (holding that co-worker harassment is actionable if the employer knew or should have known the harassment was occurring and took no remedial action).
100. *See Oncale*, 523 U.S. at 82.
101. *See id.* at 77. Joseph Oncale alleged that his male supervisors and co-workers "forcefully subjected [him] to sex-related, humiliating actions," "called him a name suggesting homosexuality," physically assaulted him in a sexual manner, and threatened him with rape. *See id.* This case is further complicated by the fact that Joseph Oncale identifies as heterosexual. *See Brief for Petitioner, at 27-28, Oncale* (No. 96-568) (also available at 1997 WL 458826).
102. The Court did not grant certiorari on the issue of whether homophobic harassment constituted sexual harassment actionable under Title VII. It only granted certiorari on the issue of whether sexual harassment directed at a person of the same sex was cognizable under Title VII. *See On-
of the victim and the perpetrator are not relevant in a Title VII action as long as the harassment is "because of . . . sex." 103 Paradoxically, the Court ignored the fact that lower courts routinely treat the sexes and the sexual orientations of the parties as relevant in determining whether the harassment can be categorized as "because of . . . sex." 104

The Court acknowledged that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex" and that "[a] trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." 105 However, the Court did not discuss that "general hostility" may be in response to how the victim expresses his or her gender rather than in response to the victim's biological sex. Instead, the majority opinion simply reiterated that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.' " 106 Thus, while a lesbian might be harassed because of her sexual orientation, if her harasser does not otherwise display hostility toward women in general, a court need not find that actionable sexual harassment has occurred.

Although attempting to create a bright line rule in Oncale, the Court was superficial and simplistic in its approach to sexual harassment law, providing lower courts with little guidance as to how to apply Title VII to anti-gay harassment. The Court never explained how sexually offensive comments directed at a person could not be discrimination based on sex under the Court's own holding in Meritor. If the harassment is directed at the victim's sexuality and is sufficiently pervasive so as "to alter the conditions of [the victim's] employment," 107 it appears to automatically create a prima facie case of "hostile environment sexual harassment" under Title VII. 108 However, due to the confusing nature of the Court's Oncale
opinion, lower courts may be unable to hold as much. "[W]hen the Supreme Court recognized sexual harassment causes of action under Title VII, it reintroduced the element of sexuality into the notion of 'sex,' creating a tension with its refusal to recognize Title VII protection against discrimination based on sexual orientation."\(^{109}\)

Despite Justice Scalia’s narrow interpretation of Title VII in *Oncale*,\(^{110}\) the very claim of sexual harassment requires one to read beyond the statutory language and to extrapolate to various forms of discriminatory conduct.\(^{111}\) The Supreme Court routinely invokes common law principles to fill in the gaps of statutory language,\(^{112}\) and lower courts have consistently held that "[t]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexually derogatory language is implicit, and thus should be recognized as a matter of course."\(^{113}\) Therefore, in most cases involving a female victim and a male harasser, once the plaintiff has proven that a hostile work en-

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basis of sexual orientation. See EEOC COMPLIANCE MANUAL § 615.2(b)(3) (2000) ("If a male supervisor harasses a male employee because of the employee’s homosexuality, then the supervisor’s conduct would not be sexual harassment since it is based on the employee’s sexual preference, not on his gender.").


110. Despite the defendant’s attempt to convince the Court that Joseph Oncale suffered harassment on the basis of “sexuality,” neither the defense nor the Court ever provided a definition of “sexuality” or explained how one’s “sexuality” could be completely distinct from one’s “sex” or how one’s sexual orientation can be determined without any reference to biological sex. See generally Transcript of Oral Argument, *Oncale* (No. 96-568) (also available at 1997 WL 751912 at *9). For a discussion of Justice Scalia’s theory of textual interpretation of Title VII in the *Oncale* decision, see Davis, supra note 107.

111. The language of Title VII makes no mention of “sexual harassment.” The Supreme Court interpreted the meaning of unlawful sex discrimination to include sexual harassment. See *Oncale*, 523 U.S. at 80; see also Davis, supra note 107, at 1371 ("When Justice Scalia invokes the language of [Title VII] as though it were an explanation, he . . . avoids facing the inconsistency which recognizing sexual harassment actions introduces into Title VII interpretation . . . . [Interpretation of the Title VII language] in greater detail . . . would force him to face the transformation the courts had wrought when they severed sexuality from ‘sex,’ leaving only the thinnest notion of gender remaining.").

112. The Supreme Court has interpreted federal statutes to benefit certain discrete and insular minorities because public values dictate such an outcome rather than because the statutory text dictates it. See Immigration and Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 449 (1987) (citing the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien") (citations omitted); United Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (holding that Title VII does not preclude employers and union from utilizing affirmative action programs to help minority employees even though such programs are interpreted by some as discriminatory). The Court will often look to public values in interpreting and applying statutes. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1010-17 (1989). As Professor Eskridge acknowledges, however, the problem is deciding whose public values ought to be used. See id. at 1009-10. Professor Eskridge argues that the Court favors “establishment values” which reflect segments of the population that are wealthy, influential, and well organized—the same population segment that tends to dominate the political arena. See id. at 1088-91. In a country with a wide spectrum of attitudes toward gay people, and an only occasionally well organized gay movement, there is hardly a consensus among the public, let alone among the Justices, as to whether discrimination against gay people should be prohibited by federal law.

environment existed, she has *per se* proven discrimination based on sex.\(^\text{114}\) Courts have not insisted that she prove that but for her being female, the harassment would not have occurred.

The requirement that a plaintiff show that but for his or her sex no discrimination would have occurred is inconsistent with prior case law. In *Price Waterhouse*, the Supreme Court held that an employer can be liable for sex discrimination under Title VII for making employment choices that are rooted in sex stereotypes, thereby rejecting the "but for" test.\(^\text{115}\) Although *Price Waterhouse* involved promotion decisions rather than sexual harassment, the Court's analysis is applicable to any claim of sex discrimination. In *Price Waterhouse*, the Court held that the defendant employer engaged in sex discrimination when it refused to promote a female employee because she did not act and dress in a sufficiently feminine manner.\(^\text{116}\) Although the plaintiff did not claim, nor could she show, that the employer categorically chose men over women for promotions, the Court held that the plaintiff could state a claim under Title VII. In other words, the claim withstanded summary judgment even though the plaintiff did not allege that, but for her being a woman, she would have received the promotion in question.

Despite the elimination of the "but for" test in *Price Waterhouse*, in *Oncale* the Supreme Court emphasized the importance of the "but for" test in hostile environment sexual harassment cases.\(^\text{117}\) This approach allows lower courts to apply the "but for" test as a way to bar recovery for sexually offensive harassment that has any homophobic component to it.\(^\text{118}\) By requiring the victim to show that the harassment would not have

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114. See Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1424 (N.D. Cal. 1996) ("[H]ostile environment sexual harassment is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof.").

115. See *Price Waterhouse* v. Hopkins, 490 U.S. 228, 240-41 (1989). ("[S]ince we know that the words 'because of' do not mean 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations . . . even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.").

116. See id. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). Some partners at Price Waterhouse described the plaintiff, Ann Hopkins, as "macho" and suggested that she "take a course at charm school" and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances for partnership. See id. at 235.

117. Justice Scalia emphasized the "but for" test in his majority opinion. See *Oncale*, 523 U.S. at 81. Justice Thomas also dwelled on the "but for" test in his concurrence, emphasizing that he only agreed that a claim of same-sex harassment was cognizable if the discrimination could be shown to be ""because of . . . sex."" Id. at 82 (Thomas, J., concurring). This language implies that he would not agree that harassment based on sex stereotypical notions of gender, such as the stereotypes that the employer in *Price Waterhouse* relied on when making promotion decisions, would present a valid claim of "hostile environment sexual harassment." The argument in the *Oncale* concurrence contradicts the Court's reasoning in *Price Waterhouse*. Indeed, had the *Price Waterhouse* Court insisted that a Title VII violation had not occurred unless the discrimination was "because of sex" as defined by the *Oncale* court, the case would have been decided differently.

118. See cases cited infra note 141.
occurred but for the victim’s sex, federal courts have created a legal paradox known as the “bisexual defense” or the defense of the “equal opportunity harasser.” Several courts have indicated in dicta a realization that it is illogical that an individual who subjects others to a barrage of sexually offensive comments will escape liability if the victims of the abuse happen to be both men and women. Even questions raised by the Justices during oral argument in *Oncale* hint at an awareness of the illogicality of such situations. Nevertheless, a court has yet to hold that the “but for” test is no longer applicable in “hostile environment sexual harassment” cases.

The “but for” test comes from a strict interpretation of the language of Title VII, defining discrimination “because of . . . sex” as nothing more than discrimination that would not have occurred had the plaintiff been a different biological sex. A strict interpretation of the language of Title VII does not account for the reality that both men and women may be the victims of sex discrimination at the hands of the same harasser. However, the definition of sexual harassment should allow the law to address situations of equal opportunity harassment. Courts generally define “hostile environment sexual harassment” as sexually offensive conduct that sub-

119. See Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 351 (1990) (noting the anomaly that “[t]he identical offense is sex discrimination under Title VII when perpetrated by a man against a woman, by a man against a man, by a woman against a woman, or by a woman against a man; yet, if a bisexual of either sex preys equally upon men and women, he (or she) is beyond the reach of Title VII”); Sandra Levitsky, Note, *Footnote 55: Closing the “Bisexual Defense” Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1027-30 (1996) (discussing the illogic in finding no cause of action against an employer who sexually harasses both male and female employees).

120. See, e.g., Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 761 & n.6 (D.D.C. 1995) (“[T]his Circuit apparently does not recognize a Title VII cause of action for sexual harassment when the supervisor is bisexual . . . . This would appear to produce an anomalous result.”); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336-37 (D. Wyo. 1993) (“Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks . . . . [T]his Court reasons that the equal harassment of both genders does not escape the purview of Title VII in the instant case.”); see also Paul, supra note 119, at 351 (noting that “the bisexual supervisor does raise a perplexing doctrinal anomaly”).

121. See Transcript of Oral Argument, *Oncale* (No. 96-568) (also available at 1997 WL 751912 at *8-*12).

122. Some courts have, however, held that a harasser who targets both men and women may still be liable under Title VII. See, e.g., McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) (“It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.”); Steiner v. Showboat Operating Sys., 25 F.3d 1459, 1464 (9th Cir. 1994) (refusing to rule out the possibility that both men and women subjected to verbal sexual abuse by the same employee would have valid claims for sexual harassment); *Chiapuzio*, 826 F. Supp. at 1337 (“The principal flaw in the defendant’s argument is that it assumes that if a harasser harasses both genders equally, it necessarily follows that the harasser did not harass the employees “but for” their gender.”).

123. Even before *Price Waterhouse*, at least one circuit did not apply such a strict interpretation of Title VII. See Pitre v. Western Elec. Co., Inc., 843 F.2d 1262, 1272 (10th Cir. 1988) (rejecting employer’s defense that it could not have engaged in sex discrimination against the plaintiff because similarly situated male employees were also demoted and because more women than men were promoted during the relevant period).
stantially and perversely interferes with the victim's ability to work, a
definition based on the Meritor holding. The definition does not require
that there be a particular reason or motivation underlying the harasser's
offensive conduct. The Supreme Court has already used a definition of sex
discrimination broader than the "but for" test when it held that Title VII
prohibits discrimination in hiring and promotion decisions against specific
types of people of the same sex, such as married women, pregnant
women, women with small children, and insufficiently feminine women. The
Court should therefore apply Title VII broadly in the context of hos-
tile environment sexual harassment as well.

With respect to anti-gay harassment, the "but for" test is especially
pernicious because it forces the victim of harassment to convince a court
that his or her sexuality or sexual orientation was not the reason for the
harassment. Furthermore, the application of the "but for" test creates a
situation where gay men and lesbians are liable for harassing others in a
sexually offensive manner but are barred from recovery when they are
victims of pervasive sexually offensive conduct in the workplace. "Based
on the same alleged behavior, a straight perpetrator does not en-
gage in sexual harassment because he is not expressing his sexuality to-
wards the plaintiff; a gay perpetrator does engage in sexual harassment
because he is expressing his sexuality towards the plaintiff." In addition,
because of the "but for" test, virtually identical behavior, such as genital
groping and propositions for sex, can be interpreted as "because of sex" in
some cases and but not in others.

The "but for" test is deficient because it "ignores the essence of the
offensive behavior." To remedy this deficiency, one commentator sug-
ests replacing the "but for" test with one that "asks whether the victim

124. See Meritor, 477 U.S. at 64-67.
125. See, e.g., Inda v. United Air Lines, Inc., 565 F.2d 554, 562 (9th Cir. 1977) (prohibiting an airline
from employing only unmarried women); UAW v. Johnson Controls, Inc., 499 U.S. 187, 197-99
(1991) (barring employers from discriminating against women because of their childbirthing
status); Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (disallowing discrimination
against women with young children); Price Waterhouse, 490 U.S. at 250 (1989) (prohibiting dis-
crimination against women who are not sufficiently "feminine").
126. See cases cited infra note 141.
127. See Levitsky, supra note 119, at 1034-36; Samuel A. Marcossen, Harassment on the Basis of
128. Carolyn Grose, Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII,
129. Grose, id. at 375-76, 387-88, describes how identical situations are interpreted differently based
solely on whether the fact finder knows that the alleged harasser is gay. Grose argues that Title
VII is not a effective tool to prevent anti-gay harassment in the workplace because Title VII
only protects men and women who are perceived to be straight, and offers no such protection for
those who are, or are perceived to be, gay. Id. at 388. Compare Joyner v. AAA Cooper Transp.,
597 F. Supp. 537, 541-42 (M.D. Ala. 1983) (holding employer liable for sexual harassment of
68, 71 (Cal. Ct. App. 1987) (absolving employer from liability for heterosexual male's harass-
ment of another male under California law which prohibits discrimination "because of sex").
130. Grose, supra note 128, at 382.
endured harassment that perpetuated gender stereotypes.\textsuperscript{131} When the proposed test is used, anti-gay harassment is clearly an example of harassment based on stereotypical gender roles: the harasser believes the victim appears or acts in a way that is improper for his or her biological sex, and the harasser punishes the victim for the transgression and nonconformity.\textsuperscript{132} This test clearly conforms to the principle articulated in \textit{Price Waterhouse} that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."\textsuperscript{133}

As a result of the Supreme Court's ambiguity in articulating what factors constitute "sex" in sex discrimination cases, lower courts have exercised wide "discretion to invoke a victim's sexual orientation as a reason for dismissing a Title VII cause of action."\textsuperscript{134} If courts consistently used sexual orientation as a factor in determining whether a Title VII action exists, they would fully appreciate the complexity of the issue. Professor Samuel Marcosson, formerly an attorney for the EEOC Appellate Division, argues that sexual orientation is always an element of sexual harassment, either explicitly or implicitly.\textsuperscript{135} For example, in the "classic" sexual harassment case of a male harasser who makes unwelcome, sexually suggestive comments to a female victim, both biological sex and sexual orientation are key. The harasser not only harasses because the victim is female but also because he is a heterosexual male. In addition, the harassment may be motivated by the presumption that the victim is heterosexual and could potentially have welcomed the comments. It is not as simple as saying the victim was harassed because of her sex, or that but for her femaleness, she would not have suffered the harassment.\textsuperscript{136} It is certainly possible that if the victim publicly identified as a lesbian, the harasser would have focused his unsolicited sexual attention elsewhere. However, it is just as possible that the lesbian victim is the subject of harassment because the harasser is threatened by her sexual orientation. In some cases, sexual desire is the motive for the harassment, but in other cases, sexual hostility is the motivating factor. As for the equal opportunity (or bisexual) harasser, the sex of the victim may be irrelevant to the harasser's sexual desire or hostility.

Harassment that takes the form of sexually demeaning insults and physical assaults cannot simply be separated into two categories, harassment on the basis of sex and harassment on the basis of "sexuality," as

\textsuperscript{131} Levitsky, \textit{supra} note 119, at 1038.
\textsuperscript{132} See Marcosson, \textit{supra} note 127, at 32-34.
\textsuperscript{133} \textit{Price Waterhouse}, 490 U.S. at 251.
\textsuperscript{134} Levitsky, \textit{supra} note 119, at 1035.
\textsuperscript{135} See Marcosson, \textit{supra} note 127, at 15-23.
the Supreme Court implied in *Oncale*.\footnote{137} To create such categories is to create "an artificial bifurcation of 'sex' into gender and sexual orientation."\footnote{138} Attacks on a person's sexuality serve to punish the victim for deviating from the perpetrator's notion of how a person of that sex should think, feel, and act.\footnote{139} Regardless of the biological sex or the sexual orientation of the particular victim, sexual insults remind the victim that she or he must conform to sex stereotypes in order to avoid harassment. Conforming to a stereotype might entail working in a job that is typical for a person of the victim's sex, wearing gender specific clothing, or engaging in sexual activity that is deemed appropriate for one's biological sex.

This point has not been completely lost on the judiciary. A tiny number of state courts have resisted applying the "but for" test in sexual harassment cases.\footnote{140} Although the federal courts have not yet adopted the same reasoning,\footnote{141} they eventually may. During oral argument in *Oncale*, Justice Ginsburg\footnote{142} seemed to understand that anti-gay harassment is harassment that enforces sex stereotypes and prescribed gender norms. She posed the following question to counsel for the defense:

> Why couldn't [harassment] be because you're not the right kind of man, just as with respect to women, and wasn't there, at least in one case, a statement to the effect of what Title VII is aimed at is getting rid of stereotypical notions about the way men are or the way women are . . . So if that's what Title VII is

\footnote{137}{See Davis, *supra* note 109, at 1344 (arguing that the Supreme Court opinion in *Oncale* makes this distinction "harder to maintain").}

\footnote{138}{Id.}

\footnote{139}{See David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1328-32 (1999) (arguing that similar judgments are made when assessing mental illness).}

\footnote{140}{See Melnychenko v. 84 Lumber Co., 676 N.E.2d 45, 48 (Mass. 1997) (holding that any offensive conduct of a sexual nature can be considered sexual harassment under Massachusetts state law regardless of the sexual orientations of the harasser or victim); Cummings v. Koehnen, 556 N.W.2d 586, 589 (Minn. Ct. App. 1996) (holding that as long as complained of conduct is of a sexual nature, claimant need not prove that it was "because of" or "based on" gender or sexual orientation in order to establish prima facie case of sexual harassment); Zalewski v. Overlook Hosp., 692 A.2d 131, 135-36 (N.J. Super. Ct. Law Div. 1996) (holding that state's "Law Against Discrimination" prohibits male-on-male sexual harassment based on failure to conform to gender stereotypes).}

\footnote{141}{Since the Supreme Court's ruling in *Oncale* that same-sex sexual harassment is cognizable under Title VII, only a few federal courts have considered claims of anti-gay harassment. None have interpreted *Oncale* to prohibit anti-gay harassment. See, e.g., Bibby v. Philadelphia Coca-Cola Bottling Co., 85 F. Supp. 2d 509 (E.D. Pa. 2000) (analyzing *Oncale* to lend weight to court's decision that sexual orientation is not a protected class under Title VII); Retterer v. Whirlpool Corp., No. 9-98-55, 1999 WL 254412, at *2 (Ohio Ct. App. Mar. 26, 1999) (holding that *Oncale* did not affect the court's previous decision that harassment based on the victim's sex orientation was not "because of sex").}

\footnote{142}{While the Westlaw version of the transcript does not identify the name of the Justice asking each question, the voice on the audio recording asking the cited questions is distinctly Justice Ginsburg's. For an audio recording of the Oral Argument in *Oncale*, see Oyez Oyez Oyez: *Oncale* v. Sundowner Offshore Services, Inc.—Docket (visited Apr. 11, 2000) <http://oyez.nwu.edu/cases/cases.cgi?command=show&case_id=1108>.}
The Court, unfortunately, refused to provide a ruling that would have given a clear answer to Justice Ginsburg’s question. In light of the murky precedent set in Oncale, lower courts must now reconsider whether harassment against an individual because of his or her actual or perceived desire to have sex with someone of the same gender is based on the stereotype that it is unacceptable for that person to have such desires. Clearly not all nine justices on the Supreme Court appear ready to embrace the idea that compulsory heterosexuality reflects and reinforces a gender stereotype. However, among those better versed in the nuances of gender and sexuality, such as scholars of feminist and queer theory, this is a perfectly reasonable and valid argument. Until the day comes when the Supreme Court takes Justice Ginsburg’s suggestion and rules that discrimination against gay people falls within the purview of Title VII, the law of sex discrimination will continue to be an inadequate means to address the plight of gay individuals working in hostile environments. In the meantime, it is imperative that when courts address discrimination against gay students under Title IX, they do not perpetuate the same inadequacies.

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143. Transcript of Oral Argument, Oncale (No. 96-568) (also available at 1997 WL 751912 at *48-*49). This question suggests that at least some of the Justices may be willing to recognize that harassment on the basis of sexual orientation is a form of discrimination based on sex stereotyping. This argument was rejected by the Sixth Circuit in an unpublished opinion. See Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992) at *4-*5. The plaintiff, Ernest Dillon, alleged that he was subject to homophobic taunts and graffiti, which his employer ignored, because his co-workers did not consider him sufficiently “macho.” See id. at *1,*5. The court held that this was not sex stereotyping actionable under Title VII. See id. at *7-*8. The Tenth Circuit also rejected the argument in the school context. See infra text accompanying notes 159-165.

144. The Court made a point of only addressing the question of whether a claim of sexual harassment could exist if the victim and perpetrator were the same gender. See Oncale, 523 U.S. at 76. Despite the defense counsel’s insistence that Joseph Oncale was harassed because of his sexual orientation, not his gender, the Court did not need to reach that issue in its reversal of the Fifth Circuit holding that a Title VII suit for same-sex sexual harassment is cognizable. See id.; Transcript of Oral Argument, Oncale (No. 96-568) (also available at 1997 WL 751912 at *6).

145. Compulsory heterosexuality may be a prescriptive norm more than a stereotype. However, since the Supreme Court has qualified characteristics generally associated with femaleness and maleness as “generalizations” in United States v. Virginia, 518 U.S. 515, 541 (1996), I continue to use the word “stereotype.”

146. See Marcosson, supra note 127; Andrew Koppelman, Why Discrimination Against Lesbian and Gay Men is Sex Discrimination, 69 N.Y.U L. Rev. 197 (1994).

147. Some courts have already applied the same faulty reasoning in Title IX cases. A version of the defense of the “equal opportunity harasser” was successful in one circuit court. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996). The court reasoned that the school district would be liable under Title IX if it treated the claim of girls differently than the claims of boys, but since the school district completely ignored all sexual attacks, it did not discriminate and thus was not liable. See id.
IV. JUSTIFICATION FOR INTERPRETING TITLE IX TO PROHIBIT ANTI-GAY HARASSMENT

Without question, victims of sexual orientation harassment face unique legal issues. Nevertheless, most of these issues are so similar to those facing non-gay victims that they reinforce the need to impose uniform liability for both types of peer harassment. For example, parents, teachers, and school boards often attempt to deny that gay school children exist. Schools are reluctant to create policies that recognize the problems gay students face, preferring to believe that they have no need for such policies. Though such denial may appear unique to gay students, many adults also prefer to deny the fact that school children experience sexuality at all. The entire movement to eliminate comprehensive sex education from school curricula is based on the premise that students will not engage in sexual activity if they never learn about sex. This reluctance to acknowledge that children are sexual beings with sexual identities keeps school boards and school officials from truly addressing the need to create policies about student-on-student harassment that is sexually offensive, sexist, or anti-gay. An honest and realistic approach to students’ sexual desires, fears and confusion—which leads to much of the inappropriate and harmful behavior—would be the first step toward properly educating school officials in how to respond to all types of peer harassment.

A more troubling difference between gay and non-gay victims of harassment stems from the need or desire of some gay children to remain closeted within their schools and homes. Some gay children may not

148. See Teemu Ruskola, Minor Disregard: The Legal Contraction of the Fantasy that Gay and Lesbian Youth Do Not Exist, 8 YALE J.L. & FEMINISM 269 (1996) (arguing that laws governing child custody, adoption, and the employment of gay teachers seek to “protect” heterosexual youth and calling for laws to acknowledge that gay youth exist without any outside influence from gay adults).


150. See, e.g., Eve Jackson, Beyond Sex Education to Abstinence Only Approach, THE INDIANAPOLIS STAR, Sept. 27, 1998, at D3 (“Just as the goal of drug prevention education is not to teach people how to use a needle, the goal of sex education should not be to teach people how to use a condom”); Steven Tobias, On Sex and Singles, PITTSBURGH POST-GAZETTE, June 5, 1997, at A18 (“It wasn’t until idiots like you started lying to children, telling them that pre-marital sex wasn’t wrong, that we had a problem with teen-age pregnancies.”).

151. One researcher found that at least some of his subjects who had committed violent acts against gay men specifically targeted men they found attractive. See COMSTOCK, supra note 20, at 172. A truly honest and realistic approach to sex education would acknowledge that many people have same-sex attractions, even if many never act on them. Addressing paranoia surrounding sexual orientation may alleviate some of the gay-bashing that stems from perpetrators’ own fears that they may be gay.

152. See Julie Carter, Cat, in LESBIANS, GAY MEN AND THE LAW 159, 162 (William Rubenstein ed., 1993) (relating one girl’s experience of being kicked out of her home by her father upon his discovery of her lesbianism); Youth Comm’n and City and County of San Francisco, San Francisco Human Rights Comm’n, Public Hearing: Lesbian, Gay, Bisexual, Transgender, Queer and Questioning Youth 68 (1996) (testimony of Amy Paul), reprinted in Arriola, supra note 149, at 430 (“I was 19 when I came out to my parents. And they said, ‘You can choose that lifestyle or you can
even want their parents or teachers to know that they have been victims of sexual orientation harassment for fear that these adults will learn or assume they are gay. One cannot assume that parents will always support their children and assist them in gaining help from school officials. Internalized homophobia and shame are also likely to keep some children from letting anyone in authority know about the harassment and violence they endure. This reluctance is legally significant because of the requirement that schools have actual knowledge of harassment before they can be found liable under Title IX.

If victims of anti-gay harassment do not immediately report instances of abuse to school officials directly or through their parents, the school escapes liability in any subsequent lawsuits unless the victim can show that a school official actually witnessed the harassment or had actual knowledge some other way. Although non-gay victims of sexual harassment may be more likely to report the abuse, shame and parental disapproval may make even some heterosexual students reluctant to complain as well. For example, a female student who is being harassed because she has engaged in consensual sex may not want her teachers and parents to have any hint that she is sexually active. A policy that allows victims to report harassment anonymously would address the needs of both gay and non-gay victims while effectively giving school officials actual notice.

While these problems may make it more difficult for gay students to deal with harassment, the only issue that is truly unique to gay students is the reluctance of teachers to reach out to help gay victims. One study of teachers found that there were three common reasons for this reluctance. First, the teachers had not been provided with an adequate education regarding what constitutes impermissible student-on-student harassment. Second, the teachers' own feelings of homophobia prevented them from knowing how to handle the issue. The third and most common reason for the teachers' reluctance was their fear that their colleagues would think they were gay or lesbian if they helped a gay victim of peer harassment, which might compromise their reputation and future employment. This fear is not unfounded, for there have been several instances where teachers have been fiercely attacked simply for attempting

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153. See sources cited supra note 152.
154. See Davis IV, supra note 9, at 650.
155. Anonymous reporting does have the inherent problem that the victim cannot be questioned further about the incident, which may be necessary before punishing the harasser. However, anonymous reports can bolster the credibility of a non-anonymous report as well as simply give school officials notice that such harassment is occurring on campus. Many colleges and universities provide such anonymous reporting systems for victims of harassment and/or victims of rape.
to help a student who is or is perceived to be gay. This fear would be alleviated if all teachers were required by law to prevent students from engaging in anti-gay harassment.

Despite these differences between the experiences of gay and straight victims of sexual harassment, it is equally important to protect gay students from harassment that interferes with their education. In its initial review of Davis v. Monroe County Board of Education, the Eleventh Circuit recognized the importance of protecting students from sexual harassment:

[W]here there are distinctions between the school environment and the workplace, they serve only to emphasize the need for zealous protection against sex discrimination in the schools. The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

The Seventh Circuit's description of the importance of protecting children from harassment that interferes with their education applies equally to gay students. Courts must realize that when school officials treat students' complaints of harassment differently based on the actual or perceived sexual orientation of the complaining student, they are engaging in impermissible sex stereotyping. If courts come to appreciate this, schools will be held liable for deliberately ignoring the complaints of

157. In 1992, Concerned Women of America, Inc. filed grievances against a high school teacher in Montgomery County, Maryland. The teacher had showed the film "The Life and Times of Harvey Milk" and had two speakers from the local gay and lesbian speakers bureau come to class, all with the permission of the school principal. The teacher did this in an effort to help two of her students whom the school psychologist had identified as suicidal. Concerned Women of America was represented by two attorneys who interrogated the teacher and accused her of being a lesbian. In a private arrangement, the school offered not to fire the teacher if she would deny that the school had given her approval for the curriculum. See id. at 13-14. New Hampshire teacher Penny Culliton was fired after refusing the principal's order to keep books that portray homosexuality in a positive light, previously assigned as optional reading, out of her classroom. See Patty Henetz, Should Schools Expel Gay and Lesbian Teachers? The Issue Polarizes Communities and the Nation: Homosexual Teachers the Focus of Debate, THE SALT LAKE TRIB., Feb. 8, 1998, at A1. Teachers in California, Connecticut, Indiana, and Utah are also under fire for trying to create a safe space for gay students. See id.

158. Davis II, supra note 9, at 1193 (internal quotations omitted).
gay victims of harassment just as they are liable for ignoring the more commonly understood "peer sexual harassment."

The case of Seamons v. Snow illustrates how courts have wrongfully chosen to ignore the fact that school officials are engaging in sex stereotyping when they ignore students' complaints. In Seamons, a heterosexual male student, Brian Seamons

was grabbed [by his football teammates] as he came out of the shower, forcibly restrained and bound to a towel rack with adhesive tape. Brian's genital area was also taped. . . . [O]ne of his teammates brought a girl that Brian had dated into the locker room to view him . . . while other members of the team looked on.160

After Brian reported the incident to school authorities, his coach "brought Brian before the football team, accused Brian of betraying the team . . . and told Brian to apologize to the team." The school district, however, responded to the incident by canceling the final football game of the season. Angry about the game's cancellation, Brian's classmates threatened and harassed him.162 When Brian sought help, school officials told him that he had brought the harassment upon himself by making the initial complaint, and they told him he "should have taken it like a man." The school officials' callous response to Brian Seamons' complaint was most likely rooted in the sexist and stereotypical notion that boys should be "tough." The circuit court, however, did not agree that the school's response amounted to sex discrimination.165

Similar sexist assumptions were at the heart of a Wisconsin school's lack of action when Jamie Nabozny, a gay student, suffered four years of verbal and physical harassment. Jamie sought help from school administrators after two of his classmates performed a mock rape on him as twenty other students looked on. The school principal "told Nabozny that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."167

The cases of Brian Seamons and Jamie Nabozny demonstrate that both heterosexual students and gay students suffer when school officials make the decision to ignore the pleas for help of a student who does not conform to conventional stereotypes regarding sex. The notion that anyone, male or female, gay or straight, could ever "deserve" such brutal-

159. 84 F.3d 1226 (10th Cir. 1996).
160. Seamans, 84 F.3d at 1230.
161. Id.
162. See id.
163. See id.
164. Id.
165. See id. at 1233.
166. See Nabozny v. Podelesny, 92 F.3d 446, 451 (7th Cir. 1996).
167. Id.
ity and harassment is based on the belief that men and women should each act, appear, and think in a certain sex-specific way, and that any deviation from that norm deserves violent punishment. Acting (or failing to act) based on this belief meets the definition of sex discrimination.

Professor Marcosson explains that harassment based on sex and harassment based on sexual orientation are "species of sex discrimination" because they are both based on sexist stereotypes.\(^\text{168}\) He argues that sexual orientation harassment is gender-based because the harassment reinforces male-created and male-dominated norms and therefore "amounts to a formidable barrier to women's participation and advancement in the workplace,"\(^\text{169}\) or in this context, the classroom. Whether it is sexually demeaning, sexist, or anti-gay, victims of peer harassment should not be made to feel that they, rather than the perpetrators, are the problem because they are not adhering closely enough to gender norms.\(^\text{170}\) In past cases, the federal judiciary had been asked to determine whether a policy or procedure is permissibly based on actual differences between males and females or impermissibly based on stereotypes.\(^\text{171}\) In future cases, courts should determine whether school policies that dictate what is proper behavior for males and females impermissibly punish those who do not conform to stereotypes.\(^\text{172}\)

Anti-gay bias is also a form of impermissible sex stereotyping because it is based in the premise that same-sex attraction is an inappropriate expression of one's gender. "[N]ormative sex stereotyping requires that men be not only aggressive, independent, and competitive, but also heterosexual."\(^\text{173}\) Similarly, "any woman who steps out of role risks being called a lesbian."\(^\text{174}\) Whether it occurs in the workplace or in school, sexual harassment is really more about the expression of gender than about

\(^{168}\) Marcosson, supra note 127, at 7, 22-24; see also Kopperman, supra note 146.

\(^{169}\) Marcosson, supra note 127, at 21-22.

\(^{170}\) See Hearing before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, Second Session on Anti-Gay Violence, 113-15 (Oct. 9, 1986) (testimony of Joyce Hunter). This is similar to traditional notions about victims of rape. Defense attorneys and even many judges blamed rape victims for encouraging the violence inflicted upon them by wearing certain clothing or appearing too attractive. See Susan Estrich, Real Rape 20-21 (1987).

\(^{171}\) In United States v. Virginia, 518 U.S. 515, 550-51 (1996), which involved an equal protection claim, the Court held that the creation of the Virginia Women's Leadership Institute (VWLI) did not remedy the fact that the Virginia Military Institute (VMI) refused to admit female students. Although the district court found that most girls would have more success under the VWLI curricula due to differences between females and males, the Court held that prohibiting all girls from attending VMI, based on the notion that no girls could benefit from the VMI curricula, was impermissibly based on sex stereotypes. See id. at 552.

\(^{172}\) Although there has been limited success in combating prescriptive gender norms with federal statutes, Virginia, 518 U.S. at 541, holding that Virginia could not use generalizations about women's "tendencies" to justify exclusion of all women from adversative training program, and Price Waterhouse, 490 U.S. at 250, holding that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," indicate that federal statutes that prohibit sex discrimination are valid tools for doing so.

\(^{173}\) Bennett Capers, Note, Sex(ual Orientation) and Title VII, 91 COLUM. L. REV. 1158, 1183 (1991).

biological sex. This is clear in situations where there is no issue of sexual orientation: A woman may be picked out for harassment because she is especially attractive or unattractive, aggressive or naive, or unusually sensitive to jokes of a sexual nature. In a school situation, the reasons a student is singled out by his or her peers for sexually demeaning, sexist, or anti-gay harassment may be even more varied. A school-age victim may be early or late in his/her physical development, may have more or less sexual experience than his/her peers, or may simply dress differently. Something about the way the victim manifests his or her biological sex makes the student a target for harassment. An individual student, male or female, can be singled out because of some difference that relates to gender.

Consequently, many instances of sexually offensive harassment are attacks on expressions of gender that violate conventional social norms. The above examples establish that a student's identifying as gay, being perceived as gay, and trying to act and dress as if she were not gay, are all aspects of that student's expression of gender. Harassment based on sexual orientation should be treated the same as "peer sexual harassment" 175. Of course, some of these same traits are the basis for homophobic harassment as well. Unattractive and aggressive women are often labeled lesbian, and particularly quiet or attractive men are labeled gay, whether or not they actually are. See id.; Capers, supra note 173, at 1183; cf. The Los Angeles County Bar Association Report on Sexual Orientation Bias, 4 S. CAL. REV. L. & WOMEN'S STUD. 297, 298 (1995) ("Reports of stereotyping gay attorneys—as 'effeminate' and HIV-infected (for gay men), as unattractive and 'aggressive' (for lesbians), as 'unstable,' 'un-controlled' sexually or criminally-inclined (for lesbians and gay men)—were not uncommon.").

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175. Of course, some of these same traits are the basis for homophobic harassment as well. Unattractive and aggressive women are often labeled lesbian, and particularly quiet or attractive men are labeled gay, whether or not they actually are. See id.; Capers, supra note 173, at 1183; cf. The Los Angeles County Bar Association Report on Sexual Orientation Bias, 4 S. CAL. REV. L. & WOMEN'S STUD. 297, 298 (1995) ("Reports of stereotyping gay attorneys—as 'effeminate' and HIV-infected (for gay men), as unattractive and 'aggressive' (for lesbians), as 'unstable,' 'un-controlled' sexually or criminally-inclined (for lesbians and gay men)—were not uncommon.").

176. See Judy Mann, Making Schools Safe for Girls, WASH. POST, May 7, 1993, at E3 (describing the peer sexual harassment inflicted on girls because of their physical development).

177. See Jane Gross, Schools are Newest Arenas for Sexual Harassment Issues, N.Y. TIMES, March 11, 1992, at B8 (describing how rumor of a female student's promiscuity ignited severe peer sexual harassment inflicted on that student).

178. Our culture's obsession with gossip and speculation about people's sexual orientation based on their physical appearance is well-reflected in popular media reports about the sexual orientation of celebrities. See Andrew Essex, Not So Little Ricky, ENTERTAINMENT WEEKLY, Apr. 23, 1999 (noting that Latin pop singer Ricky Martin's gay following has sparked debate about the singer's sexual orientation); Ann Northop, Lesbians Have Always Run Everything, IN THESE TIMES, June 27, 1999 (speculating that Rosie O'Donnell, cabinet secretary Donna Shalala, and Senator Barbara Mikulski are lesbians and noting that the tabloid press has outed such closeted women); Kevin Spacey Interview, PLAYBOY, Oct. 1, 1999, at 53 (interview with Kevin Spacey about addressing gossip, perpetuated by a cover story in ESQUIRE magazine, that he is gay); Bruce Handy, Roll Over, War d Cleaver and Tell Ozzie Nelson the News; Ellen DeGeneres is Poised to Become TV's First Openly Gay Star, TIME, Apr. 17, 1999 (discussing Ellen DeGeneres' "coming out" to the public after months of gossip). Even non-human television characters have been the subject of such speculation. When the Washington Post identified Tinky Winky as "the gay teletubby" because of the character's telltale purple hue, triangular antenna, and bag identified as a purse, see Michael Colton, Style, WASH. POST, Jan. 1, 1999 at G1, Jerry Falwell started a national panic that the Teletubby show, geared toward a toddler audience, was indoctrinating youngsters into gay life, see Parents Alert, <http://www.liberty.edu/chancellor/nlj/feb99/politics2.htm> (visited Feb. 13, 1999) (website sponsored and maintained by Jerry Falwell warning parents of television shows and movies with offensive content); see also Hanna Rosin, A 'Tubby' Ache for Jerry Falwell, Religious Right Leader Sees Gay Threat in Children's TV Character, WASH. POST, Feb. 11, 1999, at C1. If a sexless, non-human television character can so easily be labeled gay, one can only imagine how easily a child may be the victim of sexual orientation harassment for doing no more than wearing the "wrong clothing" or doing anything that other students believe is gender non-conforming.
because it is harassment based on how the victim intentionally or unintentionally manifests his or her gender. Therefore, schools should be liable to both gay and non-gay victims of peer abuse of a sexual nature. If schools are liable if they ignore the type of “peer sexual harassment” described in Davis IV, they should be liable to all students, not just those who conform to community standards of femininity and masculinity.

A student’s public identification that she or he is gay does not justify treating that student any differently than any other student. It is hard to imagine that a school official would argue that it is defensible to ignore the complaints of a female student who reported that her classmates harassed her because of her bust size because the complaining girl actually does have a large bust. Similarly, the fact that a student victim may actually be gay is no excuse for school officials to ignore the student’s complaints of a sexually demeaning hostile environment. Not only is the act of harassment the same, but the injuries to the victims are also very similar. Many victims of both sexist harassment and anti-gay harassment suffer from depression and low self-esteem that interferes with their ability to function productively in school.

Consider the fact that Title IX most likely compels school officials to stop harassment by male students directed at a girl who wears a short skirt. After the Supreme Court’s ruling in Davis IV, school officials may

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179. In contrast to those who would say that anyone who identifies as gay is “asking” to be harassed, the Seventh Circuit has stated that it was “unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation.” Nabozny v. Podelesny, 92 F.3d 446, 458 (7th Cir. 1996). When a high school prohibited a gay student from bringing a same-sex date to the prom, a district court concluded “that meaningful security measures are possible [to prevent violence erupting at the prom], and the First Amendment requires that such steps be taken to protect rather than to stifle free expression [of gay students].” Fricke v. Lynch, 491 F. Supp. 381, 388 (D.R.I. 1980). The court added:

This case can also be profitably analyzed under the Equal Protection Clause of the Fourteenth Amendment. In preventing Aaron Fricke from attending the senior reception, the school has afforded disparate treatment to a certain class of students—those wishing to attend the reception with companions of the same sex. Ordinarily a government classification need only bear a rational relationship to a legitimate public purpose. . . . [However,] [w]here, as here, government classification impinges on a First Amendment right, the government is held to a higher level of scrutiny. I find [the school principal’s] reason for prohibiting Aaron’s attendance at the reception—[the potential for disruption]—is not sufficiently compelling to justify a classification that would abridge First Amendment rights. Id. at 389, n.6 (citation omitted). Cf Arriola, supra note 149 (arguing that homophobic social policies directed at adolescents coming to terms with their developing sexual and gender identities create injustice); Sonia Renee Martin, A Child’s Right To Be Gay: Addressing the Emotional Mistreatment of Gay Youth, 48 HASTINGS L.J. 167, 182-84 (1996) (arguing that the law allows judges too much discretion in finding instances of child abuse where the child in question identifies as gay).

180. See Sherer, supra note 56, at 2133-34. Sherer reports that female victims of sexual harassment by males experience such symptoms as embarrassment, fear, anger, frustration, loss of confidence, powerlessness, insomnia, depression, absenteeism, tardiness, diminished sense of trust for people in general, and diminished enthusiasm about education. These symptoms are also pervasive among gay students. See Anthony R. D’Augelli & Scott L. Hershberger, Lesbian, Gay, and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems, 21 AM. J. COMMUNITY PSYCHOL. 421, 437 (1993).
no longer get away with refusing to take action because they believe that girls who wear especially short skirts are "asking" for harassment by wandering too far from the social norms of female appearance. Therefore, it logically follows that Title IX should also compel school officials to stop harassment directed at a girl who refuses to wear skirts at all, or a boy who wishes to wear skirts. If school administrators themselves believe, or acquiesce to students' beliefs, that gay students are, in Justice Ginsburg's words, "not the right kind" of boys and girls, and discriminate against them on that basis, their actions are impermissibly based on sex stereotyping and should fall squarely within the prohibitions of Title IX.

In many situations, a school administrator's response may be based on his or her own assumption regarding the victim's sexual orientation. This assumption may be informed by stereotypes of how a gay student looks, acts, and responds to peer harassment, rather than the student's own declaration of his or her sexual orientation. Despite the assumptions of others, some school age victims of anti-gay harassment may still be forming their sexual identities and may not even understand what it means to be gay. Furthermore, because school-age children use anti-gay epithets against victims who do not even identify as gay, it is often impossible to distinguish "peer sexual harassment" from anti-gay harassment.

In one case, a female student charged that her school ignored her complaints that "male students regularly called her and her female classmates sexually derisive names such as bitches, prostitutes, whores, lesbians and lesbians." In its holding, the court discussed the barrage of epithets collectively without making any distinction between the sexist epithets and the anti-gay ones. However, had there been information in the record that the plaintiff and the other victims were tomboys, and therefore perceived as lesbians, or were previously seen engaging in sexual activity with each other, or were self-identified as lesbians or bisexuals,
the court could have easily inferred that the abuse they suffered was based on sexual orientation.

This case illustrates that when students use anti-gay epithets, it is often unclear whether they actually believe the victim is gay and whether they intend the harassment to be on that basis.\(^{185}\) Depending on the age of the students, the perpetrator may not even understand what words such as “fag,” “lesbo,” and “homo” mean. They may only know that these words are derogatory. This provides further evidence that “peer sexual harassment” and anti-gay harassment are two sides of the same coin and should be treated the same under the law.

By not responding to anti-gay harassment in the same manner as “peer sexual harassment,” schools institutionalize anti-gay harassment and violence as acceptable conduct that is somehow different from racist and sexist harassment. A massive body of psychological and sociological research has documented that gay youth are especially prone to drug addiction, risky behavior, severe depression and suicide as a direct result of the institutionalized homophobia they face every day.\(^{186}\) A school’s indifference to anti-gay harassment implicitly condones attacks against anyone who does not conform to sex stereotypes, regardless of sexual orientation. The message is that only students who conform to sex-stereotypes will benefit from the protections of Title IX. This is the very message Congress intended to eradicate in passing Title IX.\(^{187}\)

Furthermore, anti-gay harassment against a gay student is likely to hurt the victim’s classmates, as well, because it sends the message that those who do not adhere to gender stereotypes will be punished. The harassment is a threat to both girls and boys, telling them that if they deviate from gender norms, they too will be victims of harassment and even violence. Girls may be afraid to excel in sports or the sciences, and boys may fear distinguishing themselves in the arts, for fear of being labeled gay and subjecting themselves to peer harassment. Because gender roles often advantage males, a hostile educational environment due to sexist or anti-gay harassment is a way for students to perpetuate a pattern of male domi-

\(^{185}\) A 1993 study found that 17% of surveyed students representing a cross-section of the population report that they have been called gay or lesbian when they did not want that label put on them. See Lovell, supra note 60, at 621 (citing American Ass’n of Univ. Women Educ. Found., Hostile Hallways: The AAUW Survey of Sexual Harassment in America’s Schools, 10 (1993)). It is highly unlikely that all of the students reporting such name-calling are actually gay or lesbian.

\(^{186}\) See, e.g., Paul Gibson, Gay and Lesbian Youth Suicide, in U.S. DEPT. OF HEALTH AND HUMAN SERVS., YOUTH SUICIDE REPORT 110 (1989), reprinted in LESBIANS, GAY MEN AND THE LAW, supra note 152, at 163; MAKING SCHOOLS SAFE, supra note 15, at 8-19 (reporting on harassment, suicide, low self-esteem, and increased drop-out rates among queer students in Massachusetts and the need for public schools to address these problems).

\(^{187}\) See Yellow Springs Exempted Village Sch. Dist. Bd. Of Ed. v. Ohio High Sch. Athletic Ass’n, 647 F.2d 651, 657 (6th Cir. 1981) ("Congress passed Title IX in the face of longstanding sexual stereotypes that led educational institutions to make arbitrary distinctions. Thus, an overriding purpose of the statute was to determine the nature of equality for men and women in contexts in which their differences are particularly relevant.").
nance, socially as well as academically and professionally. School officials, entrusted with the responsibility of ensuring equal participation and opportunity for all students, have a duty to break this pattern of male dominance in the schools. In the spirit of Title IX, they should be compelled to do so.

Although liability under Title IX will not eliminate anti-gay attitudes in the minds of students or school officials, there are several good reasons why liability should be imposed. First, Title IX can prevent school officials from allowing anti-gay harassment to continue, even when they would prefer to let gay students suffer. Second, if school officials are forced to respond to anti-gay harassment, they will have to learn more about and become more sensitive to conduct that is sexually offensive or demeaning and interferes with the ability of all children to get an education. These first two reasons parallel the goals of Title VI of the Education Amendments, which seeks to ensure that African-American children to have equal educational opportunities. After American schools became racially integrated, teachers and school officials had to learn how to treat students of all races equally, regardless of the school officials' personal attitudes about integration. Title VI was enacted in part because of the concern of racial hostility among students and teachers in newly integrated schools. Though Title VI could not stop racism, it could stop racism from interfering with African-American children's efforts to get an education. Similarly, Title IX cannot stop anti-gay attitudes and the sexist assumptions that perpetuate homophobia, but it can stop those attitudes from interfering with gay children's right to equal educational opportunities. The third and perhaps most important reason to apply Title IX to anti-gay harassment is that doing so would protect teachers who want to help gay students but are afraid to do so. If all teachers were required to respond to all instances of sexual harassment, reaching out to help a gay victim would not be an exceptional act, and teachers who did so would be less likely to fear that their colleagues would assume that they too are gay.

189. See Transcript of Oral Argument, Davis IV (No. 97-843) (also available at 1999 WL 20710 at *25) ("Title VI, after all, was concerned, among other things, with the racial hostility of students to each other in newly integrated schools, as well as the racial hostility of teachers.") (Underwood, B., attorney amicus curiae, supporting the Petitioner); see also Department of Educ., Racial Incidents and Harassment Against Students at Educational Institutions, Investigative Guidance 59 Fed. Reg. 11448, 11449-50 (1994) (discussing the impact of racial harassment by teachers).
V. CONCLUSION—THE NEXT STEP

Because progressive changes in sex discrimination law tend to occur first in employment law under Title VII, and only later under Title IX, it may be a long time before school children who are, or are perceived to be, gay are afforded the same protections from a sexually demeaning and hostile environment as their heterosexual classmates. Nevertheless, federal courts can choose to recognize the deficiencies of the Supreme Court’s Title VII analysis in the context of “hostile environment sexual harassment” and refuse to transfer the same fallacious reasoning to the claims of student victims of anti-gay harassment. Despite the murky boundaries of sexual harassment law, courts can prioritize the very real needs of students above conflicting and illogical precedent. They can do this by understanding that anti-gay harassment is rooted in sex stereotypes and frustrates Title IX’s purpose of giving all students equal opportunities in education.

Title IX by itself is by no means sufficient to ensure equal rights for gay students. Even if every reported instance of anti-gay harassment were met with swift discipline, there is likely enough homophobia and heterosexism in our culture that school liability will not fundamentally alter the reality for most gay students. Not every instance of harassment will be reported, and much harassment will continue to exist beyond school grounds. This article’s proposal is only an incremental step toward the long-term goal of eliminating all discrimination against gay, lesbian, bisexual, and transgendered people. Yet, if schools are threatened with liability and the possibility of paying large sums in damages and/or settlements, many are likely to institute policies that will do much to improve the educational environment of gay students. Policies that broadly define “peer sexual harassment” and proscribe anti-gay taunting, such as the one adopted in Vermont, do more than just create disciplinary measures for bullies. They send the message to the entire community, in addition to teachers and students, that homophobia is not a norm or an accepted practice.

190. The very notion of sexual harassment was first identified in workplace environments and only later applied to educational contexts. It is likely that courts will continue to look to the law of sex discrimination in the workplace when addressing the problems in schools, rather than vice versa.

191. Samuel A. Marcosson describes the concept of “incrementalism—fighting for limited protections, such as protection from workplace harassment—instead of concentrating on achieving the broader goal of making illegal all discrimination against gay men and lesbians.” Marcosson, supra note 127, at 36.

192. Jamie Nabozny was awarded just under a million dollars in damages. See Buckel, supra note 1, at 12. In a settlement with a school district in Washington, another self-identified gay student whose complaints were ignored received $40,000. See Dionne Searcey, Kent Schools to Pay Victim of Harassment $40,000, Seattle Times, Nov. 7, 1998, at A1.
Gay people and gay issues should be included, like other issues of diversity, in school curricula. Students should learn that sexual orientation harassment is wrong. If schools taught that anti-gay harassment is just as intolerable as harassment based on race, religion, or sex, disapproval of gay-bashers would eventually be as pervasive as disapproval of white supremacists is today. Training is also essential to educate teachers to identify and help students who, while perhaps not being sexually harassed, are suffering deeply because of their sexual orientation. Though there will continue to be teachers and administrators who resist teaching tolerance for gay people, if one of the goals of education is to teach "'ethics and civic values'... 'human individuality, dignity, and worth,' 'freedom and autonomy,' 'the common good,' and 'equality of opportunity,"' this goal should overcome individuals' desires to suppress tolerance for diversity.

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193. In its summary of recommendations for schools, the Governor's Commission on Gay and Lesbian Youth in Massachusetts recommended that school libraries should "develop a collection of literature, books, films, and pamphlets for students seeking to learn more on gay and lesbian issues" and that school curriculum should facilitate that learning by integrating gay issues and themes into other subject areas. See Making Schools Safe, supra note 15, at 31 (1993) (Massachusetts report on harassment, suicide, low self-esteem, and increased drop-out rates among queer students and the need for public schools to address these problems).

194. See id.