

**The Legal Liability
Associated with
Homosexuality Education
in Vermont Public Schools**

**An assessment of the risks and liabilities associated with
policies and programs that normalize homosexual
behavior in public schools**

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THE LEGAL LIABILITY ASSOCIATED WITH HOMOSEXUALITY EDUCATION IN VERMONT PUBLIC SCHOOLS

Since the early 1990s, homosexual activist organizations have been working for greater access to public schools with the stated purpose of making them a safer place for young people who have become involved in homosexual behavior. In Vermont this effort was made particularly obvious by the October, 1999 statewide planning conference titled “Safe Schools for the New Millennium” which was co-sponsored by the Vermont Departments of Education and Health and homosexual activist groups. Unfortunately, the activist organizations are not pointing out the fact that school districts can become legally liable for creating a hostile academic environment, for discrimination, and for violating the First Amendment rights of parents and students. Additionally, as increasing numbers of students begin to suffer the negative health consequences of behaviors that teachers and other school agents have endorsed, there is likely to be a corresponding increase in litigation by students and parents on a variety of legal theories.

Liability for such conduct can result in the imposition of injunctive relief orders, compensation for special and general damages, and even punitive damages. The costs of hiring competent counsel to defend against allegations of sexual harassment and constitutional violations can be exorbitant. Fortunately, school districts can avoid liability by recognizing and respecting the existing rights of parents and students.

This booklet is intended to give school administrators a brief overview of the facts, law, and strategies applicable to defending against potential liability. It is our goal to provide school staff personnel with the information and tools necessary to protect their schools and districts from unnecessary lawsuits.

The Source of Potential Liability

One of the most active organizations on school campuses, the Gay Lesbian and Straight Education Network (GLSEN), insists that self-identified homosexual students are regularly harassed, threatened and abused, and thus placed in an environment in which they cannot learn. Another group which promotes this idea is Parents, Families and Friends of Lesbians and Gays (PFLAG), which is gaining a significant presence in many schools across the country. Other organizations exist solely at the local level and may or may not be affiliated with the large national groups.

Both of these homosexual activist groups *falsely* assert that new laws and school regulations are necessary to protect “gay, lesbian, bisexual and transgendered” students from taunting, harassment, violence, and other offensive conduct on school campuses. They are well aware that existing law and school regulations, including Title IX of the Federal Code, protect all students from genuinely abusive conduct by others. However, they have discovered that the theme of “school safety” serves as a useful pretext to advance a

much broader agenda: the legitimization of homosexuality and related conduct to impressionable schoolchildren, under the color of government authority. GLSEN, PFLAG and similar local groups have persuaded well-meaning educators and school officials that harassment of self-identified or perceived homosexual students can only be stopped by teaching everyone in the K-12 school system (administrators, teachers, and students) that homosexual behavior is normal, healthy, and natural.

Discouraging uncivil behavior between students is a laudable and nearly universal goal of parents and teachers. However, teaching civility to school children does not now and has never required legitimization of immoral or harmful behaviors or meddling with students' deeply personal religious or moral values. By following the self-serving guidance of homosexual political activists, some schools and their agents, including teachers, have crossed beyond the legitimate goal of ending harassment into the realm of illegal and unconstitutional manipulation of non-homosexual students.

GLSEN's Deliberate Deception of School Officials

GLSEN's Executive Director Kevin Jennings revealed in a speech to the homosexual political organization, Human Rights Campaign, in 1995 how he used "safety" to delude the Massachusetts legislature into adopting the pro-homosexual agenda for the schools in that state. His speech, "Winning the Culture War," was given at a conference on March 5 of that year.

In Massachusetts, the effective reframing of this issue was the key to the success of the Governor's Commission on Gay and Lesbian Youth. We immediately seized upon the opponent's calling card "safety" and explained how homophobia represents a threat to students' safety by creating a climate where violence, name-calling, health problems, and suicide are common. Titling our report "Making Schools Safe for Gay and Lesbian Youth," we automatically threw our opponents onto the defensive and stole their best line of attack. This framing short-circuited their arguments and left them back-pedaling from day one.¹

Obviously, reliance upon self-serving programs and policy guidelines developed and promoted by GLSEN and other homosexual activist groups will not minimize legal liability of schools, since it is schools and school officials, not these outside organizations, who have the duty of care of students. However, liability may be enhanced if a responsible school official is found to have a conflict of interest in that he or she is a member of an activist homosexual organization.

¹. The Massachusetts News, "'Governor's Commission for Gay Youth' Retreats to 'Safety' and 'Suicide,'" December 2000.

Students as a Captive Audience

Liability for school districts and officials, as opposed to other types of defendants, may also be enhanced due to the nature of the teacher/student relationship. The following two pages are quoted from a summary of parental rights by Jay Seculow, lead counsel for the American Center for Law and Justice (ACLJ) .

In his article, *Of God And Caesar: The Free Exercise Rights of Public School Students*, 43 Case W. Res. L. Rev. 707 (1993), Professor George Dent of Case Western University School of Law argued that under the Supreme Court's definition of coercion in its school Establishment Clause cases, particularly *Lee v. Weisman*, 505 U.S. 577 (1992), students who are exposed to concepts hostile to their religious faith experience coercion, albeit subtle, to renounce their faith in the same way that students who are exposed to bible reading or prayer are "coerced" to embrace a religious faith. 43 Case W. Res. L. Rev. at 717-721.

Dent noted that in its public school Establishment Clause cases, the Supreme Court has always been extremely solicitous of students who might feel coerced by any school-sponsored religious activity. *Id.* The Court has recognized on numerous occasions that the public school creates an inherently coercive atmosphere due to mandatory attendance laws, the tender age of most students, students' emulation of teachers as role models, and peer pressure in group settings. See, e.g. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). The Court's decision in *Lee v. Weisman* is replete with language expressing the Court's "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. at 592." (www.aclj.org/resources/studrts/resources/optout.asp)

Pro-Homosexuality Education as Religious Discrimination

Unarguably, disapproval and proscription of homosexuality is a central tenet in the religious doctrine (creed) of several world religions and numerous religious sects. In light of this fact, the adoption by schools of any policy which defines opposition to homosexuality as wrong, harmful, immoral or "homophobic" directly attacks the religious beliefs and values of many students. (See discussion of harassment *infra.*) Indeed, the very adoption of the term "homophobia" by teachers or school officials, if it is used to characterize disapproval of homosexuality as wrong, harmful, immoral or mentally disordered, may be raised as evidence of religious discrimination in litigation.

The Supreme Court has been very clear that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, *Tinker v. Des Moines ISD*, 393 U.S. 503 (1969) but retain the right to express their religious beliefs in their homework, artwork and other written or oral assignments. *Westside Community Schools v. Mergens*, 496 U.S. 248 (1990); *Tinker*, 393 U.S. 503; *Clark v. Dallas*

ISD, 806 F.Supp. 116 (N.D. Tex. 1992); *Good News/Good Sports Club v. School District of the City of Ladue*, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 115 S.Ct. 2640 (1995); *Religious Expression in Public Schools*, U.S. Dept. of Education Guidelines, Secretary Richard W. Riley, August 1995, Revised and Reissued, May 1998.

School districts stand on reasonably solid legal ground when they act against abusive *behavior* between students or between teachers and students, but any policy that seeks to coerce or manipulate students to change or abandon their religious *beliefs, values or attitudes* is potentially actionable.

The Nature of Parental Rights

“Among the most important of the liberties accorded... special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship. ... The constitutional interest in the development of parental and filial bonds free from governmental interference has many avatars. It emerges in a parent’s right to control the manner in which his child is reared and educated and in the child’s corresponding right not to have the content of his instruction prescribed by the state.” *Franz v. United States*, 707 F.2d 582, fns. 53-57 (D.C. Cir., 1983). The Supreme Court has held that parents’ right to direct the moral upbringing and education of their children is one of the most fundamental of all rights, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), violations of which may be litigated in federal court under 42 U.S.C. §§1983.

School officials should recognize that the law on parental rights clearly suggests that a district could be liable for violating parental rights by subjecting a child to diversity training or other such indoctrination without proper consent.

To assure compliance with parental rights, parental consent must be affirmative. A district may not simply assume that it is acceptable to subject a child to diversity training, discussions of sexual morality, or sex education without having the parent specifically approve of the program with the provisions of written and informed consent. A failure to insure proper consent can result in liability for damages, including punitive damages, both to the school district and to individual district employees.

What Permission is Required Before ‘Diversity Training’?

Before issues of a sexual nature may be made a part of the curriculum, written parental permission should be acquired. This permission should not be by what is known as an “opt out” approach. In other words, a district should not simply send out a general permission slip for the entire year to cover all discussions concerning sex or morality, nor should the district send out a form that allows student participation where the parent does not respond with affirmative consent. No child should participate in diversity training without

express written permission. See, also, 20 U.S.C. § 6312, 42 U.S.C. § 2000e-a(4).

Sexual Discrimination and the Hostile Academic Environment

One of the oddities of diversity training is that it often includes distribution of condoms, sexually explicit dialogue, and other sexually charged matter. Were an adult to distribute condoms at a workplace or use explicit sexually-charged language, he or she could be assured of a sexual harassment lawsuit since such conduct would make a reasonable person feel uncomfortable. Under federal and state law, all persons are entitled to be free of a sexually-charged environment in the workplace and in education.

Title IX of the Federal Code provides that a person cannot be subjected to discrimination under any education program or activity receiving Federal financial assistance, 20 U.S.C. §§ 1681(a). The U.S. Supreme Court held, in *Cannon v. University of Chicago* 441 U.S. 677, that Title IX is enforceable through an implied private right of action. See also *Nicole M. v. Martinez Unified School District*, 964 F.Supp. 1369 (1997). In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, the Court established that monetary damages are available in such an action.

Relying on *Davis v. Monroe County Board of Education* 526 U.S. 629 (1999), the Federal Office for Civil Rights has advised in its Revised Sexual Harassment Guidelines, that harassment includes “creat[ion] of a hostile or abusive educational environment.” ([Www.ed.gov/offices/OCR/shguide/index.html](http://www.ed.gov/offices/OCR/shguide/index.html)). As quoted from the Vermont School Board Association’s mandatory harassment policy for Vermont schools

Under Vermont law, harassment is defined as verbal, written or physical conduct based on a student's race, religion (creed), color, national origin, marital status, sex, sexual orientation, or disability which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive learning environment. School Community: Includes but is not limited to all students, school employees, contractors, unpaid volunteers, work study students, interns, student teachers, and visitors. : (www.vtvsba.org/policy/F20.htm).

Judgment awards in harassment cases can be quite high, one survey citing a range of \$1.6 million to \$4.2 million dollars.² Individual administrators and school personnel can be held personally liable for violations.

Since the landmark decision in *Gebster v. Lago Vista Independent School District*, 524 U.S. 274 (1998), school districts have faced more limited liability for the actions of their agents of which the schools were unaware. However, monetary damages under Title IX are still available where responsible school officials know about and display deliberate indifference toward abuses. Even where this threshold has not been met,

² Hendrie, Carolyn, “Cost is High When Schools Ignore Abuse,” *Education Week*, December 9, 1998. Cases cited were of incidents where school districts were held financially accountable under current civil rights regulations, albeit for severe abuses, i.e. heterosexual and homosexual sexual molestation of students by school employees.

schools remain subject to administrative discipline including possible loss of federal funding.³ Under the *Gebster* “knowledge” standard, schools face potential liability for the actions of overtly “activist” homosexual teachers and other school employees, especially where these individuals have openly advocated for the suppression of opposing views on the issue of homosexuality and related conduct. The question will be, “What did school officials know about and allow to continue?”

In this still developing area of litigation, novel legal theories are likely to emerge, including hybrid claims that integrate elements of Title IX and Title VII. As noted in the OCR Revised Sexual Harassment Guidelines, the *Davis* court drew repeatedly on Title VII to interpret Title IX. In our opinion, schools can minimize their legal exposure under these scenarios by treating homosexual advocacy in schools in the same manner as they treat religious proselytizing under Title VII: protect the free speech of students, but avoid any appearance of government endorsement of homosexual political/ideological doctrine.

Liability can also be minimized by avoiding any situation whereby children are encouraged to see themselves as sexually-charged beings who should be experimenting sexually with each other. Concern about the sexual climate of schools is on the increase. One recent national study conducted by the Kaiser Family Foundation and Children Now was highlighted by the Medical Institute for Sexual Health in March of 2001⁴. It reported that 33% of 8-11 year olds and 49% of 12-15 year olds complain that pressure to have sex is a “big problem” for them. This is a sizable pool of potential litigants against schools that allow their campuses to become centers of sexual libertinism.

School Liability in Tort

Schools may face liability for intentional or negligent instruction of students who rely upon false or misleading information about sexual conduct and are subsequently harmed, if the school or its agents (including outside presenters) can be shown to have breached a duty to the students and that breach is the actual and proximate cause of the injury. Injury may include sexually transmitted diseases, psychological damage and other harm. The voluntary nature of the students’ conduct will not automatically absolve schools of liability. Indeed, students injured by reliance on schools arguably have a much stronger case than that of smokers who have sued tobacco companies.

Homosexual behavior is well known to expose participants to very serious risks, including early death. The public health record is replete with evidence that should place every reasonable adult on notice of the severe consequences of homosexual conduct. As government employees, school officials may face a greater presumption of knowledge of these risks, even in the absence of the type of notification contained in this document.

One purpose of this document is to remind school officials of these serious physical and mental health risks.

³ OCR Revised Sexual Harassment Guidelines, *supra*.

⁴ *The Medical Institute Advisory*, “Sexual Pressure Confronting Kids at Younger Ages,” March 30, 2001.

Endangering the Physical Health of a Child

Studies indicate a significantly greater threat to public health from same-sex than from opposite-sex relationships, especially regarding AIDS. According to the most recent statistics compiled by the Centers for Disease Control, same-sex relationships account for 361,867 of the 793,026 total cases of AIDS reported in the United States as of June, 2001, while homosexual intravenous drug users accounted for another 50,066 cases. This is compared to 85,738 cases caused by opposite-sex relations.⁵ An alarming recent increase in drug resistance to AIDS, or AIDS “super-infection,” is also highest among homosexuals.⁶

The magnitude of the disparity between same-sex and opposite-sex conduct cannot be overlooked. According to the widely respected 1994 University of Chicago study “Sex in America: A Definitive Survey,” only 5% of men and 4% of women have engaged in same-sex conduct at any time in their lives, with just 2.8% of men and 1.5% of women choosing homosexual relations exclusively.⁷ There is thus a dramatically disproportionate public health risk associated with same-sex conduct as opposed to opposite-sex conduct. (This should in no way be construed as an endorsement or condonation of heterosexual promiscuity.)

Another concern is early death. Oxford University’s *International Journal of Epidemiology* indicates that gay and bisexual men involved in same-sex activity risk cutting years off their lives. One study showed that

in a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 years will not reach their 65th birthday. Under even the most liberal assumptions, gay and bisexual men in this urban centre are now experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871.⁸

While HIV infection is very serious, same-sex sexual behavior exposes individuals to many other serious and life-threatening health risks. The Medical Institute for Sexual Health research reveals that

homosexual men are at significantly increased risk of HIV/AIDS, hepatitis, anal cancer, gonorrhea and gastrointestinal infections as a result of their sexual practices. Women who have sex with women are at significantly increased risk of bacterial vaginosis, breast cancer and ovarian cancer than are

⁵ <http://www.cdc.gov/hiv/stats.htm#exposure>

⁶ Antiretroviral-Drug Resistance among Patients Recently Infected with HIV, *New England Journal of Medicine*, Volume 347:385-394, August 8, 2002. Susan J. Little, M.D., Sarah Holte, Ph.D., Jean-Pierre Routy, M.D., Eric S. Daar, M.D., Marty Markowitz, M.D., Ann C. Collier, M.D., Richard A. Koup, M.D., John W. Mellors, M.D., Elizabeth Connick, M.D., Brian Conway, M.D., Michael Kilby, M.D., Lei Wang, Ph.D., Jeannette M. Whitcomb, Ph.D., Nicholas S. Hellmann, M.D., and Douglas D. Richman, M.D.

⁷ R. Michael, J. Gagnon, E. Laumann, *Sex in America: A Definitive Survey* (Boston: Little, Brown and Company, 1994), pp. 175-177; Tom W. Smith, “American Sexual Behavior: Trends, Socio-Demographic Differences, and Risk Behavior,” National Opinion Research Center, GSS Topical Report No. 25, December 1998, p. 50. See also Dawson, D. A., “AIDS knowledge and attitudes,” [various dates] Advance Data, *National Center for Health Statistics*: DHHS Pub. No. (PHS) 88-1_250, nos. 160, 161, 163, 176, 183, 193 reporting on a Federal government study considered to be the largest continuing survey of homosexual activity ever conducted, reaching 119,347 randomly selected adults by March of 1991. This study revealed that only 3% of males had reported any homosexual activity since 1977.

⁸ Hogg, R. S., et. al., “Modelling the impact of HIV disease on mortality in gay and bisexual men,” *International Journal of Epidemiology*, Vol. 26, 657-661, 1997.

heterosexual women.⁹

Perils of the Human Papillomavirus

Genital human papillomavirus (HPV) infections are sexually transmitted infections of increasing public health concern. The CDC has stated that HPV is the most common sexually transmitted disease (STD) in the U.S. and has no cure or vaccine. Although the virus has been known for years as the cause of genital warts, there is a growing body of evidence demonstrating its association with a variety of anogenital cancers.

HPV is a collection of more than 70 types of viruses that tend to cause warts, or papillomas, on various parts of the body. Most HPV infections are subclinical or asymptomatic, while only one in a hundred people experience the symptoms of genital warts.

According to the CDC, an estimated 5.5 million people become infected with HPV each year in the U. S., and an estimated 20 million are currently infected, including 15% of Americans ages 15-49. A staggering estimated 75% of the reproductive-age population has been infected with sexually transmitted HPV.

HPV: “Hard to Prevent Virus”

HPV no doubt has a one-two punch. First, because the person infected is generally not aware of the contagion, he or she passes it on unknowingly. Secondly, if someone is infected, it is virtually impossible for that person to prevent transmission during sexual contact.

HPV differs from other STDs in its method of transmission; it is not spread from one person to another through the exchange of bodily fluids. Rather, it spreads through skin-to-skin contact. Since HPV is a regional, multicentric disease, it infects the entire genital area: the penis, scrotum, vulva, and surrounding areas. Condoms do not cover the scrotum, nor most of the other areas that can be infected with the virus.¹⁰

A CDC report dated July 20, 2001, entitled “Scientific Evidence on Condom Effectiveness for Sexually Transmitted Disease (STD) Prevention” has provided the latest evidence for the lack of protection from HPV infection afforded by condoms. The National Institute of Allergy and Infectious Diseases, National Institutes of Health, and the Department of Health and Human Services released the results of a workshop sponsored by a number of federal agencies assigned with the task of answering the following question: “What is the scientific evidence on the effectiveness of latex male condom use to prevent STD transmission during vaginal intercourse?”

The report concluded that there is insufficient evidence that condoms prevent the spread of most STDs. “For HPV, the Panel concluded that there was no epidemiologic evidence that condom use reduced the risk of HPV infection, but study results did suggest that condom use might afford some protection in reducing the risk of HPV-associated diseases, including warts in men and cervical neoplasia in women.”¹¹

⁹ Medical Institute for Sexual Health, “Executive Summary: Health Implications Associated with Homosexuality,” 1999.

¹⁰ “The Human Papillomavirus (HPV) Epidemic: Condoms Don’t Work,” *Insight* (Family Research Council) 1999.

¹¹ *Ibid.*

As a result of the study, HHS Secretary Tommy Thompson was also called on to enforce the federal law requiring all federal agencies to provide “medically accurate information regarding the effectiveness or lack of effectiveness of condoms.” The law’s author now believes that “when condom use is discussed it is no longer medically accurate...or legal for the CDC...to refer to sex as ‘safe’ or ‘protected.’”¹²

HPV and Homosexual Behavior

A report in *Tracking the Hidden Epidemics 2000* by the CDC, noted a study with an extremely high prevalence of HPV infection among gay and bisexual men: 60% of those HIV-negative and almost universal infection among HIV-positive individuals. Similarly, a six-city study among high risk and HIV-infected women found that 26% of HIV-negative women were infected with HPV, but 70% of HIV-positive women with severely compromised immune systems were infected with HPV.

Gay Health magazine reports that HPV causes most anal cancers in men who have sex with men (MSM), and that such cancer is the only type which has a greater prevalence among MSM than in the general population. The risk of anal cancer soars by nearly 4,000% for MSM and doubles if a man is HIV-positive.

Other Health Risk Behaviors

In May, 1998, *Pediatrics*, the Journal of the American Academy of Pediatrics, published one of the most compelling studies identifying the association between health risk behaviors and sexual orientation. Results of the study revealed that there are currently more than 30 risks positively associated with self-reported gay-lesbian-bisexual (GLB) orientation.¹³

This Harvard Medical School study of 4,159 9th- to-12th-grade students, found that “GLB youth report disproportionate risk for a variety of health risk and problem behaviors... engage[ing] in twice the mean number of risk behaviors as did the overall population.”

The health risks and problem behaviors specifically identified by the study included, but were not limited to, “an increased...use of cocaine (and other illegal drugs). GLB youth were more likely to report using tobacco, marijuana, and cocaine before 13 years of age. Among sexual risk behaviors, sexual intercourse before 13 years of age, sexual intercourse with four or more partners...all were associated with GLB_orientation.”

Endangering the Mental Health of a Child

Serious mental health problems are also associated with same-sex relationships. A recent government-sponsored study of 5,998 Dutch adults ages 18 to 64 was published in the January, 2001 issue of the *Journal of the American Medical Association*. Specifically, the study found that -

Compared to heterosexual men, males who engage in homosexual behavior are:

- 727 percent more likely to have suffered bipolar disorders at some point in their lives, and 502 percent

¹² National Institute of Allergy and Infectious Diseases, et. al., “*Workshop Summary: Scientific Evidence on Condom Effectiveness for Sexually Transmitted Disease (STD) Prevention*,” June 12-13, 2000.

¹³ Garofalo, Robert, et. al., “The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents,” *PEDIATRICS*, Vol. 101, No. 5, May 1998: 895-902.

more likely in the last twelve months.

- 718 percent more likely to have suffered obsessive-compulsive disorder in the last twelve months, and 620 percent more likely at some point in their lives.
- 632 percent more likely to have suffered agoraphobia (fear of leaving home or being in public) in the last twelve months, and 454 percent more likely at some point in their lives.
- 421 percent more likely to have suffered panic disorder, and 229 percent more likely to have suffered social phobia at some point in their lives.
- 375 percent more likely to have suffered simple phobia in the last twelve months, and 361 percent more likely at some point in their lives.
- 311 percent more likely to have suffered mood disorders at some point in their lives, and 293 percent more likely in the last twelve months.
- 261 percent more likely to have suffered anxiety disorders in the last twelve months, and 267 percent more likely over the course of their lifetimes.
- 270 percent more likely to have suffered two or more psychiatric disorders during their lifetime.
- 235 percent more likely to have suffered major depression at some point in their lives.

Compared to heterosexual women, females who engage in homosexual behavior are:

- 405 percent more likely to have suffered a substance use disorder.
- 241 percent more likely to have suffered mood disorders during their lifetimes.
- 209 percent more likely to have suffered two or more mental disorders during their lifetimes.¹⁴

As summarized by the researchers, “[t]he findings support the assumption that people with same-sex behavior are at greater risk for psychiatric disorders.”¹⁵ Lest the reader assume that the mental health problems identified here result from general societal disapproval and/or stigmatization of homosexual behavior, it must be noted the country from whose population the participants were drawn, the Netherlands, is generally considered the most tolerant and homosexual-affirming in the world.

Negligent Referral to Outside Homosexual Groups

Misguided school counselors and other school officials may expose school districts to liability by referring students who are struggling with gender identity confusion to outside homosexual organizations. Such

¹⁴ Sandfort, Theo G.M, et. al., “Same-Sex Sexual Behavior and Psychiatric Disorders,” *Archives of General Psychiatry* (Journal of the American Medical Association), Vol. 58, No. 1, January 2001.

¹⁵ Ibid.

referrals are aggressively solicited by these organizations, often on the threat that failure to properly “affirm” questioning youth could result in their suicide.¹⁶ Typically operating as “gay and lesbian youth centers,” these organizations serve as social clubs where adult homosexuals can meet and mingle with teens without supervision or interference by parents or police.

Liability for Wrongful Death

Studies are mixed as to whether self-identified “homosexual teens” are at truly at greater risk of suicide than their peers.¹⁷ While such a conclusion might seem intuitive given the stigma against homosexual conduct, such a conclusion is not legally defensible. Importantly, no study has yet shown whether homosexuality and suicidal tendencies are merely a separate effects of a common cause.

Regardless, even if a correlation between homosexuality and suicide were established, it would be highly irresponsible, and thus potentially actionable, for school officials to refer students to activist homosexual individuals or groups, since these almost universally insist that homosexuality is innate and unchangeable. Recent studies published in the journal of the American Psychological Association (APA) have confirmed that many people have successfully recovered from homosexuality.¹⁸ Obviously, persuading a potential suicide that he or she has no hope of recovery from what is very often an unwanted condition could result in that child taking his or her own life and lead to wrongful death litigation by surviving family members.

Students who become involved with outside homosexual organizations also face greater threats to their health/longevity/quality of life due to the libertine philosophy of such groups. For example, on the weekend of March 25, 2000, GLSEN/BOSTON & Project 10 East held their tenth annual *Teach Out*’ conference at Tufts University. One particular workshop called, “What They Didn’t Tell You About Queer Sex & Sexuality in Health Class,” was described in conference materials as follows:

This workshop for youth addresses what is different for glbt (gay, lesbian, bisexual, transgender, transsexual) youth when it comes to sex, dating, relationships, HIV etc. Come and discuss the questions you couldn’t or didn’t ask in health class. What’s it like to be young, queer and beginning to date? Are lesbians at risk for HIV? What does it mean to identify as queer and still be sexually active with the opposite sex? Who can you talk to about these things? And, why aren’t queer issues addressed in Sex Ed classes? We will address the information you want about

¹⁶ Labarbara, Peter, “Debunking the Myth of Gay Youth Suicide”, http://cwfa.org/library/family/1997-08-07_pp_gaysuicide.sht

¹⁷ Ibid. The primary study purporting to show a higher risk of suicide for “gay and lesbian” teens was challenged by other researchers on the basis that it “was never subjected to the rigorous peer review that is required for publication in a scientific journal and contained no new research findings.”

¹⁸ See *Professional Psychology: Research and Practice*, 2002, Vol. 33, No. 3, 242-248. For more information about “reparative therapy” and other successful techniques for treating homosexuality, see www.NARTH.com, the website of the National Association for Research and Therapy of Homosexuality.

queer sexuality and some of the politics that prevent us from getting our needs met.¹⁹

Scott T. Whiteman, a concerned parent from Boston, attended the GLSEN workshop and noted the workshop's discussion on condoms: "As often as we hear that there is an aggressive HIV/AIDS prevention campaign, the session ran 55 minutes before the first mention of 'protection' and safer sex came. In the context of the 'safer sex' discussion, however, it was pointed out that these children could make an informed decision not to use a condom."²⁰

Unconstitutional Restraint of First Amendment Rights Through Restrictive Student Speech Codes or Anti-Harassment Codes

Aggressive efforts by homosexual activist organizations to discourage opposition to homosexuality have resulted in over-restrictive speech or anti-harassment codes that have infringed upon students' free speech rights under the First Amendment. These unconstitutional policies are being successfully challenged by students.

In *Saxe v. State College Area School District* the 3rd U.S. Circuit Court of Appeals recently ruled unconstitutional an anti-harassment policy that forbade students from expressing sincerely held beliefs, both secular and religious, about homosexuality.

Teacher David Saxe, Ph.D., and two students in the State College Area School District (SCASD) argued that the schools' ant-harassment code was being used to suppress the freedom of speech of students who, out of a sincere sense of compassion and care for their fellow students, attempted to warn others about the severe mental and physical health hazards associated with such behavior. The school district defended the speech code as a necessary protection for homosexual students.

In a strongly worded opinion, the 3rd Circuit upheld the right of students to speak out against homosexuality and struck down the anti-harassment policy as overbroad and vague. The ruling also said that clauses in the SCASD speech code which sought to prohibit "disparaging speech directed at a person's values" struck at the very "heart of moral and political discourse -- the lifeblood of constitutional self-government (and democratic education) and the core concern of the First Amendment." The court ruling reaffirmed the longstanding position of the court that student expressive rights exist even if some find the student speech offensive. *Tinker v. Des Moines Independent School District*, *supra*.

Political Correctness as Government Censorship

Censorship, or government suppression of individual speech, has taken many forms over the years. In times past, government censors banned certain books and movies. Today, the new form of censorship is

¹⁹ Affidavit of Scott T. Whiteman.

²⁰ *Ibid*.

popularly known as “political correctness.”

Political correctness is a “secular” dogma that defines opposition to homosexuality, abortion, pornography and other socially liberal causes as morally wrong. Political correctness often asserts itself in the public school in active discouragement of or open hostility to opposing views on these controversial issues. This is clearly the antithesis of the “freedom of speech” protected by the First Amendment.

In order for a school to avoid legal liability in this area, its policies should affirm that

1. Students, parents and teachers have the right to responsibly speak their opinions and engage in persuasive argument about any issue in schools without fear of discrimination, retaliation or punishment.
2. Students have the right to disagree with, question and to dispute political correctness in text-books, classroom instruction, and official school policies.
3. All students have the right to invite speakers into their school to present their side of the issues to the same extent as students with politically correct views.
4. Schools, subject to constitutional principles, have the responsibility to determine whether a given issue may introduce harmful messages to children, and the right to decide not to deal with that issue at all. This should apply to establishment of “gay” clubs²¹, which may expose children to homosexual practices without parental knowledge.
5. Students have the right to be protected while in the school setting from any policy or program that could lead to harm to their physical or emotional health.

Conclusion

This document is by no means an exhaustive treatment of the subject of legal liabilities for school officials and districts, but it has addressed the topic in sufficient depth to alert responsible parties to the danger of legitimizing homosexuality to school children. As a person interested not only in the care and guidance of vulnerable children, but with the fiscal health of an important branch of local government, you must carefully consider the risks presented here. It is in your interest to also think ahead to the legal climate that can be expected to develop as this first generation of student “guinea pigs” comes of age to litigate in their own

²¹ Homosexual activists have used the threat of litigation under 20 U.S.C. 4071-74, known as the Equal Access Act, to force many schools to allow homosexual clubs, commonly called Gay/Straight Alliance (GSA) clubs, to form on school campuses. The Equal Access Act prohibits discrimination against non-curricular clubs based upon the content of the students’ speech. However, schools retain the right to control curriculum-related clubs. Schools which address issues of sexuality, family life and alternate lifestyles in the curriculum are not obligated to allow GSA clubs. Where a school allows such a club, its legal exposure can be reduced by adopting a policy requiring written parental permission for a student to join any student club, and by closely adhering to Sec. 4071(c)1-5 which requires clubs to be entirely student initiated and led, without *any* direction or control of meetings by teachers, school staff or outside groups or individuals, and without *any* sponsorship by the school, its agents or employees.

capacity. Reversing the current trend before it has become entrenched in the educational bureaucracy of your school, district or state could prevent much needless suffering and expense.

Legal Assistance Available

The sponsors of this report stand ready to assist school officials who wish to overturn or revise existing pro-homosexual policies in order to protect their students and reduce their own legal exposure.