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CONFRONTING SAME-SEX, STUDENT-TO-STUDENT SEXUAL HARASSMENT: RECOMMENDATIONS FOR EDUCATORS AND POLICY MAKERS

Thomas A. Mayes*

Student-on-student sexual harassment has been the subject of significant scholarly commentary and numerous court battles.¹ In light of the United States Supreme Court's decision in *Davis v. Monroe County Board of Education*,² which held that in certain cases students have a cause of action under Title IX against schools for peer sexual harassment,³ many schools have been advised to

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A Note On Vocabulary: This article uses the terms "homophobia" and "heterosexism" frequently. Homophobia is "prejudice, discrimination, harassment or acts of violence against sexual minorities . . . evidenced in a deep-seated fear or hatred of those who love and sexually desire those of the same sex." James T. Sears, *Thinking Critically/Intervening Effectively About Homophobia and Heterosexism*, in *OVERCOMING HETEROSEXISM AND HOMOPHOBIA* 1, 16 (James T. Sears & Walter L. Williams eds., 1997). Heterosexism is "a belief in the superiority of heterosexuals or heterosexuality evidenced in the exclusion, by omission or design, of non-heterosexual persons in policies, procedures, events, or activities." *Id.* For alternate definitions of these terms, see Karen M. Jordan et al., *I Will Survive: Lesbian, Gay, and Bisexual Youths' Experience of High School*, 4 J. GAY & LESBIAN SOC. SERVICES, 17, 18 (1997). This article uses "sexual minority" as a generic term for persons who describe themselves as gay, lesbian, bisexual, transgendered, and asexual; those questioning their sexual orientation; and those who describe themselves as intersexed.

1. See, e.g., Kathleen A. Sullivan & Perry A. Zirkel, *Student to Student Sexual Harassment: Which Tack Will The Supreme Court Take in a Sea of Analyses?*, 132 EDUC. L. REP. 609 (1999) (summarizing the state of the law before the United States Supreme Court's 1999 decision of *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)); Daniel G. McBride, Note, *Guidance for Student Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523 (1998) (same).

2. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). Justice O'Connor wrote the majority opinion, which was joined by Justices Stevens, Souter, Ginsberg, and Breyer. *Id.* at 632. Justice Kennedy filed an emphatic dissent, which was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. *Id.* at 654.

3. *Id.* at 633. For three discussions of *Davis*, see David Schimmel, *When Schools Are Liable For Peer Sexual Harassment: An Analysis of Davis v. Monroe*, 141 EDUC. L. REP. 437 (2000) Perry Zirkel, *More Harassment*, 81 PHI DELTA KAPPAN 171 (1999); and *The Supreme Court, 1998 Term - Leading Cases*, 113 HARV. L. REV. 368-78 (1999).

consider responses to and ways to prevent student-on-student sexual harassment.⁴

When considering corrective and preventative approaches to peer sexual harassment in the schools, educators and policy makers should strongly consider addressing same-sex harassment. Prior to its decision in *Davis*, a unanimous United States Supreme Court, in *Oncale v. Sundowner Offshore Services, Inc.*, held that same-sex harassment in the workplace may be actionable under Title VII.⁵ Given the judiciary's frequent reliance on Title VII standards in Title IX cases,⁶ at least when considering what type of conduct is actionable,⁷ *Oncale*, when read together with *Davis*, signals the opening of a new avenue for students seeking relief for same-sex peer harassment.

Notably, at least one federal appellate court has extended *Oncale* to Title IX's prohibition of teacher-to-student sexual harassment. In *Doe v. Dallas Independent School District*, the Fifth Circuit held that a male third grade teacher's molestation of several of his male students was actionable under Title IX.⁸ Furthermore, the United States Supreme Court cited *Oncale*, albeit for rather uncontroversial points of law, in *Davis*⁹ and another subse-

4. See, e.g., Arval A. Morris, *School Board Responsibility For Student on Student Sexual Harassment: Comment on Davis v. Monroe County Board of Education*, 137 EDUC. L. REP. 441 (1999); Schimmel, *supra* note 3, at 451. For detailed advice published prior to *Davis*, see David S. Doty & Susan Strauss, "Prompt and Equitable": *The Importance of Student Sexual Harassment Policies in the Public Schools*, 113 EDUC. L. REP. 1 (1996).

5. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Justice Scalia delivered the opinion of a unanimous court. *Id.* Justice Thomas filed a brief (one sentence) concurring opinion. *Id.* For more information on *Oncale*, see Mary Coombs, *Title VII and Homosexual Harassment after Oncale: Was It a Victory?*, 6 DUKE J. GENDER L. & POL'Y 113 (1999) and Ronald Turner, *The Unenvisioned Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL'Y 57 (2000).

6. See, e.g., Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN'S L.J. 159, 171-73 (1999); Sullivan & Zirkel, *supra* note 1, at 626; Amy Lovell, Comment, "Other Students Always Used to Say, 'Look at the Dykes'": *Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 634 (1998); McBride, *supra* note 1.

7. Schaffner, *supra* note 6, at 162, 177.

8. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 220 (5th Cir. 1998). For a same-sex, teacher-on-student sexual harassment case decided prior to *Davis* and *Oncale*, see *Kinman v. Omaha Public School District*, 94 F.3d 463 (8th Cir. 1996). Relying on *Oncale*, the Alabama Supreme Court acknowledged in *H.M. v. Jefferson County Board of Education* that Title IX could encompass same-sex teacher-on-student harassment claims. *H.M. v. Jefferson County Bd. of Educ.*, 719 So. 2d 793, 795 (Ala. 1998). The claims against the school failed for other reasons. *Id.*

9. *Davis*, 526 U.S. at 651.

quent Title IX sexual harassment case.¹⁰ Finally, the United States Department of Education has stated that same-sex peer harassment may violate Title IX's prohibition of sex discrimination in education, although the department acknowledges that Title IX does not prohibit sexual orientation harassment.¹¹ Sex and sexual orientation, however, are "closely related" concepts.¹² Harassment based on sexual orientation may also be harassment based on sex and therefore actionable under Title IX. The Supreme Court's precedents, coupled with the Department of Education's statement, underscore the viability of same-sex, student-to-student sexual harassment lawsuits.

Any school's response to sexual harassment should account for developments in this area of Title IX. Recent court cases decided on constitutional grounds¹³ and the enactment of several state and local civil rights laws¹⁴ also afford legal protections to students victimized by same-sex peer harassment. Although the response of education to homosexuality has long been controversial¹⁵ and re-

10. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (citing *Oncale*, 523 U.S. at 75).

11. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., *SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES*, 62 Fed. Reg. 12,034, 12,039 (1997). The *Davis* court relied on portions of this guidance to support its conclusion that schools could be liable for money damages under Title IX for peer sexual harassment. *Davis*, 526 U.S. at 647-49.

12. Diane P. Wood, *Sex Discrimination in Life and Law*, 1999 U. CHI. LEGAL F. 1, 8 (1999); see also Schaffner, *supra* note 6, at 173-74; Turner, *supra* note 5; Lovell, *supra* note 6, at 638-43; McBride, *supra* note 1, at 545-47.

13. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). This Article, however, focuses on Title IX and does not explore *Nabozny's* constitutional theories. Both the Constitution and Title IX should provide sufficient impetus to adopt a same-sex harassment policy. See also Schaffner, *supra* note 6, at 174-76; Alycia N. Broz, Note, *Nabozny v. Podlesny: A Teenager's Struggle to End Anti-Gay Violence in Public Schools*, 92 NW. L. REV. 750 (1998); Lovell, *supra* note 6, at 630-32; Maggie J. Randall Robb, Note, *A School's Duty to Protect Students from Peer-Inflicted Abuse: Nabozny v. Podlesny*, 22 DAYTON L. REV. 317 (1997).

14. See, e.g., John D. Anderson, *Supporting the Invisible Minority*, EDUC. LEADERSHIP, Apr. 1997, at 65, 66; Barbara A. Rienzo et al., *The Politics of School-Based Programs Which Address Sexual Orientation*, 66 J. SCH. HEALTH 33, 33 (1996); Schaffner, *supra* note 6, at 173 n.94; Lovell, *supra* note 6, at 632-33.

15. See, e.g., Harry J. Canon, *Gay Students*, 21 VOCATIONAL GUIDANCE Q. 181 (1973); Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUT.-CAM. L.J. 399 (1978); Gary Remafedi, *Homosexual Youth: A Challenge to Contemporary Society*, 258 J. AM. MED. ASS'N 222 (1987); John C. Walden & Renee Culverhouse, *Homosexuality and Public Education*, 55 EDUC. L. REP. 7 (1989); Del Stover, *The At-Risk Kids Schools Ignore*, EXECUTIVE EDUCATOR, Mar. 1992, at 28; Joseph A. Devito, *Educational Responsibilities to the Gay and Lesbian Student*, Paper presented at the Annual Meeting of the Speech Communication Association (Nov. 10-13, 1979) (ERIC No. ED184167); see also, e.g., Michelle Fine, *Sexuality*,

mains so today,¹⁶ school leaders ignore this controversy at their legal peril.

This article hopes to offer some insight for educators and policy makers developing responses to same-sex peer harassment. First, it more fully explains the Supreme Court's decisions in *Davis* and *Oncale* and their importance to educators.¹⁷ Second, it briefly summarizes recent scholarship concerning the effects of a homophobic school climate on students.¹⁸ Finally, it offers some basic guidance for practice and policy formation.¹⁹

I. FEDERAL STATUTORY PROHIBITIONS OF SEXUAL HARASSMENT

The two major federal statutes concerning sexual harassment are Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which respectively govern sex-based discrimination at school and at work. Title VII provides in relevant part that covered employers shall not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex."²⁰ Similarly, Title IX states that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."²¹

Sexual harassment has long been held to be prohibited sex discrimination under both Title VII and Title IX.²² A person may

Schooling, and Adolescent Females: The Missing Discourse of Desire, 58 HARV. EDUC. REV. 29, 43 (1988) (noting that, even though a majority of those surveyed favor including a discussion of homosexuality in the curriculum, the debate continues).

16. See, e.g., *Collins v. Faith Sch. Dist.*, 574 N.W.2d 899 (S.D. 1998); R. Stephen Brown et al., *Equal Access: Community Values and Student Rights*, 2 J. CASES IN EDUC. LEADERSHIP 5 (1999); Rienzo et al., *supra* note 14; Schaffner, *supra* note 6; Perry A. Zirkel, *Are You Gay?*, 81 PHI DELTA KAPPAN 332 (1999); Patrick Henigan, Note, *Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents*, 62 BROOKLYN L. REV. 1261 (1996); Lovell, *supra* note 6; David S. Doty, *Public Engagement or Public Enragement?*, EDUC. WK., Mar. 1, 2000, at 72; Catherine A. Lugg, *No Trespassing: U.S. Public Schools and the Border of Institutional Homophobia*, Paper presented at the Annual Convention of the University Council for Educational Administration (Oct. 26-28, 1997) (ERIC No. ED429252).

17. See *infra* Part I.

18. See *infra* Part II.

19. See *infra* Part III.

20. 42 U.S.C. § 2000e-2(a)(1) (2001).

21. 20 U.S.C. § 1681(a) (2001).

22. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (Title VII); *Franklin v. Gwinnet County Pub. Schs.*, 503 U.S. 60 (1992) (Title IX). For more information about

prove sexual harassment by demonstrating a "quid pro quo" proposition (i.e., making a positive performance evaluation or desired grade conditional upon performance of a sexual act).²³ Alternatively, one may prove sexual harassment by showing the existence of a "hostile environment,"²⁴ an environment in which the conditions of a person's employment or educational setting are altered by unwelcome harassment based upon the person's gender. Recent United States Supreme Court cases, including those mentioned previously, have apparently expanded the practical reach of both statutes.²⁵

A. The *Davis* Decision

In *Davis*, the Supreme Court held that Title IX's prohibition of sex discrimination in education extends to student-on-student harassment. In a complaint against the Monroe County Board of Education, Aurelia Davis alleged that her daughter LaShonda was repeatedly subjected to sexually suggestive conduct by G.F., one of her fifth grade classmates.²⁶ Ms. Davis alleged that LaShonda repeatedly reported this conduct to several of her teachers to no avail.²⁷ Ms. Davis sought damages from the board.²⁸ The federal trial court dismissed Ms. Davis' complaint against the board, ruling that Title IX provided no basis to hold the board liable for peer harassment.²⁹ On appeal, a divided panel of the Court of Appeals for the Eleventh Circuit reversed the judgment of the trial court.³⁰ A divided Eleventh Circuit, en banc, reversed the panel decision

sexual harassment litigation, see CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 103-16 (1987) and CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

23. See, e.g., OFFICE OF CIVIL RIGHTS, *supra* note 11, at 12,038; Martha M. McCarthy, *Students as Victims of Sexual Harassment: The Evolving Law*, 27 J.L. & EDUC. 401, 403-04 (1998).

24. See, e.g., *Meritor Sav. Bank*, 477 U.S. at 67; McCarthy, *supra* note 23, at 404; Schaffner, *supra* note 6, at 161.

25. In addition to *Davis*, *Oncala*, and *Gebser*, see *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). For a discussion of these cases, see Wood, *supra* note 12. See also Schimmel, *supra* note 3; David P. Thompson & Karen L. Michaelis, *The "O'Connor Shuffle:" School District Liability Under Title IX for Sexual Harassment of Students*, 141 EDUC. L. REP. 967 (2000); William W. Thro & Brian A. Snow, *The Subtle Implications of Gebser v. Lago Vista Independent School District*, 141 EDUC. L. REP. 409 (2000).

26. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633-35 (1999).

27. *Id.* at 634.

28. *Id.* at 634-35.

29. *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994).

30. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996).

and affirmed the trial court.³¹ The Supreme Court granted certiorari.³²

In *Davis*, the Supreme Court held that a school is liable for peer harassment in “certain limited circumstances.”³³ First, the behavior must have been “so severe, pervasive, and objectively offensive that it . . . deprive[s] the victim of access to . . . educational opportunities or benefits.”³⁴ Second, school officials must have actually known of this behavior.³⁵ Third, the school officials must have responded to the behavior with “clearly unreasonable” action or inaction.³⁶ Applying this standard to the allegations contained in Ms. Davis’ petition, the Court concluded that Ms. Davis was entitled to pursue a claim under Title IX and reversed the Eleventh Circuit’s judgment.³⁷

The *Davis* Court indicated that its holding had limits.³⁸ The Court noted that conduct alleged to be peer sexual harassment under Title IX must be judged in light of its context—the schoolhouse. As students are still learning how to behave and commonly “interact in a manner that would be unacceptable among adults,”³⁹ the *Davis* Court concluded that “simple acts of teasing and name-calling” would not justify an award of damages under Title IX.⁴⁰ Rather, damages are an allowable remedy only when harassment has a “systemic effect on educational programs or activities.”⁴¹

In retrospect, the *Davis* case appeared to many commentators to be an incomplete victory for students. Although establishing the viability of a peer sexual harassment cause of action under Title IX, the *Davis* decision’s adoption of “actual knowledge” and “clearly unreasonable response” as required elements of such a cause of

31. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997).

32. *Davis v. Monroe County Bd. of Educ.*, 524 U.S. 980 (1998).

33. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999).

34. *Id.* at 650. *Cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (invoking test under Title VII).

35. *Davis*, 526 U.S. at 650.

36. *Id.* at 648-50.

37. *Id.* at 654.

38. The guidance the *Davis* court gave may not seem satisfactory to those seeking hard-and-fast answers. However, no such certainty is possible, given the extremely fact-specific nature of sexual harassment cases. *See Davis*, 526 U.S. at 651 (liability “depends on a constellation of surrounding circumstances,” (quoting *Oncale*, 523 U.S. at 82)).

39. *Davis*, 526 U.S. at 651.

40. *Id.* at 651-52.

41. *Id.* at 653.

action has effectively limited successful suits.⁴² However, the *Davis* case may provide a necessary platform upon which targets of same-sex harassment may base a claim for relief.

B. The *Oncale* Decision

Does *Davis* extend to same-sex student-on-student sexual harassment? Any answer to this question must adequately explain the Supreme Court's *Oncale* decision, in which the Court recognized that Title VII's prohibition of sex discrimination in employment encompasses same-sex sexual harassment.⁴³ In this case, plaintiff Joseph Oncale alleged that he had endured physical and verbal harassment of a sexual nature by male co-workers on an offshore oil platform, including threats of rape.⁴⁴ After his supervisors did not take any "remedial action,"⁴⁵ Mr. Oncale resigned.⁴⁶ Later, he said "I felt that if I didn't leave my job, that I would be raped or forced to have sex."⁴⁷ The lower courts, however, did not recognize Oncale's sex discrimination claim.⁴⁸

After the Supreme Court granted Oncale's petition for certiorari,⁴⁹ it reversed the lower courts' rulings,⁵⁰ concluding "that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."⁵¹ In doing so, the Court declined to follow lower court decisions limiting sexual harassment under Title VII to conduct "motivated by sexual desire."⁵² The Court noted that "harassing

42. See, e.g., Karen L. Michaelis, *Title IX and Same-Gender Sexual Harassment: School District Liability for Damages*, 2000 BYU EDUC. & L. J. 47, 87-88 (2000); Morris, *supra* note 4, at 445-46; Schimmel, *supra* note 3, at 450; *The Supreme Court, 1998 Term—Leading Cases*, *supra* note 3, at 370.

43. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

44. *Id.* at 77.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (1996).

49. *Oncale v. Sundowner Offshore Servs., Inc.*, 520 U.S. 1263 (1997).

50. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

51. *Id.* at 79.

52. *Id.* This seems to call into question the rationale of *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). In *Seamons*, plaintiff was taped naked to a towel rack by his football teammates, who brought one of Seamons's girlfriends into the locker room to view him. Seamons complained to the principal. The coach then asked Seamons to apologize for "betraying" the team. Seamons refused to do so, and was dismissed from the team. He was harassed by his former teammates and classmates, and the school principal (instead of responding to harassment) suggested that Seamons enroll in a different school. Seamons alleged that the harassment following his report of the

conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”⁵³ The Court also rejected any “conclusive presumption” that individuals would not discriminate against members of the same sex.⁵⁴

The Court repeated the established rule that Title VII is only violated if conduct, objectively viewed from the point of view of the plaintiff, is so abusive or offensive that it alters the conditions of employment.⁵⁵ The Court made clear that Title VII does not sterilize employment of all sexual content: “The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectionably offensive as to alter the ‘conditions’ of the victim’s employment.”⁵⁶ The Court continued by stating: “Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”⁵⁷ After the decision’s release,⁵⁸ the parties settled.⁵⁹

Before continuing, it may be helpful to further consider how sex discrimination may include same-sex harassment.⁶⁰ The *Oncale* court rejected the notion that the perpetrator must be motivated by sexual desire, considering this too narrow a reading of Title

incident to the principal, as well as his treatment by the principal and coach, constituted sex-based harassment under Title IX. Seamons did not complain about the original assault. In affirming the dismissal of his Title IX complaint, the Tenth Circuit noted that plaintiff “fails to allege any facts that would suggest that he was subjected to unwelcome sexual advances or request for sexual favors, or that sex was used to contribute to a hostile environment for him.” *Seamons*, 84 F.3d at 1233. In doing so, the court rejected Seamons’s argument that he had been subjected to sex-based discrimination for failing to conform to gender expectations (i.e., coach stating that Seamons “should have taken it like a man”). The *Oncale* Court’s expansion of sexual harassment beyond instances motivated by sexual desire would have provided additional support for Seamons’s claim that he was harassed for transgressing the gender norms held by his coach and teammates.

53. 523 U.S. at 80. Although heterosexual (usually male-on-female) harassment frequently involves sexual desire, the Court was not willing to limit Title VII to those instances. The Court concluded that non-sexually motivated discrimination could still run afoul of Title VII’s plain-language prohibition of “discrimination . . . because of . . . sex.” *Id.* at 79-80.

54. *Id.* at 78 (citing *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

55. *Oncale*, 523 U.S. at 75.

56. *Id.* at 81.

57. *Id.* at 82.

58. *Id.*

59. Schaffner, *supra* note 6, at 177.

60. *Id.* at 173-74; see Wood, *supra* note 12, at 8; Lovell, *supra* note 6, at 638-43; McBride, *supra* note 1, at 545-47.

VII.⁶¹ The Supreme Court has long made clear that Congress enacted Title VII in part to combat differential treatment based on sex stereotypes.⁶² Same-sex harassment is often motivated by sex stereotypes, in an effort to punish targets for transgressing norms about sex roles⁶³ and to enforce “compulsory heterosexuality.”⁶⁴ As Professor Koppelman observed:

Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male. . . . Lesbianism also challenges male privilege, but in a different way: it denies that female sexuality exists, or should exist, only for the sake of male gratification.⁶⁵

Violence against gay men and lesbians has a social regulation function:⁶⁶ the targets, to avoid further assaults, conform their outward conduct to established gender roles.⁶⁷ Thus, sexual orienta-

61. *Oncale*, 523 U.S. at 78.

62. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the plaintiff had been passed over for partnership in the defendant accounting firm. *Id.* According to Professor Turner, the partners

described the plaintiff as “macho,” suggested that she take a “course in charm school,” commented that she “had matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate,” and advised the plaintiff to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Turner, *supra* note 5, at 84 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). In *Price Waterhouse*, the Court held that this evidence was sufficient to demonstrate a violation of Title VII. *Price Waterhouse*, 490 U.S. at 255; see also *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

63. Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 *YALE L.J.* 145, 159 (1988); see also Schaffner, *supra* note 6, at 168-69.

64. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980).

65. Koppelman, *supra* note 63, at 159-60; Didi Khayatt, *Surviving School as a Lesbian Student*, 6 *GENDER & EDUC.* 47, 49-50 (1994).

66. Karen Franklin, *Psychosocial Motivations of Hate Crime Perpetrators: Implications for Educational Intervention*, Paper presented at the 106th Annual Meeting of the American Psychological Association 2-3 (Aug. 16, 1998) (ERIC No. ED423939).

67. See Neil W. Pilkington & Anthony R. D’Augelli, *Victimization of Gay, Lesbian, and Bisexual Youth in Community Settings*, 23 *J. COMMUNITY PSYCH.* 34, 44-45 (1995) (“Homophobia is a very strong technique used to maintain limited sex roles that narrow potential contributions that persons can make to society.”); see also Sue Sattel et al., *Sexual Harassment and Sexual Orientation: The Coaches’ Corner, in OVERCOMING HETEROSEXISM AND HOMOPHOBIA* 233, 237 (James T. Sears & Walter L. Williams eds., 1997).

tion harassment is often a method of sex discrimination that may be prohibited under federal anti-discrimination statutes.

C. Synthesizing *Davis* and *Oncale*

What would have happened if Joseph Oncale had alleged that he had been harassed, not on an offshore oil platform, but in a public school? What if LaShonda Davis' harasser had been female? Should those factual differences make a difference? Is there any principled way to read Title IX to prohibit only opposite sex student-on-student sexual harassment? According to this article, as well as other authorities,⁶⁸ there is not. For several reasons, any argument attempting to exclude same-sex peer harassment from Title IX's scope must fail.

As the application of Title IX to same-sex peer sexual harassment places the scope of Title IX at issue, one must first start with the language of the statute.⁶⁹ Title IX prohibits a range of differential treatment in education "on the basis of sex."⁷⁰ The statute neither protects a certain gender from harassment nor requires that the alleged harasser be of the opposite gender. By its plain language, Title IX applies to all acts "on the basis of sex."⁷¹ Any additional limitations on the statute's scope, such as restricting its prohibitions to opposite sex peer harassment, would impermissibly depart from Title IX's plain language.⁷²

When reading a statute, one must also look to similar statutes and cases interpreting them for guidance.⁷³ Applying this principle

68. See, e.g., Shaffner, *supra* note 6; Lovell, *supra* note 6; see also, e.g., Kathy J. Gill, *Maintaining the Dignity and Rights of Gay and Lesbian Students*, 7 RECLAIMING CHILD. & YOUTH 25, 25 (1998) (noting that, in 1992, Los Angeles schools considered same-sex harassment as potentially violating Title IX). *But see* Michaelis, *supra* note 42.

For two federal trial court cases synthesizing *Davis* and *Oncale*, see *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000) and *Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000).

69. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); see Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?*, 8 J.L. & POL'Y 455, 472 (2000).

70. 20 U.S.C. § 1681(a) (2001).

71. *Id.*

72. See, e.g., *Buckellew v. Bd. of Educ.*, 575 N.E.2d 556, 559 (Ill. App. Ct. 1991) (stating that a court may not "depart from the plain meaning of the language employed in the statute"); *Kelly v. Brewer*, 239 N.W.2d 109, 114 (Iowa 1976) (stating that courts may not add to or alter the terms of a statute "under the guise of statutory construction").

73. See, e.g., *Ende v. Bd. of Regents*, 757 F.2d 176, 183 (7th Cir. 1985) (stating that Equal Pay Act and Title VII should be read together and harmonized).

requires a Title IX reader to also consider Title VII and the *Oncale* decision. The two statutes are strikingly similar in operative language. One proscribes employment discrimination “because of . . . sex,”⁷⁴ while the other prohibits discrimination in education “on the basis of sex.”⁷⁵ When read in comparison, the two clauses are virtually identical. In fact, they are so similar that any attempt to read “because of” to include same-sex harassment while simultaneously reading “on the basis of” to exclude same-sex harassment is both illogical and indefensible. The same standard for actionable conduct applies under both Titles VII and IX.⁷⁶ Accordingly, *Oncale* is highly persuasive, if not binding, in cases under Title IX.

In addition to the typical approaches to statutory construction, additional rules apply because Title IX was enacted under the Spending Clause.⁷⁷ Under the Supreme Court’s Spending Clause precedents, conditions of a Spending Clause statute must be clear or ascertainable before liability for any violation attaches.⁷⁸ Under Spending Clause statutes such as Title IX, “private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue.”⁷⁹ Has Congress, by enacting Title IX, spoken with sufficient clarity to subject school districts to liability for same sex peer harassment? Congress passed a clear statute prohibiting entities receiving Federal financial assistance from discriminating “on the basis of sex.”⁸⁰ As noted above, this statute is facially neutral as to the gender of the victim and the harasser.⁸¹ Because the statute is gender neutral, one may readily and reasonably infer that the statute applies to all instances of sex-based harassment. In addition to the notice offered by the plain text of Title IX, the Department of Education has informed subject entities that same-sex peer harassment may violate the statute.⁸² Recipients have adequate notice of their Title

74. 42 U.S.C. § 2000(e)-(k) (2001).

75. 20 U.S.C. § 1681(a) (2001).

76. Compare *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999), with *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). See also *Schaffner*, *supra* note 6, at 162, 177.

77. U.S. CONST. art. I, § 8, cl. 1. Under the Spending Clause, Congress may oblige recipients of federal funds to fulfill certain conditions. See, e.g., *Davis*, 526 U.S. 629, 640 (1999); *South Dakota v. Dole*, 483 U.S. 203 (1987).

78. *Davis*, 526 U.S. at 637-38 (citing cases).

79. *Id.* at 640.

80. 20 U.S.C. § 1681(a) (2001).

81. 20 U.S.C. § 1681(a) (2001). See *supra* note 72; see also *supra* text accompanying notes 70-72.

82. OFFICE OF CIVIL RIGHTS, *supra* note 11, at 12,039.

IX obligations. The Supreme Court's Spending Clause jurisprudence is satisfied.

One commentator, Professor Karen Michaelis, asserts that *Oncale* provides very limited relief to students who are targets of same-sex peer harassment.⁸³ Although seemingly critical of this outcome, Michaelis states in effect that *Oncale* and *Davis* are distinguishable because there is a different standard for institutional liability under Title VII and Title IX.⁸⁴ Although Professor Michaelis draws a correct distinction, it is a distinction with little practical difference concerning the issue of same-sex peer harassment. While an educational institution's liability for student-on-student harassment may be limited, post-*Davis*, there is no indication in *Davis* that the court altered the definition of conduct constituting sexual harassment. In other words, *Davis* defined the point at which institutional liability for harassment attached under Title IX, not the particular nature of the conduct constituting actionable sexual harassment.⁸⁵ Furthermore, neither *Davis* nor the text of Title IX permits an inference that there is a differential standard for institutional responses to same-sex, as opposed to opposite-sex, harassment.

D. Same-Sex Peer Sexual Harassment in Context

Since *Oncale* and *Davis* held that alleged harassment is assessed in context,⁸⁶ one must closely examine contemporary public education in America and its response (or lack of response) to same-sex peer harassment.⁸⁷ As the *Davis* Court noted, schools are places of learning, rather than places of employment; at school, one learns acceptable social behavior.⁸⁸ This learning of social behavior, however, occurs during a period of emotional turmoil for many youth, who often experience uncertainties regarding sexuality and other aspects of personal identity.⁸⁹ Furthermore, students are subject to compulsory attendance laws.⁹⁰ In contrast to those in the work-

83. Michaelis, *supra* note 42, at 48, 81. However, in her conclusion Michaelis seemingly reverses course when she states that *Davis* "fits well with the" *Oncale* decision. *Id.* at 88.

84. *Id.* at 80-88.

85. See *supra* notes 26-41 and accompanying text.

86. *Oncale*, 523 U.S. at 82; *Davis*, 526 U.S. at 651.

87. See *infra* Part II.

88. *Davis*, 526 U.S. at 651.

89. See *infra* notes 103-08 and accompanying text.

90. McCarthy, *supra* note 23, at 401.

place, many victims of schoolhouse sexual harassment have no choice where to attend school.⁹¹

Consider again the questions posed at the beginning of section C. "What if Joseph Oncale had alleged that he had been harassed in a public school? What if LaShonda Davis' harasser had been female?" Same-sex peer harassment presents notable difficulties for American educators. In contemporary American education, same-sex peer harassment is particularly prevalent and often astonishingly cruel.⁹² Educators often hesitate to prevent this variety of harassment, either because of ignorance or silent complicity.⁹³ Frequently, inaction is motivated by a desire to avoid a controversial issue.⁹⁴ Some homophobic educators knowingly contribute to an atmosphere in which same-sex peer harassment thrives.⁹⁵ These factors appear to inhibit a school's effective response to actionable same-sex peer harassment. Same-sex peer harassment may well be the one form of harassment that America's schools are least prepared to address. The remainder of this article attempts to further identify these barriers⁹⁶ and provide educators and policy makers with strategies to surmount these barriers.⁹⁷

II. THE PRICE OF "NONEXISTENCE"⁹⁸ FOR SEXUAL MINORITY STUDENTS

The percentage of Americans who eventually identify themselves as gay, lesbian, bisexual, or transgendered is not precisely known.⁹⁹ This figure, however, is commonly estimated at up to ten percent.¹⁰⁰ The number of students who openly identify themselves (or will in the future) as gay and lesbian is larger than many school officials may realize. One research team found that school

91. *Id.*

92. See *infra* Part II; Schaffner, *supra* note 6, at 159-60; Lugg, *supra* note 16, at 14.

93. See, e.g., Rienzo et al., *supra* note 14, at 33. See *infra* Part II.B.

94. See *supra* notes 15-16; *infra* Part II.B.

95. See, e.g., Gill, *supra* note 68, at 26; *infra* Part II.B.

96. See *infra* Part II.

97. See *infra* Part III.

98. Remafedi, *supra* note 15, at 222.

99. Susan K. Telljohann et al., *Teaching About Sexual Orientation by Secondary Health Teachers*, 65 J. SCH. HEALTH 18, 18 (1995); Virginia Uribe, *The Silent Minority: Rethinking Our Commitment to Gay and Lesbian Youth*, 33 THEORY INTO PRAC. 167, 168 (1994); Lovell, *supra* note 6, at 621-22.

100. See, e.g., Jami L. Van Ryswyk, *Supporting the Student in the Sexual Minority: Thriving in a Heterosexist School*, in PATHWAYS TO TOLERANCE: STUDENT DIVERSITY 35, 35 (Dorothy Daugherty & Victoria Stanhope eds., 1998); Rita M. Marinoble, *Homosexuality: A Blind Spot in the School Mirror*, PROF'L SCH. COUNSELING, Feb. 1998, at 4; Stover, *supra* note 15, at 30; Uribe, *supra* note 99, at 168.

counselors misjudge the percentage of students who are sexual minorities.¹⁰¹ Furthermore, many gay and lesbian students remain “closeted” (keep their sexual orientation secret) during their school years,¹⁰² or may not have resolved their sexual identities.¹⁰³

A. School Climate and Sexual Minorities

Sexual minority students, often described as silent or hidden,¹⁰⁴ pose special challenges for educators. As one author noted, the hidden nature of this group of students “works against any response.”¹⁰⁵ Lesbian and gay youth have an increased rate of mental illness when compared to their heterosexual peers.¹⁰⁶ This is most likely a consequence of social pressure and isolation, rather

101. James H. Price & Susan K. Telljohann, *School Counselors' Perceptions of Adolescent Homosexuals*, 61 J. SCH. HEALTH 433 (1991).

102. See e.g., Van Ryswyk, *supra* note 100, at 35; Canon, *supra* note 15, at 181-82; Rita M. Kissen, *Listening to Gay and Lesbian Teachers*, TEACHING EDUC., Spring 1993, at 56, 60; Lovell, *supra* note 6, at 621 n.12. The decision to remain “in the closet” is often due to the hazards of disclosing one’s sexual orientation. See Janet H. Fontaine & Nancy L. Hammond, *Counseling Issues with Gay and Lesbian Adolescents*, 31 ADOLESCENCE 817, 826-27 (1996); Gill, *supra* note 68, at 26; Shane Town, *Is It Safe to Come Out Yet?* Paper presented at the 77th Annual Meeting of the American Educational Research Association 25-26 (Apr. 8-12, 1996) (ERIC No. ED395262).

103. Eli Coleman & Gary Remafedi, *Gay, Lesbian, and Bisexual Adolescents: A Critical Challenge to Counselors*, 68 J. COUNSELING & DEV. 36, 36 (1989); Fontaine & Hammond, *supra* note 102, at 823 (“[M]any adolescents who question their sexual orientation will not develop a gay or lesbian identity.”).

104. John D. Anderson, *School Climate for Gay and Lesbian Students and Staff Members*, 76 PHI DELTA KAPPAN 151, 151 (1994) (“hidden”); Fontaine & Hammond, *supra* note 102, at 828 (“invisible”); Gloria J. Krysiak, *A Very Silent and Gay Minority*, 34 SCH. COUNSELOR 304 (1987); Carla Mathison, *The Invisible Minority: Preparing Teachers to Meet the Needs of Gay and Lesbian Youth*, 49 J. TCHR. EDUC. 151, 154-55 (1998); William P. McFarland, *Gay, Lesbian, and Bisexual Student Suicide*, PROF’L SCH. COUNSELING, Feb. 1998, at 26; Sharon L. Nichols, *Gay, Lesbian, and Bisexual Youth: Understanding Diversity and Promoting Tolerance in Schools*, 99 ELEMENTARY SCH. J. 505, 509 (1999); Eric Rofes, *Opening Up the Classroom Closet: Responding to the Educational Needs of Gay and Lesbian Youth*, 59 HARV. EDUC. REV. 444, 445 (1989); Uribe, *supra* note 99, at 167.

105. Stover, *supra* note 15, at 30; Nichols, *supra* note 104, at 509 (noting that many sexual minority students remain closeted during school).

106. See, e.g., Coleman & Remafedi, *supra* note 103, at 37; Fontaine & Hammond, *supra* note 102, at 819; Marinoble, *supra* note 100; Mathison, *supra* note 104, at 151, 154; Remafedi, *supra* note 15, at 224-25; Barbara A. Rienzo et al., *School-Based Programs Addressing Gay/Lesbian/Bisexual Youth Issues*, J. INT’L COUNCIL FOR HEALTH, PHYSICAL EDUC. RECREATION, SPORT, & DANCE, Winter 1997, at 20; Rofes, *supra* note 104, at 445. Of course, a large number of sexual minority youth thrive in school and society, in spite of the often toxic environment. James T. Sears, *Helping Students Understand and Accept Sexual Diversity*, EDUC. LEADERSHIP, Sept. 1991, at 54.

than sexual orientation.¹⁰⁷ Adolescence is an emotionally turbulent time during which all youth are confronted with issues of identity formation and sexuality.¹⁰⁸ For sexual minority youth, this process is complicated by feelings of difference, loneliness, and ostracism.¹⁰⁹ Compared with their straight peers, sexual minority students are at greater risk of depression,¹¹⁰ running away (or being forced to leave home),¹¹¹ substance abuse,¹¹² school failure,¹¹³ dropping out,¹¹⁴ sexually transmitted diseases including HIV/AIDS,¹¹⁵ and suicide.¹¹⁶

107. See, e.g., RITCH C. SAVIN-WILLIAMS, *GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY* 181 (1990); Coleman & Remafedi, *supra* note 103, at 37 (observing that "homosexuality per se is not associated with illness"); Howard M. Miller, *Swimming with the Sharks*, 52 *READING TCHR.* 632, 633 (1999) (stating that mental illness and substance abuse among school-age sexual minorities is caused by isolation and "despair."); Lovell, *supra* note 6, at 623-24.

108. See, e.g., Nichols, *supra* note 104, at 509; Uribe, *supra* note 99, at 167-70.

109. SAVIN-WILLIAMS, *supra* note 107, at 1; Anderson, *supra* note 104, at 152; Coleman & Remafedi, *supra* note 103, at 37; Fontaine & Hammond, *supra* note 102, at 819-23; Kissen, *supra* note 102, at 57; Deborah Tharinger & Greg Wells, *An Attachment Perspective on the Developmental Challenges of Gay and Lesbian Adolescents: The Need for Continuity of Caregiving from Family and Schools*, 29 *SCH. PSYCH. REV.* 158 (2000); Town, *supra* note 102, at 20-22; See *supra* note 102; cf. Krysiak, *supra* note 104, at 305-06 (noting that many sexual minority youth "do not have a parent as a role model"); Deana F. Morrow, *Social Work with Gay and Lesbian Adolescents*, 38 *SOC. WORK* 655, 656 (1993).

110. Fontaine & Hammond, *supra* note 102, at 819; Stover, *supra* note 15, at 29.

111. Coleman & Remafedi, *supra* note 103, at 37; Ann T. Edwards, *Let's Stop Ignoring Our Gay and Lesbian Youth*, *EDUC. LEADERSHIP*, Apr. 1997, at 68, 68; Fontaine & Hammond, *supra* note 102, at 819; Mary Ellen Gevelinger & Laurel Zimmerman, *How Catholic Schools Are Creating a Safe Climate for Gay and Lesbian Students*, *EDUC. LEADERSHIP*, Oct. 1997, at 66, 66; Miller, *supra* note 107, at 633; Morrow, *supra* note 109, at 656; Rofes, *supra* note 104, at 446; Stover, *supra* note 15, at 29; Telljohann et al., *supra* note 99, at 18; Tharinger & Wells, *supra* note 109; Uribe, *supra* note 99, at 169.

112. Coleman & Remafedi, *supra* note 103, at 37; Edwards, *supra* note 111, at 68; Fontaine & Hammond, *supra* note 102, at 819; Karen M. Jordan, *Substance Abuse Among Gay, Lesbian, Bisexual, Transgender, and Questioning Adolescents*, 29 *SCH. PSYCH. REV.* 201 (2000); Miller, *supra* note 105, at 633; Morrow, *supra* note 107, at 657; Remafedi, *supra* note 15, at 224; Rofes, *supra* note 104, at 445; Sears, *supra* note 106, at 54; Stover, *supra* note 15, at 29; Telljohann et al., *supra* note 99, at 18; Tharinger & Wells, *supra* note 109.

113. Anderson, *supra* note 14, at 66; Coleman & Remafedi, *supra* note 103, at 37; Jordan et al., *supra* note *, at 19; Sears, *supra* note 106, at 54; Stover, *supra* note 15; Tharinger & Wells, *supra* note 109.

114. Gill, *supra* note 68, at 26; Jordan et al., *supra* note *, at 19; Morrow, *supra* note 109, at 656; Telljohann et al., *supra* note 99, at 18; Tharinger & Wells, *supra* note 109; Uribe, *supra* note 99, at 169.

115. See, e.g., Coleman & Remafedi, *supra* note 103, at 37; Remafedi, *supra* note 15, at 224; Rofes, *supra* note 104, at 452-53; Leo Treadway & John Yoakam, *Creating a Safer School Environment for Lesbian and Gay Students*, 62 *J. SCH. HEALTH* 352, 355 (1992).

School climate and culture often intensifies the hardships of sexual minority youth.¹¹⁷ The enacted and informal curricula of many schools reinforce society's preference for heterosexuality.¹¹⁸ One writer described sexual minority students as "outsiders in their own community."¹¹⁹ Another described school as "a lonely and frightening place to be" for gay and lesbian students.¹²⁰ Often, schools ignore the issues facing sexual minority youth.¹²¹ When gay and

116. Coleman & Remafedi, *supra* note 103, at 37; Edwards, *supra* note 111, at 68; Gevelinger & Zimmerman, *supra* note 111, at 66; Matthew Hilton, *Options for Local School Districts Reviewing Local Governance and Moral Issues Raised by the Equal Access Act: The Gay-Straight Student Alliance in Utah*, 1996 B.Y.U. EDUC. & L.J. 1, 34; Kissen, *supra* note 102, at 57; Jordan et al., *supra* note *, at 20; Gerald P. Mallon, *When Schools Are Not Safe Places: Reconnecting Gay and Lesbian Young People to Schools*, REACHING TODAY'S YOUTH, Fall 1997, at 41; McFarland, *supra* note 104; Miller, *supra* note 107, at 633; Morrow, *supra* note 109, at 657; Nichols, *supra* note 104, at 510-11; Remafedi, *supra* note 15, at 224; Sears, *supra* note 106, at 54; Telljohann et al., *supra* note 99, at 18; Tharinger & Wells, *supra* note 109; Treadway & Yoakam, *supra* note 115, at 354; Uribe, *supra* note 99, at 169; Henigan, *supra* note 16, at 1262 n.4; Lovell, *supra* note 6, at 622-28; Jameson K. Hirsch & Jon B. Ellis, *Reasons for Living in Homosexual and Heterosexual Older Adolescents*, Presentation at the Annual Meeting of the American Educational Research Association (Mar. 1997) (ERIC No. ED371270). Many of these authorities cite Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in 3 U.S. DEP'T OF HEATH AND HUM. SERVS., REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110, 110 (M. Feinleib ed., 1989). For a brief critique of Gibson's methodology, see Lowell, *supra* note 6, at 626 n.48 and the authorities cited therein.

117. SAVIN-WILLIAMS, *supra* note 107, at 177-85; Jordan et al., *supra* note *, at 18; Khayatt, *supra* note 65; Morrow, *supra* note 109, at 658; Rienzo et al., *supra* note 14; Rofes, *supra* note 104, at 451-52; Stover, *supra* note 15; Treadway & Yoakam, *supra* note 115, at 352; Lovell, *supra* note 6, at 624.

118. Sattel et al., *supra* note 67, at 234; Gevelinger & Zimmerman, *supra* note 111, at 66; Jordan et al., *supra* note *, at 18; Khayatt, *supra* note 65; Mathison, *supra* note 104, at 152; Nichols, *supra* note 104, at 509-10, 514-15; Sears, *supra* note 106, at 55; Telljohann et al., *supra* note 99, at 18, 20; Town, *supra* note 102, at 17-19. *Cf.* Fine, *supra* note 15, at 31 (noting that while "evidence of sexuality" is omnipresent in schools, "official sexuality education occurs sparingly").

119. Morrow, *supra* note 109, at 658.

120. Uribe, *supra* note 99, at 167, 171.

121. *See, e.g.*, Van Ryswyk, *supra* note 100, at 36; Anderson, *supra* note 14, at 65; Khayatt, *supra* note 65, at 53-56; Mathison, *supra* note 104, at 152; Telljohann et al., *supra* note 99, at 18; Tharinger & Wells, *supra* note 109; Town, *supra* note 102, at 15. This silence is pronounced even in the typical sex education curriculum. SAVIN-WILLIAMS, *supra* note 107, at 179; Anderson, *supra* note 104, at 153-54. Professor Town, in a study of young gay men in New Zealand, quotes one study subject that sex education focused solely on heterosexual concerns: "[S]ex education covered only the science side of things . . . the mechanical. . . ." Town, *supra* note 102, at 17. Another subject stated "I didn't learn anything [in sex education] except how to treat a girl right which wasn't useful at all." *Id.* Professor Town's observations regarding gay and lesbian issues in the sex education curriculum parallel Michelle Fine's general observation regarding sex education: "Most instruction was, however, limited to 10 hours or less, with content focused on anatomy." Fine, *supra* note 15, at 43. This is true even

lesbian issues are discussed in school, they are regularly cast in a negative light.¹²² Many gay and lesbian youth have unhappy school experiences.¹²³ These experiences include enduring verbal and physical violence at the hands of their peers¹²⁴ or witnessing such violence.¹²⁵ Many assailants consider their conduct socially desirable, or minimize the harms caused by their conduct,¹²⁶ and have never been taught that anti-gay assaults are wrong.¹²⁷ Often, it is family members who are the assailants.¹²⁸ Peers and family members, however, are not the only possible assailants. In one study, seven percent of gay and lesbian students reported being harmed by a teacher.¹²⁹ In another study, seventeen percent of youth (regardless of sexual orientation) reported that they "had been called 'gay' or 'lesbian' when they did not want to be."¹³⁰ Many students report hearing frequent pejorative references to sexual minorities.¹³¹ School staff frequently do not intervene to stop harassment,¹³² even though many indicate they have a professional responsibility to take such action.¹³³ Commonly, verbal assaults are precursors to physical assaults, according to the accounts of gay

though a vast majority of Americans favor including discussions of sexual minorities in sex education. *Id.*

122. Mathison, *supra* note 104, at 152; Nichols, *supra* note 104, at 509-10, 514-15; Telljohann et al., *supra* note 99, at 18, 20; Sears, *supra* note 106, at 55; Town, *supra* note 102, at 17-18.

123. Anderson, *supra* note 14, at 65; Khayatt, *supra* note 65; Kissen, *supra* note 102, at 58-60. *See also* Lovell, *supra* note 6 at 617 (discussing a statutory protection against student-to-student sexual orientation harassment).

124. SAVIN-WILLIAMS, *supra* note 107, at 178; Gill, *supra* note 68, at 26; Morrow, *supra* note 109, at 657; Stover, *supra* note 15; Treadway & Yoakam, *supra* note 115, at 352; Lovell, *supra* note 6, at 622-628; *see also* Anthony R. D'Augelli, *Lesbian and Gay Male Undergraduates' Experiences of Harassment and Fear on Campus*, 7 J. INTERPERSONAL VIOLENCE 383 (1992). This, however, is not universal. In one study, seventeen percent of gay and lesbian youth reported no victimization of any kind due to sexual orientation. Pilkington & D'Augelli, *supra* note 67, at 39.

125. Kissen, *supra* note 102, at 60.

126. Amy M. Rey & Pamela Reed Gibson, *Beyond High School: Heterosexuals' Self-Reported Anti-Gay/Lesbian Behaviors and Attitudes*, 7 J. GAY & LESBIAN SOC. SERVICES, 65, 75 (1997); Franklin, *supra* note 66, at 2-3.

127. Franklin, *supra* note 66, at 7.

128. Morrow, *supra* note 109, at 657; Pilkington & D'Augelli, *supra* note 67, at 40-43.

129. Gill, *supra* note 68, at 26 (citing Pilkington & D'Augelli, *supra* note 67, at 44).

130. Lovell, *supra* note 6, at 622 (citing AM. ASS'N OF UNIV. WOMEN EDUCATORS FOUND., HOSTILE HALLWAYS 10 (1993)).

131. *See, e.g.*, Kelley Carter, *Gay Slurs Abound*, DES MOINES REG., Mar. 7, 1997.

132. *Id.*; *see also* Gill, *supra* note 68, at 26; Lugg, *supra* note 16, at 9; Tharinger & Wells, *supra* note 109.

133. Telljohann et al., *supra* note 99, at 20.

youths.¹³⁴ Many of these experiences continue in college¹³⁵ and professional school.¹³⁶ In general, this intimidating atmosphere significantly inhibits disclosure of sexual orientation to students and teachers.¹³⁷

The preceding paragraphs are a broad-brush summary of the experiences of most sexual minority youth in American schools. Their respective responses to homophobic and heterosexist school climates are as diverse as humanity itself. Although overall trends are detectable, each individual responds to a "toxic culture" in unique ways.¹³⁸ It should be noted that not every sexual minority youth considers suicide, for example. Scholars caution against pathologizing sexual orientation by focusing entirely on negative aspects of gay and lesbian life; in fact, one study revealed that a large majority of sexual minority students "reported feeling positive about their sexual orientation."¹³⁹ Some sexual minority students thrive in school, while others merely "get by."¹⁴⁰ Some seek to excel in school "as a means of hiding their sexual feelings from themselves or others."¹⁴¹ Others aggressively attempt to conform to traditional gender roles, including dating members of the opposite sex and parenting children.¹⁴² Sometimes, however, fitting in can go too far. Some participate in anti-gay violence, as a means of

134. Town, *supra* note 102, at 21.

135. D'Augelli, *supra* note 124; Franklin, *supra* note 66.

136. Janice L. Austin et al., *Results from a Survey: Gay, Lesbian, and Bisexual Students' Attitudes about Law School*, 48 J. LEG. EDUC. 157 (1998); see also, e.g., Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990).

137. Pilkington & D'Augelli, *supra* note 67, at 44; see *supra* note 102 and accompanying text.

138. Nichols, *supra* note 104, at 509 (rejecting the "assumption of homogeneity", which asserts that all sexual minorities have identical reactions to identical experiences); Lovell, *supra* note 6, at 623 (not all gay youth respond to harassment in the same manner). For a brief discussion of "toxic cultures" in schools, see Kent D. Peterson & Terrance E. Deal, *How Leaders Influence the Culture of Schools*, EDUC. LEADERSHIP, Sept. 1998, at 28-29.

139. Jordan et al., *supra* note *, at 25; SAVIN-WILLIAMS, *supra* note 107, at 182-85; Town, *supra* note 102, at 18.

140. See, e.g., SAVIN-WILLIAMS, *supra* note 107, at 182-85; Jordan et al., *supra* note *, at 20-21, 25-26; Lovell, *supra* note 6, at 624 & n.32.

141. Sears, *supra* note 106, at 54; Treadway & Yoakam, *supra* note 115, at 353; Uribe, *supra* note 99, at 169; Town, *supra* note 102, at 25.

142. Treadway & Yoakam, *supra* note 115, at 353; Uribe, *supra* note 99, at 169; Lovell, *supra* note 6, at 623; Town, *supra* note 102, at 25.

publicly demonstrating their heterosexual "credentials."¹⁴³ Occasionally, targets violently strike back against their tormentors.¹⁴⁴

What are the hallmarks of a homophobic student or teacher? As noted above, many such persons have never been told that anti-gay words and actions are unacceptable.¹⁴⁵ Persons holding homophobic attitudes are more likely to be less educated,¹⁴⁶ more religiously conservative,¹⁴⁷ more politically conservative,¹⁴⁸ and come from households with less education¹⁴⁹ than persons who do not hold homophobic attitudes. Males are more likely than females to have homophobic attitudes and perpetrate homophobic acts.¹⁵⁰ The available literature and research points to one key attribute of homophobia: anti-gay attitudes are "worse among people who have never knowingly met a homosexual."¹⁵¹

Several authorities have noted that homophobic school climates harm straight students as well as their sexual minority peers. Homophobia harms heterosexuals intellectually¹⁵² by teaching hatred¹⁵³ and reinforcing unfounded myths about sexual minorities.¹⁵⁴ Further, homophobia may obstruct the formation of emotionally intimate same-sex friendships,¹⁵⁵ especially among males.¹⁵⁶ In addition, straight students may engage in sexual behaviors that place them at risk for contracting HIV, in the mistaken belief that HIV/AIDS is a gay man's disease.¹⁵⁷ Fundamentally, homophobic violence in schools may foster other violence by contributing to an

143. Treadway & Yoakam, *supra* note 115, at 353.

144. *See, e.g.*, Schaffner, *supra* note 6, at 160 (noting one instance where a gay male shot his tormentors at school, killing three).

145. Franklin, *supra* note 66, at 7.

146. Rey & Gibson, *supra* note 126, at 78 (lower GPA); Richard Seltzer, *The Social Location of Those Holding Antihomosexual Attitudes*, 26 *SEX ROLES* 391, 395-96 (1992); Jane M. Simoni, *Pathways to Prejudice: Predicting Students' Heterosexist Attitudes With Demographics, Self-Esteem and Contact with Lesbians and Gay Men*, 37 *J. C. STUDENT DEV.* 68, 69 (1996); Telljohann et al., *supra* note 99, at 21.

147. Seltzer, *supra* note 146, at 395; Uribe, *supra* note 99, at 169.

148. Seltzer, *supra* note 146, at 393.

149. Simoni, *supra* note 146, at 169.

150. Rey & Gibson, *supra* note 126, at 78; Seltzer, *supra* note 146, at 395-96; Simoni, *supra* note 146, at 69; Telljohann et al., *supra* note 99, at 21.

151. Anderson, *supra* note 104, at 152; Mathison, *supra* note 104, at 152; Uribe, *supra* note 99, at 169.

152. Simoni, *supra* note 146, at 68.

153. Gill, *supra* note 68, at 26.

154. Anderson, *supra* note 104, at 153; Simoni, *supra* note 146, at 68.

155. SAVIN-WILLIAMS, *supra* note 107, at 178; Rienzo et al., *supra* note 14, at 33; Simoni, *supra* note 146, at 68.

156. Rienzo et al., *supra* note 14, at 33.

157. Miller, *supra* note 107, at 633.

insecure school climate. As two parochial school administrators from Minnesota indicated with reference to sexual minority students: “[I]f one person is not safe, no person is safe.”¹⁵⁸

B. School Staff and Hostile School Climates

Several authors note that school officials have been slow to respond to the obstacles facing sexual minority students.¹⁵⁹ Two leading authors, writing separately, termed the education community’s response to the needs of gay and lesbian students a “conspiracy of silence.”¹⁶⁰ A substantial number of teachers are described as homophobic, both by students¹⁶¹ and fellow professionals.¹⁶² Many authors assert that anti-gay attitudes held by teachers and administrators, often based on myths, ignorance, political rhetoric, and misconceptions,¹⁶³ contribute to a homophobic atmosphere in public education.¹⁶⁴ For example, one research team found that thirty-four percent of high school health teachers surveyed considered homosexuality a threat to American family values.¹⁶⁵ Several authorities described a disturbing amount of homophobia among pre-service teachers.¹⁶⁶ For example, Professor Kissen described a

158. Gevelinger & Zimmerman, *supra* note 111, at 68.

159. See, e.g., Anderson, *supra* note 104, at 152; Edwards, *supra* note 111, at 68; Janet H. Fontaine, *The Sound of Silence: Public School Response to the Needs of Gay and Lesbian Youth*, 7 J. GAY & LESBIAN SOC. SERVICES, 65, 101 (1997); Kissen, *supra* note 102; Rienzo et al., *supra* note 14; Mathison, *supra* note 104, at 152; Uribe, *supra* note 99.

160. Anderson, *supra* note 104, at 151; Sears, *supra* note 106, at 55.

161. See, e.g., Telljohann et al., *supra* note 99, at 18.

162. Price & Telljohann, *supra* note 101.

163. Anderson, *supra* note 104, at 151; Fontaine & Hammond, *supra* note 102, at 828; Mathison, *supra* note 104, at 152; Rofes, *supra* note 104, at 451; Sears, *supra* note 106, at 55; Karen L. Butler, *Prospective Teacher’s Knowledge, Attitudes, and Behavior Regarding Gay Men and Lesbians* (Nov. 1994) (unpublished manuscript, ERIC No. ED379251); Lugg, *supra* note 16. Many of these attitudes are derived from the popular media. Telljohann et al., *supra* note 97, at 20 (discussing the most prevalent source of information for secondary health teachers). For a discussion of the mass media’s portrayal (or lack thereof) of sexual minority youth, see Alfred P. Kielwasser & Michelle A. Wolf, *Mainstream Television, Adolescent Homosexuality, and Significant Silence*, 9 CRITICAL STUD. MASS COMM. 350 (1992).

164. Canon, *supra* note 15, at 181, Kissen, *supra* note 102, at 63-64; Uribe, *supra* note 99; Lugg, *supra* note 16; James T. Sears, *Personal Feelings and Professional Attitudes of Prospective Teachers toward Homosexuality and Homosexual Students*, Paper presented at the Annual Meeting of the American Educational Research Association (Mar. 27-31, 1989) (ERIC no. ED312222).

165. Telljohann et al., *supra* note 99, at 19

166. Kissen, *supra* note 102, at 62-64; Miller, *supra* note 107, at 632-34; Butler, *supra* note 163; Sears, *supra* note 164.

powerful class discussion about *Annie on My Mind*,¹⁶⁷ “a young adult lesbian romance,”¹⁶⁸ during her course on literature for adolescents:

The previous week the students responsible for leading our discussion on lesbian and gay fiction had asked us to write down whatever came to our minds when we heard the words “gay” or “lesbian.” That night they began our discussion by unveiling a large poster designed to look like a brick wall. On the “wall” they had chalked all the words the rest of us had written. With one or two exceptions, our class-generated “graffiti” were negative, hostile, even violent. For a long time, no one said a word.¹⁶⁹

Professor Kissen reported that the resulting discussion allowed students to confront homophobia and the educational harms that it causes.¹⁷⁰ Other professors report similar outcomes in other teacher education classes.¹⁷¹

Why do many educators fail to intercede on behalf of targets of same-sex harassment? Aside from the anti-gay prejudice that some educators harbor,¹⁷² many are fearful of the consequences (actual or perceived) of intervening.¹⁷³ They may fear being fired;¹⁷⁴ being accused of violating state or local law;¹⁷⁵ being wrongly labeled as gay or lesbian; being “outed”;¹⁷⁶ or being targets of anti-gay harassment or violence themselves. Others, although not purposefully homophobic, are ignorant of the harms caused by same-sex peer harassment or the means that they possess to intervene.¹⁷⁷ Sexual minority teachers, in addition to these

167. NANCY GARDEN, *ANNIE ON MY MIND* (1982).

168. Kissen, *supra* note 102, at 63.

169. *Id.* at 63-64.

170. *Id.* at 64-66.

171. Miller, *supra* note 107, at 632-34.

172. See *supra* notes 161-69 and accompanying text.

173. Fontaine, *supra* note 159, at 102; Kissen, *supra* note 102, at 65; Stover, *supra* note 15, at 30; Franklin, *supra* note 66, at 8.

174. Morrow, *supra* note 109, at 658; Rofes, *supra* note 104, at 451; Walden & Culverhouse, *supra* note 15, at 1421; Zirkel, *supra* note 16, at 333; Thomas P. Juul, Tenure, Civil Rights Laws, Inclusive Contracts, and Fear: Legal Protection and the Lives of Self-Identified Lesbian, Gay Male, and Bisexual Public School Teachers, Paper presented at the Annual Meeting of the Northeastern Educational Research Association (Oct. 26-28, 1994) (ERIC No. ED377565); Lugg, *supra* note 16, at 7-10.

175. Rofes, *supra* note 104, at 451; Lugg, *supra* note 16.

176. To “out” someone is to identify publicly as being such secretly; especially to identify as being a closet homosexual. Meriam Webster Online (2001), at <http://www.m-w.com>.

177. Anderson, *supra* note 104, at 151; Tharinger & Wells, *supra* note 109; Frankin, *supra* note 66, at 8.

factors, may be further constrained by widespread and unfounded social fears that a gay or lesbian teacher will “recruit,” “convert,” or molest students.¹⁷⁸ In addition, these teachers may avoid interceding on behalf of sexual minority students because of unresolved, painful memories of their own youth.¹⁷⁹ In fact, homophobic school climates deter many skilled or promising sexual minority teachers from entering or remaining in the profession.¹⁸⁰

What are the consequences of a staff member’s inactivity in the face of same-sex peer verbal harassment? By failing to act, the staff is in collusion with the perpetrator.¹⁸¹ At a minimum, failure to intervene is tacit consent to continued harassment.¹⁸² When verbal same-sex harassment is unchecked, it frequently escalates along a continuum, up to and including physical violence.¹⁸³

Aside from inaction, educators may actively contribute to a homophobic school climate by their words and deeds, by using derogatory language,¹⁸⁴ laughing at or otherwise encouraging same-sex harassment,¹⁸⁵ and participating in anti-gay violence.¹⁸⁶ In one instance, a teacher gave a failing grade to a student who complained of same-sex peer harassment.¹⁸⁷ Other anti-gay actions by educators are more covert and insidious. For example, Professor Morrow notes that educators frequently place comments about

178. See, e.g., Anderson, *supra* note 104, at 151; Canon, *supra* note 15, at 183; Morrow, *supra* note 109, at 655; Rofes, *supra* note 104, at 446; Lugg, *supra* note 16, at 6-7. Sexual minority youths begin their discovery of their own sexual identities without being “recruited” by adult gay men or lesbians. Discussing the issue will not cause persons to “choose” sexual minority status. “Information does not cause homosexuality—it is unreasonable to expect that the discussion of homosexuality in the middle or high schools will lead students to adopt this ‘lifestyle.’” Van Ryswyk, *supra* note 100, at 35.

179. Rofes, *supra* note 104, at 446.

180. Juul, *supra* note 174.

181. Fontaine, *supra* note 159, at 108-09; Miller, *supra* note 107, at 632; Town, *supra* note 102, at 15-17.

182. Miller, *supra* note 107, at 632; Treadway & Yoakam, *supra* note 115, at 356.

183. Treadway & Yoakam, *supra* note 115, at 356; Darcia H. Bowman, *Report Says Schools Often Ignore Harassment of Gay Students*, EDUC. WK., June 6, 2001, at 5. Of course, this is true for most bullying, whether or not motivated by homophobia. See generally Philip B. Monteith, *Squaring Off with Bullying: What Middle Schools Can Do*, Presentation at Lehigh University Middle Level Conference (April 14, 2001).

184. See, e.g., Jordan et al., *supra* note *, at 29; Kissen, *supra* note 102, at 61 (noting example of a teacher telling “fag” jokes).

185. See, e.g., Schaffner, *supra* note 6, at 159 (providing two examples); Town, *supra* note 102, at 15-17.

186. See, e.g., Gill, *supra* note 68, at 26; Pilkington & D’Augelli, *supra* note 67, at 44.

187. Schaffner, *supra* note 6, at 159.

sexual orientation in student records.¹⁸⁸ Some sexual minority students are inappropriately referred for special education by being labeled as "emotionally disturbed" due to their emergent sexual orientation.¹⁸⁹ In a similar vein, many sexual minority youth are committed to mental or psychiatric institutions solely because of their sexual orientation.¹⁹⁰

In sum, America's sexual minority youth present multifaceted challenges for the nation's schools, and schools typically are not structured to respond effectively to such challenges. The remainder of this article will offer guidance to educators and policy makers in their attempts to rectify same-sex peer harassment.

C. School Staff, School Climates, and Social Forces

Before continuing, one must acknowledge the difficulties of implementing any school reform,¹⁹¹ let alone one as potentially controversial as addressing same-sex harassment.¹⁹² It would be terribly naive to assume that a policy confronting same-sex harassment would be easy to adopt and implement. Schools are subject to tremendous internal and external pressures on the local, state, and national levels.¹⁹³ Society is still divided concerning rights and protections to be afforded to gay men, lesbians, bisexuals, and other sexual minorities. As Professor Zirkel observed, "questions of homosexuality in our society are still unsettling and unsettled."¹⁹⁴ Consequently, sexual minority youth receive mixed messages from society. For example, a gay/straight student club's attempt to organize in the Salt Lake City public schools generated

188. Morrow, *supra* note 109, at 658. For more information on laws protecting student records, see, for example, Mayes & Zirkel, *supra* note 69.

189. Jordan et al., *supra* note *, at 20. For a brief overview of identifying students with disabilities as emotionally disturbed, see Perry Zirkel, *How to Determine Eligibility of Students with Behavioral Problems*, THE SPECIAL EDUCATOR, Feb. 12, 1999, at 1.

190. See Miye A. Goishe, *Unlocking the Closet Door: Protecting Children from Involuntary Civil Commitment Because of Their Sexual Orientation*, 48 HASTINGS L.J. 1137, 1168-69 (1997); Lugg, *supra* note 16, at 14. This includes electric shock therapy. Lugg, *supra* note 16, at 14.

191. See, e.g., Richard P. McAdams, *A Systems Approach to School Reform*, 79 PHI DELTA KAPPAN 138, 138 (1997).

192. See *supra* notes 15-16.

193. See, e.g., JOEL SPRING, CONFLICT OF INTEREST: THE POLITICS OF AMERICAN EDUCATION 103-05 (3rd ed. 1998); R.M. Latanision, *Education Reform and the Public Will*, DAEDALUS, Fall 1995, at 143-44; McAdams, *supra* note 191, at 138.

194. Zirkel, *supra* note 16, at 333.

a great deal of public controversy and litigation.¹⁹⁵ The United States Supreme Court recently upheld the right of the Boy Scouts of America to exclude non-straight men from leadership positions.¹⁹⁶ Most recently, the Reverend Jerry Falwell shocked America by apparently apportioning some of the responsibility for the terrorist attacks of September 11, 2001 to gays and lesbians.¹⁹⁷

On the other hand, sexual minorities have made notable advances in contemporary society.¹⁹⁸ The fact that Reverend Falwell's comments were so poorly received is evidence of the improved social standing of sexual minorities. Gay and lesbian litigants have had both significant victories and defeats in the courts.¹⁹⁹ Public sentiment, although remaining mercurial, has become more positive toward sexual minorities.²⁰⁰ Several states and localities have passed statutes and ordinances punishing hate crimes based on sexual orientation and protecting sexual minorities from public and private discrimination.²⁰¹ Others, notably the State of Vermont, have passed "domestic partner" statutes granting same-sex couples some, if not all, of the rights and duties associated with marriage.²⁰² Sexual minorities are openly parenting more frequently, and their children are now coming to school as

195. See, e.g., Brown et al., *supra* note 16; David S. Doty, *Finding A Third Way: The Use of Public Engagement and ADR to Bring School Communities Together for the Safety of Gay Students*, 12 HASTINGS WOMEN'S L.J. 39, 48-49 (2001); Doty, *supra* note 16; Hilton, *supra* note 116, at 1-2.

196. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

197. See Bob Pool, *Falwell Is Condemned for His Comments Following Attacks*, L.A. TIMES, Sep. 20, 2001, at II-3.

198. See, e.g., Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559, 1559-60 (2000); John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46.

199. See, e.g., Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1551-52 (1993); Michaelson, *supra* note 198; Walden & Culverhouse, *supra* note 15. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting substantive Due Process challenge to Georgia statute criminalizing sodomy), with *Romer v. Evans*, 517 U.S. 620 (1996) (sustaining Equal Protection challenge to Colorado constitutional amendment prohibiting localities from adopting "gay rights" ordinances). The Georgia Supreme Court struck down the statute at issue in *Bowers* as violating Georgia's Constitution. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

200. See, e.g., Michaelson, *supra* note 198; Leland, *supra* note 198.

201. See, e.g., Michaelson, *supra* note 198, at 1560; Rienzo et al., *supra* note 14, at 33; Leland, *supra* note 198; see also *supra* note 14.

202. See, e.g., Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1739 (1998); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149 (2000); Michaelson, *supra* note 198.

products of that openness.²⁰³ In addition, thousands of employers offer health insurance coverage to domestic partners, “including IBM, AT&T, Disney, Chevron, and General Mills.”²⁰⁴ Many popular films and television shows feature sexual minority characters, and gay and lesbian artists occupy a prominent position in the visual and performing arts.²⁰⁵ In spite of these advances, sexual minorities remain the group most victimized by hate crimes.²⁰⁶

It is in this contradictory climate²⁰⁷ that today’s sexual minority youths are coming of age. As one commentator noted, “this push-pull between progress and resistance cuts directly through [the lives of sexual minorities and their allies]—how to live in a culture that loves Rupert Everett but kills Barry Winchell?”²⁰⁸

III. TAKING ACTION

Having identified the legal²⁰⁹ and professional²¹⁰ considerations concerning same-sex harassment in public schools, what does one do next? This Part identifies several factors involved in confronting issues of same-sex peer harassment. First, it provides guidance for program design.²¹¹ Second, it provides suggestions for program content.²¹² Third, it provides suggestions concerning program implementation, with special attention to potential pitfalls and unintended consequences.²¹³ Finally, it focuses on issues aris-

203. PHYLLIS BURKE, FAMILY VALUES: A LESBIAN MOTHER’S FIGHT FOR HER SON (1993); Cynthia Asprodites, *Gay Families with Children*, in *PATHWAYS TO TOLERANCE: STUDENT DIVERSITY* 40, 40-41 (Dorothy Daugherty & Victoria Stanhope eds., 1998); Patricia Hulsebosch & Mari E. Koerner, *You Can’t Be For Children and Against Their Families*, in *OVERCOMING HETEROSEXISM AND HOMOPHOBIA* 261 (James T. Sears & Walter L. Williams eds., 1997); Virginia Casper et al., *Toward a Most Thorough Understanding of the World: Sexual Orientation and Early Childhood Education*, 66 *HARV. EDUC. REV.* 271, 278 (1996); Christensen, *supra* note 202, at 1706-14; Michaelson, *supra* note 198, at 1599; Daniel Ryan & April Martin, *Lesbian, Gay, Bisexual, and Transgender Parents in the School Systems*, 29 *SCH. PSYCH. REV.* 207 (2000).

204. Michaelson, *supra* note 198, at 1599.

205. *See id.* at 1600.

206. Rey & Gibson, *supra* note 126, at 66. Some authors state that this high rate of victimization is due to the increased visibility of sexual minorities in contemporary culture. *See, e.g.*, Morrow, *supra* note 109, at 657.

207. *See supra* notes 191-206 and accompanying text.

208. Leland, *supra* note 198, at 48-49. In July 1999, Pfc. Barry Winchell, was murdered in his barracks at Fort Campbell in Kentucky by a fellow soldier who suspected that Winchell was gay. *Id.* at 48.

209. *See supra* Part I.

210. *See supra* Part II.

211. *See infra* Part III.A.

212. *See infra* Part III.B.

213. *See infra* Part III.C.

ing from confronting same-sex harassment in a pluralistic society.²¹⁴

This Part has two overarching ideas. First, an effective same-sex harassment policy must be broad and preventative in approach. By the time a student may have an actionable peer harassment complaint, school staff may have missed opportunities to intervene, deter, redirect, and educate. An effective, preventative approach (i.e., education about the school's policy) makes other late-term interventions (i.e., suspension) unnecessary. Second, an effective same-sex harassment policy must be interwoven with all aspects of school life, not just in the classroom, but in all settings (i.e., lunch room, playground), and not just in health class, but in all curricular areas. Intervening when destructive acts and speech occur is necessary, but not sufficient. The ultimate goal of a preventative same-sex peer harassment policy is to change the school climate so that homophobic and heterosexist words and deeds become unthinkable.

A. Issues of Design

In developing a program to confront same-sex harassment in the schools, planners may wish to consider the following suggestions. First, someone must be willing to identify same-sex peer harassment as a problem and communicate that the problem exists. Whether that first voice is a teacher, student, parent, or administrator, that person must be willing to confront potential controversy²¹⁵ as well as ignorance on the part of well-meaning educators, and hostility on the part of others.²¹⁶ The pioneer of such a program must be prepared to confront the presumption of heterosexuality²¹⁷ that exists in school and society, and must be armed with facts concerning the nature and extent of the harms associated with same-sex peer harassment.²¹⁸ Once that initial leader has educated sufficient stakeholders about the nature and extent of same-sex peer harassment, then a sufficient "critical mass" will have developed to allow a sustainable effort to eradicate homophobia and heterosexism in a school's culture.

214. See *infra* Part III.D.

215. See *supra* notes 15-16; Part II.C.

216. See *supra* notes 117-23, 129, 132-33, 159-90 and accompanying text.

217. See, e.g., Fontaine & Hammond, *supra* note 102, at 818; Gevelinger & Zimmerman, *supra* note 111, at 66; Krysiak, *supra* note 104, at 305; Morrow, *supra* note 109, at 655; Nichols, *supra* note 104, at 509; Sears, *supra* note 106, at 55; Devito, *supra* note 15.

218. See *supra* Part II.

Second, these agents of change must be willing to confront specific misconceptions and myths concerning sexual minorities in school and society. One common misconception is the "heterogeneity" of sexual minorities.²¹⁹ America's sexual minorities are not a monolith. They are tremendously diverse.²²⁰ Furthermore, sexual minorities who are also members of other minority groups typically have additional concerns not faced by white sexual minorities. According to Fontaine and Hammond, "the presentation of gay issues by activists within the gay community often highlights the concerns of Caucasian middle-class gay and lesbian adults."²²¹ Sexual minorities may face additional problems due to differences in race and ethnicity,²²² class,²²³ or the presence of a disability.²²⁴ Research indicates that sexual minority adolescents who are also members of other minority groups have a higher risk of suicide.²²⁵ Similarly, sexual minority youth in rural communities are confronted by additional issues of social stigma and isolation from support services.²²⁶ Any program design must adequately account for the diversity of experiences and world-views among America's sexual minorities.

Another common misconception is that individuals are either "homosexual" or "heterosexual." This false "binary construction"²²⁷ of sexual orientation is against the weight of empirical evidence²²⁸ and serves to marginalize and isolate those individuals

219. Nichols, *supra* note 104, at 509.

220. Canon, *supra* note 15, at 181.

221. Fontaine & Hammond, *supra* note 102, at 826.

222. See, e.g., CHICANA LESBIANS: THE GIRLS OUR MOTHERS WARNED US ABOUT (Carla Trujillo ed., 1991); Connie S. Chan, *Issues of Identity Development among Asian-American Lesbians and Gay Men*, 68 J. COUNSELING & DEV. 16 (1989); Darryl K. Loiacano, *Gay Identity Issues Among Black Americans: Racism, Homophobia, and the Need for Validation*, 68 J. COUNSELING & DEV. 21 (1989); Matthew A. Bowdy, "Como Se Dice HIV?": Adapting Human Immunodeficiency Virus Prevention Messages to Reach Homosexual and Bisexual Hispanic Men: The Importance of Hispanic Cultural and Health Beliefs (Jan. 1, 1997) (unpublished manuscript) (ERIC No. ED416548).

223. SAVIN-WILLIAMS, *supra* note 107, at 185.

224. See, e.g., Yvon Appleby, *Disability and "Compulsory Heterosexuality,"* in HETEROSEXUALITY: A FEMINISM AND PSYCHOLOGY READER 266 (Sue Wilkinson & Celia Kitzinger eds., 1993); Daniel B. Swartz, *Perceptions and Attitudes of Male Homosexuals from Differing Socio-Cultural & Audiological Backgrounds* (1990) (unpublished manuscript) (ERIC No. ED354657).

225. See generally Hirsch & Ellis, *supra* note 116.

226. WILL FELLOWS, *FARM BOYS: LIVES OF GAY MEN FROM THE RURAL MIDWEST* (1996); SAVIN-WILLIAMS, *supra* note 107, at 185.

227. Town, *supra* note 102, at 3.

228. Remafedi, *supra* note 15, at 222-23

who do not fit neatly within the two categories.²²⁹ This construction has the effect of silencing and marginalizing persons who identify themselves as bisexual, in what Professor Yoshino terms "bisexual erasure."²³⁰ Transsexuals face additional pressures, often being rejected by both straight persons and sexual minorities of both genders.²³¹ Any plan to confront same-sex harassment must avoid a false dichotomous construction of sexual orientation.

Many parents and professionals hold another common myth: "no child is gay." This belief is unfounded. According to Fontaine and Hammond, "gay men and lesbians do not suddenly 'appear' in adulthood."²³² Some authorities note that sexual orientation is "firmly established" in early childhood.²³³ It is important to consider including programming to combat homophobia and heterosexism in early childhood education,²³⁴ including the training of early childhood educators.²³⁵

Still another common myth is that persons can be "cured" of homosexuality or "turned" straight. Although some professionals purport to be able to "treat" those who are not straight,²³⁶ the notion that sexual minorities can be "cured" is considered irresponsible.²³⁷ There is no reliable evidence that such "therapy" yields long-term results, and this therapy is often "psychologically scarring."²³⁸ Such "reparative therapy" is opposed by the American

229. Town, *supra* note 102, at 3.

230. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); *see also* Sari H. Dworkin, Identifying as Lesbian vs. Bisexual: The Dilemma For Women, Paper presented at the Annual Convention of the American Psychological Association (Aug. 1991) (ERIC No. 343070).

231. *See, e.g.*, Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U.L. REV. 1321 (1998).

232. Fontaine & Hammond, *supra* note 102, at 819; Casper et al., *supra* note 203; Remafedi, *supra* note 15, at 222; Rofes, *supra* note 104, at 445; Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269 (1996); Uribe, *supra* note 99, at 168.

233. *See, e.g.*, Van Ryswyk, *supra* note 100, at 35; Coleman & Remafedi, *supra* note 103, at 37; Remafedi, *supra* note 15, at 224.

234. *See, e.g.*, Casper et al., *supra* note 203; Nichols, *supra* note 104.

235. *See, e.g.*, Hulsebosch & Koerner, *supra* note 203, at 261; Rita M. Marinoble, *Elementary School Teachers: Homophobia Reduction in a Staff Development Context*, in *OVERCOMING HETEROSEXISM AND HOMOPHOBIA* 249 (James T. Sears & Walter L. Williams eds., 1997).

236. Hilton, *supra* note 116, at 37 n.123 (citing JOSEPH NICOLOSI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A CLINICAL APPROACH* (1991)).

237. Coleman & Remafedi, *supra* note 103, at 36; Uribe, *supra* note 99, at 170.

238. Coleman & Remafedi, *supra* note 103, at 36. Recently, Dr. Robert Spitzer of Columbia University presented a paper suggesting that some sexual minorities can become straight. His study was criticized, especially regarding the participants in the study, most of whom were religious conservatives and many of whom (fourty-three

Academy of Pediatrics, American Counseling Association, American Psychiatric Association, American Psychological Association, and National Association of Social Workers.²³⁹ Persons designing a response to same-sex peer harassment should avoid including “reparative therapy” in their programs.

Another related myth is the myth that a child can be “taught” to be gay. One school psychology graduate student stated: “Information does not cause homosexuality—it is unreasonable to expect that the discussion of homosexuality in the middle or high schools will lead students to adopt this ‘lifestyle.’”²⁴⁰ Although students may become more comfortable with their sexual orientation by talking to school staff,²⁴¹ there is no evidence that talking about or questioning their sexual orientation has any influence on the end result.²⁴² This false belief should not discourage school staff from confronting this issue and protecting the rights of sexual minority students.

Finally, any policy must avoid the common misconception that sexual orientation is simply about sex acts.²⁴³ Sexual orientation is broader than sexual behavior.²⁴⁴ Not all sexual minority students are sexually active; indeed, some self-identified heterosexual students engage in same-sex sexual activities.²⁴⁵ As Virginia Uribe

percent) were referred to Dr. Spitzer by “ex-gay” groups. For a discussion, see Malcolm Ritter, *Study: Some Gays Can Go Straight*, ASSOCIATED PRESS, May 9, 2001, *The Wire – News from the AP* (visited October 14, 2001), at <http://wire.ap.org>.

239. GAY LESBIAN, AND STRAIGHT EDUC. NETWORK (GLSEN), JUST THE FACTS ABOUT SEXUAL ORIENTATION & YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS & SCHOOL PERSONNEL 5-6 (1999) (ERIC No. ED43619). For a contrary viewpoint, one may wish to visit the National Association for Research and Treatment of Homosexuality (NARTH) web page at <http://www.narth.com>.

240. Van Ryswyk, *supra* note 100, at 35.

241. *Id.* at 35-38 (school psychologists); *see also* Coleman & Remafedi, *supra* note 103, at 37-38 (counselors); Morrow, *supra* note 109, at 658 (social workers); Treadway & Yoakam, *supra* note 115, at 355-56 (all school staff).

242. *See, e.g.*, Fontaine, *supra* note 159, at 105; Morrow, *supra* note 109, at 655.

243. *See, e.g.*, SAVIN-WILLIAMS, *supra* note 107, at 3, 8; Fontaine & Hammond, *supra* note 102, at 822-23; Krysiak, *supra* note 104, at 305; Remafedi, *supra* note 15, at 222-23; Uribe, *supra* note 99, at 168. The reduction of sexual orientation to sex acts is an especially potent rhetorical tool in states where same-sex sex acts are illegal. Since same-sex sex acts are illegal, it must then follow that sexual minorities are criminals (even if the statutes are seldom enforced). For a discussion of the “criminal conduct” argument, *see* Cain, *supra* note 199 and Michaelson, *supra* note 198. For brief discussions specific to public education, *see* Canon, *supra* note 15 and Walden & Culverhouse, *supra* note 15.

244. SAVIN-WILLIAMS, *supra* note 107, at 3; Uribe, *supra* note 99, at 169.

245. SAVIN-WILLIAMS, *supra* note 107, at 8.

noted, "Within heterosexuality and homosexuality are a wide range of behaviors, sexual and otherwise."²⁴⁶

Third, a well-designed response to same-sex harassment will include broad public involvement in its development, according to Professor David S. Doty.²⁴⁷ Due to the controversial nature of this issue, any indication that a school intends to honestly confront sexual orientation will provoke a massive outcry in many communities.²⁴⁸ Rather than "force" a resolution on an unwilling segment of the community, it is wise to involve all segments of the community in policy development and implementation. By involving a broad number of individuals in policy development, one increases the likelihood that the policy will be seen as legitimate and the likelihood that the policy will be enforceable.²⁴⁹ Excluding any group from policy formation will increase the likelihood of resentment and noncompliance. Further, broad public participation will help to identify barriers to policy success at an earlier stage. For example, if public discussion reveals a widely held myth, such as the idea that children can be "taught" to be gay,²⁵⁰ that myth can be addressed at the outset. Finally, by allowing broad public participation, all participants have a stake in the success of the plan and will be more likely to complement the school's work. For example, a parent who has been involved in the development of a policy addressing same-sex peer harassment may become less likely to tolerate hateful comments by her children outside of the school environment.

Fourth, state and local law may limit the strategies available to combat same-sex peer harassment.²⁵¹ These should be considered before policy design commences. For example, Utah law states that schools must provide two weeks notice and obtain parental consent before any student may participate in curricular or "other school activities," where the "purpose or evident intended effect is to cause the student to reveal information [personally identifiable

246. Uribe, *supra* note 99, at 168. Often omitted from this discussion are asexual individuals, who are sexually attracted to neither gender. For this group, sexual orientation is, simply put (perhaps too simply put), the negation of sexual desire. See Yoshino, *supra* note 230, at 357 n.8.

247. Doty, *supra* note 195; Doty, *supra* note 16.

248. Doty, *supra* note 195; Doty, *supra* note 16.

249. See Doty, *supra* note 16, at 47.

250. See *supra* notes 240-42.

251. See, e.g., Doty, *supra* note 195, at 43-44 (discussing the effects of Title IX); Hilton, *supra* note 116, at 32-33 (weighing the effects of Utah's Equal Access Act); Khayatt, *supra* note 64, at 60 n.10; Walden & Culverhouse, *supra* note 15, at 22; Yoshino, *supra* note 230, at 366 n.39.

or not], concerning the student's or any family member's . . . sexual behavior, orientation, or attitudes."²⁵² Although this statute seriously limits the ability of school personnel to discuss a student's personal concerns,²⁵³ it does not eliminate it. For example, a teacher may admonish a student for using a homophobic slur without necessarily requesting that a student reveal her sexual orientation or that of her family. The designers of a same-sex peer harassment policy should comply with state and local law while simultaneously working to repeal laws that hinder implementation of that policy.

B. Issues of Content

A same-sex peer harassment policy will be most successful when it contains a clear statement of what the policy is, and then complements the policy with education and support. The next few paragraphs explore what a successful policy will contain, from the obvious to the subtle.

First, a policy must be clear, in writing, and understandable.²⁵⁴ A policy on student harassment does no good if it is "incomprehensible and little known."²⁵⁵ Professor Morris suggests that it be made available in multiple languages and alternate formats, such as Braille.²⁵⁶ It should contain a grievance procedure²⁵⁷ and examples of what behavior constitutes harassment and the potential consequences of such harassing behavior.²⁵⁸ Harassment complaints or observed instances of harassment should be swiftly investigated²⁵⁹ and kept confidential.²⁶⁰ The anti-harassment policy should include express provisions against same-sex harassment, to avoid any presumption that the policy only covers opposite-sex harassment. The policy should be periodically reviewed to ensure that it is le-

252. Hilton, *supra* note 116, at 24 (citing Utah Code Ann. § 53A-13-302 (2001)).

253. The decision to come out to parents, as this statute would require by its parental consent provision, would serve to silence a large portion of sexual minority students who are not "out" to their parents yet. The decision to "come out" to parents is often risky, and many times "provokes a family crisis of some sort." Fontaine & Hammond, *supra* note 102, at 827.

254. Nathan L. Essex, *Classroom Harassment: The Principal's Liability*, PRINCIPAL, Mar. 2000, at 52, 55; McCarthy, *supra* note 23, at 420; Morris, *supra* note 4, at 447; Sattel et al., *supra* note 67, at 240.

255. Morris, *supra* note 4, at 447; OFFICE OF CIVIL RIGHTS, *supra* note 11, at 12,045.

256. Morris, *supra* note 4, at 447.

257. OFFICE OF CIVIL RIGHTS, *supra* note 11, at 12,044; Doty & Strauss, *supra* note 4, at 12-13; McCarthy, *supra* note 23, at 420; Morris, *supra* note 4, at 447.

258. Doty & Strauss, *supra* note 4, at 8-9.

259. *Id.* at 14; Essex, *supra* note 254, at 55; Schimmel, *supra* note 3, at 451.

260. Doty & Strauss, *supra* note 4, at 8-10; Essex, *supra* note 254, at 55.

gally defensible and targeted toward current student mores and behaviors.²⁶¹ Although a written policy against harassment may not necessarily be required to defend a damages suit under Title IX, a school is on firmer legal ground if it puts its policy in writing²⁶² and complies with Title IX regulations, which require that schools “publish” a policy on sex discrimination.²⁶³

Second, because people harass for a reason, schools should be prepared to address the needs of harassment perpetrators. As noted by Sattel, Keyes, and Tupper “Both harassers and those being harassed need to feel validated in the school environment and both may recognize that low self-esteem can cause students to disengage from the system.”²⁶⁴ A comprehensive approach to same-sex harassment (and harassment in general) will, in addition to reducing harassment by punishment and deterrence, reduce the incidence of harassment by considering the function that harassment may serve to each individual perpetrator and designing an individualized intervention if necessary.²⁶⁵ A workable intervention would find a way to meet the need that is being met by harassment.

Third, it is not enough to teach that homophobic and heterosexual words and deeds are unacceptable. A school must teach *why* they are unacceptable. A school must talk about the harms of same-sex harassment.²⁶⁶ As noted by Rey and Gibson, perpetrators of violent words and deeds directed at sexual minorities often minimize the seriousness of their conduct and the harm that it causes.²⁶⁷ Thus, a well-constructed policy will educate students and

261. See Doty & Strauss, *supra* note 4, at 12; see also Sattel et al., *supra* note 67, at 240.

262. See Sullivan & Zirkel, *supra* note 1, at 627.

263. See Doty & Strauss, *supra* note 4, at 12 (citing 34 C.F.R. § 106.8(b) (1995)). The Department of Education’s Office of Civil Rights (OCR) makes clear that a school need only have a policy against sex discrimination. If such a policy is adequate to address sexual harassment, then the policy is sufficient in OCR’s view. However, if the policy would not adequately inform students about sexual harassment, then the policy would not be considered “effective,” as required by Title IX regulations. See also OFFICE OF CIVIL RIGHTS, *supra* note 11, at 12,044.

264. Sattel et al., *supra* note 67, at 242; Rey & Gibson, *supra* note 126, at 69-70.

265. For more information on the use of “functional assessment” to reduce problem behavior, see for example Mary M. Quinn et al., *Addressing Problem Behaviors in Schools: Use of Functional Assessment and Behavior Intervention Plans*, PREVENTING SCH. FAILURE, Spring 1998, at 106.

266. For a discussion of the harms associated with a homophobic and heterosexist school climate, see *supra* Part II.A.

267. Rey & Gibson, *supra* note 126, at 75-76.

staff about the harms of same-sex harassment and why it should be stopped.²⁶⁸

Fourth, a school should be prepared to provide support to sexual minority students, whether or not they are targets of peer harassment. Student support services are essential components of a school's plan to rectify a homophobic and heterosexist climate and reduce same-sex harassment.²⁶⁹ Student support could take the form of student support groups,²⁷⁰ such as "HUG" ("Humans Unafraid of Gays") at Central High School in St. Paul, Minnesota²⁷¹ or the student support-group component of Project 10, a widely replicated school-wide program designed to prevent sexual minorities in Los Angeles' Fairfax High School from dropping out of school.²⁷² Students may also benefit from school staff, such as school counselors, school nurses, school psychologists, and school social workers, who are aware of the challenges facing sexual minorities and those who are questioning their sexual identity.²⁷³ Professor Nichols provides an interesting example of student support in the early childhood context—a Diversity Room.²⁷⁴ Staffed by a trained "Diversity Room Specialist" and supplied with informational books and videos, the Diversity Room would be a safe place available for all students with questions about human differences, including but not limited to diversity of sexual orientations.²⁷⁵ Schools must also be prepared to make referrals to outside professionals such as therapists or counselors.²⁷⁶ Neverthe-

268. Cf. Doty & Strauss, *supra* note 4, at 7 (advising schools to include a "strong philosophy statement" in anti-harassment policy, linking the policy to the school's general commitment to provide "a safe, healthy environment for all students that encourages respect, dignity, and equality").

269. Cf. Doty & Strauss, *supra* note 4, at 10-11 (stating that harassment policy should state that services are available to targets of harassment).

270. See, e.g., Sattel et al., *supra* note 67, at 244; Morrow, *supra* note 109, at 656-57; Telljohann et al., *supra* note 99, at 18-22.

271. Kay L. Williams et al., *Addressing Sexual Orientation in a Public High School*, 62 J. SCH. HEALTH 154, 155 (1992).

272. Project 10 was designed by Virginia Uribe. For more information on Project 10, see Uribe, *supra* note 99. See also Gill, *supra* note 68, at 27; Rofes, *supra* note 104, at 447-48.

273. See Van Ryswyk, *supra* note 100, at 36-37 (school psychologists); Anderson, *supra* note 14, at 67; Anderson, *supra* note 104, at 153; Coleman & Remafedi, *supra* note 103, at 37-39; Fontaine & Hammond, *supra* note 102, at 817-18 (counselors); Treadway & Yoakam, *supra* note 115, at 355.

274. Nichols, *supra* note 104, at 515-17.

275. *Id.*

276. See Marinoble, *supra* note 225, at 255; Anderson, *supra* note 104, at 153; Gill, *supra* note 68, at 27; Telljohann et al., *supra* note 99, at 22; Uribe, *supra* note 99, at 170.

less, school staff should be aware that services for sexual minority youth are often not available,²⁷⁷ especially outside of "large urban areas."²⁷⁸ In such cases, school staff may be "the only resource available."²⁷⁹

Fifth, a school should train its teachers and staff to help implement any plan to combat same-sex harassment in particular and homophobia and heterosexism in general.²⁸⁰ As noted above, staff often lack the information or skills necessary to confront homophobia and heterosexism.²⁸¹ Therefore, staff development is necessary to provide staff members with such information. In addition, staff development will help staff to confront their own prejudices and, if not overcome them, to reconcile them with professional responsibilities.²⁸² Staff development should be mandatory for all school personnel, so that all school personnel are aware of the school's position on same-sex harassment.²⁸³ Staff should be trained on the substance and procedure of the school's harassment policy.²⁸⁴ Finally, it is important that newly hired teachers receive training on combating homophobia and heterosexism during teacher induction programs, to complement or supplement what training (if any) they may have had in their professional preparation programs.²⁸⁵

277. Uribe, *supra* note 99, at 170.

278. SAVIN-WILLIAMS, *supra* note 107, at 179.

279. Uribe, *supra* note 99, at 170. Some writers admonish schools to leave the "treatment" of sexual minority youth to "trained" professionals. See Hilton, *supra* note 116, at 33. This admonition, in areas where no outside resources are available to sexual minority youth, has the effect of providing no assistance at all. In such cases, a teacher or counselor may be able to provide valuable emotional support, if not necessarily "treatment."

280. See Asprodites, *supra* note 203, at 41; Hulsebosch & Koerner, *supra* note 203, at 269; Marinoble, *supra* note 235, at 249-50; Sattel et al., *supra* note 67, at 240-41; Anderson, *supra* note 14, at 66-67; Anderson, *supra* note 104, at 153; Gill, *supra* note 68, at 26-27; Telljohann et al., *supra* note 99, at 21-22; Treadway & Yoakam, *supra* note 115, at 355.

281. See *supra* Part II.B.

282. See Asprodites, *supra* note 203, at 41; Hulsebosch & Koerner, *supra* note 203, at 269; Marinoble, *supra* note 235, at 249-50; Sattel et al., *supra* note 67, at 240-41; Anderson, *supra* note 106, at 153; Gill, *supra* note 68, at 26-27.

283. Treadway & Yoakam, *supra* note 115, at 355. Treadway and Yoakam also caution that if staff development sessions on homophobia and heterosexism were voluntary, attending staff "may be suspected of homosexuality by colleagues." *Id.* David Schimmel recommends including "all personnel who supervise students (including bus drivers and volunteer chaperones)." Schimmel, *supra* note 3, at 451.

284. See, e.g., Doty & Strauss, *supra* note 4, at 11-12; Essex, *supra* note 254, at 55.

285. Michael W. Bahr et al., *Addressing Sexual Orientation and Professional Ethics in the Training of School Psychologists in School and University Settings*, 29 SCH.

Sixth, it is important to include sexual minority issues in the curriculum. By discussing sexual minorities in courses, schools "can begin to demythologize the topic."²⁸⁶ Knowledge about sexual minorities can change attitudes about sexual minorities.²⁸⁷ Furthermore, it is important to infuse the curriculum with discussions of sexual minority issues,²⁸⁸ including health education,²⁸⁹ library content,²⁹⁰ physical education and competitive athletics,²⁹¹ and inclusive social situations such as school dances.²⁹² For example, in a history unit on the Holocaust, a teacher may wish to mention that several thousand sexual minorities were interred and killed in Hitler's concentration camps.²⁹³ As a follow-up point, the teacher may also wish to mention that the pink triangle, a symbol that the Nazis forced sexual minorities to wear, has become a contemporary symbol of gay pride. Some authors also recommend presentations by outside speakers, as these are often effective means of engaging students in the subject matter.²⁹⁴ Others recommend understanding sexual minority issues in the broader context of multicultural education.²⁹⁵

To be effective, curricular coverage of sexual minority issues must be more than a "one-shot approach"²⁹⁶ and must be age-appropriate.²⁹⁷ Paula Alida Roy recommends that rather than dictating acceptable views, teachers should engage in a dialogue with students about sexual minorities; when they do so, students are less

PSYCH. REV. 217, 220-26 (2000); Casper et al., *supra* note 203, at 276-78; Kissen, *supra* note 102; Mathison, *supra* note 104, at 152; Telljohann et al., *supra* note 99, at 21-22.

286. Fontaine, *supra* note 159, at 104.

287. Uribe, *supra* note 99, at 169.

288. Anderson, *supra* note 14, at 67; Anderson, *supra* note 104, at 154; Fontaine, *supra* note 159, at 103-05; Miller, *supra* note 107, at 633-34; Rofes, *supra* note 104, at 152.

289. Anderson, *supra* note 14, at 67; Anderson, *supra* note 104, at 153; Rofes, *supra* note 104, at 451; Morrow, *supra* note 109, at 659.

290. Anderson, *supra* note 14, at 67; Anderson, *supra* note 104, at 154; Fontaine, *supra* note 159, at 104-05; Rofes, *supra* note 104, at 447.

291. Sattel et al., *supra* note 67, at 233.

292. Edwards, *supra* note 111, at 70.

293. Miller, *supra* note 107, at 633.

294. Edwards, *supra* note 111, at 70; Rofes, *supra* note 104, at 447.

295. Sattel et al., *supra* note 67, at 243; Mathison, *supra* note 104 at 152; Miller, *supra* note 107 at 623-33; Cathy A. Pohan & Norma J. Bailey, *Opening the Closet: Multiculturalism that Is Fully Inclusive*, MULTICULTURAL EDUC., Fall 1997, at 12.

296. Telljohann et al., *supra* note 99, at 22.

297. Asprodites, *supra* note 203, at 41 ("When teachers present age-appropriate materials that remove the stigma attached to lesbians and gay men, the incidence of homophobic slurs is likely to decrease.").

likely to “clamp shut.”²⁹⁸ There are a wealth of materials on sexual minorities available for use in all levels of education.²⁹⁹ For example, the Gay Lesbian and Straight Education Network (GLSEN) produces a wide variety of high-quality materials for use in all content areas and by students of all age levels.³⁰⁰

Seventh and finally, it is important to distinguish between attitudes and behavior. There is a diversity of sincerely-held views on the place of sexual minorities in school and society. Those beliefs are often hard to change, and it is questionable whether schools in a pluralistic society should try. However, diverse attitudes should not give license for harmful action, and schools have a responsibility to regulate behavior.³⁰¹ As noted by Sattel, Keys, and Tupper, “[I]f you can’t change their minds, change their mouths.”³⁰² As one teacher education student wrote in a college class assignment, “I still think [homosexuality] is wrong, but I won’t harass the person who is homosexual.”³⁰³ It is important not to suppress student views that same-sex sexual conduct is wrong, but to educate students holding those views on acceptable ways to express such views in a pluralistic society.

C. Issues of Implementation

Once a policy is constructed, it must be implemented. The next few paragraphs illustrate potential problems with implementation and how schools may avoid such problems.

First, schools must be aware of problems associated with disciplining students for violating a policy against harassment. In disciplining students for violating the harassment policy, schools must afford students all due process rights under the United States Constitution, which vary based on the severity of the proposed disci-

298. Paula Alida Roy, *Language in the Classroom: Opening Conversations About Lesbian and Gay Issues in Senior High English*, in *OVERCOMING HETEROSEXISM AND HOMOPHOBIA* 209, 217 (James T. Sears & Walter L. Williams eds., 1997).

299. See generally Marinoble, *supra* note 237, at 254; Anderson, *supra* note 14, at 67; Anderson, *supra* note 104, at 153-54; Gill, *supra* note 68, at 26-27; Kissen, *supra* note 102, at 66-67; Sears, *supra* note 106, at 56.

300. GLSEN’s national office is located at 121 W. Twenty-Seventh Street, Suite 804, New York, NY 10001-6207 and is reachable by telephone at (212) 727 0135. GLSEN’s web page is at www.glsen.org. Many of GLSEN’s materials are available online in both HTML and PDF format.

301. Fontaine, *supra* note 159, at 107.

302. Sattel et al., *supra* note 67, at 237.

303. Miller, *supra* note 107, at 634.

pline.³⁰⁴ Additionally, schools should avoid imposing discipline where students were not aware of the harassment policy; research demonstrates that it is “unproductive and unjust to punish students without first explaining to them what they have done wrong.”³⁰⁵ Furthermore, it is important that punishment be proportional to the severity of the infraction. Professor Morris suggests that schools may “address less-serious forms of harassment by warning and counseling the harasser.”³⁰⁶ Finally, schools must make sure that when disciplining a student with disabilities for violating an anti-harassment policy, the discipline conforms to federal law protecting students with disabilities.³⁰⁷

Second, school personnel should avoid negating a student’s same-sex desires or referring to them as a “passing phase.”³⁰⁸ Although some straight persons engage in same-sex behavior during the process of sexual identity exploration, for sexual minorities, such behavior is not something that is “grown out of.”³⁰⁹ According to Savin-Williams, “for such individuals, homosexuality is not experienced as a temporary phase but as a true identity.”³¹⁰ By negating such feelings and viewing homosexuality as a passing phase, a school staff member “devalues homosexual feelings and actually intensifies anxiety in some teenagers.”³¹¹

Third, school staff should avoid labeling children based on behavior. Schools should avoid forcing children to arrive at a “premature resolution of sexual orientation questions,”³¹² for adolescence is usually a time of sexual uncertainty and experimen-

304. See *Goss v. Lopez*, 419 U.S. 565 (1975) (affording a student the opportunity to present her side of the story to avoid unsubstantiated findings of misconduct).

305. Michele J. Moore & Barbara A. Rienzo, *Sexual Harassment Policies in Florida School Districts*, 68 J. SCH. HEALTH 237, 242 (1998).

306. Morris, *supra* note 4, at 447; Doty & Strauss, *supra* note 4, at 9.

307. Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1487 (West 1990 & Supp. 1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 666 (1999) (Kennedy, J., dissenting); Doty, *supra* note 195; Doty & Strauss, *supra* note 4, at 9-10 & n.39. See generally Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1 (2000); Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77 (2000); Perry A. Zirkel, *The IDEA’s Suspension/Expulsion Requirements: A Practical Picture*, 134 EDUC. L. REP. 19 (1999).

308. See SAVIN-WILLIAMS, *supra* note 107, at 8; Coleman & Remafedi, *supra* note 103, at 36-37; Fontaine & Hammond, *supra* note 102, at 823; Remafedi, *supra* note 15, at 223; Rofes, *supra* note 104, at 445.

309. SAVIN-WILLIAMS, *supra* note 107, at 8.

310. *Id.*

311. Uribe, *supra* note 99, at 169; Coleman & Remafedi, *supra* note 103, at 36; Fontaine & Hammond, *supra* note 102, at 823.

312. Coleman & Remafedi, *supra* note 103, at 36.

tation for many individuals, and adolescent sexual behavior or orientation is not necessarily predictive of adult sexual orientation.³¹³ Forcing a child to assume a "label" may "exacerbate adjustment problems"³¹⁴ or "add to the anxiety" already felt by the child.³¹⁵

Fourth, it is important for schools to anticipate and confront staff resistance to implementing the adopted policy. Administrators, both at the building level and district level, are key to successfully implementing changes³¹⁶ such as a new harassment policy. Leaders, whether administrators or other personnel, may facilitate change by providing a "clear rationale" for why the change is needed.³¹⁷ Broad commitment to the change may minimize the effectiveness of any resistance. For resisting employees, leaders should continue to educate on the necessity and utility of the change. Ultimately, however, resistance becomes disobedience, and administrators may be forced to discipline, transfer, or even terminate the resisting teacher.³¹⁸

Fifth and finally, it is important that same-sex peer harassment policy be applied evenhandedly. In the wake of *Oncale*, some authors expressed concern that the decision would be used to target homosexuals and punish them for behavior (i.e., simply telling a person of the same sex that he looked nice in a certain business suit) that would be not be offensive if done by a straight person (i.e., simply telling a person of the opposite sex that she looked nice in a certain business suit).³¹⁹ It is important that a peer harassment policy be applied evenhandedly, without holding sexual minority perpetrators or targets to a different standard than their straight peers.

D. Issues of Diversity of Opinion

The next few paragraphs discuss issues of diversity of opinion regarding sexual minorities in public schools and how such diversity of opinion may effect a school's program to confront same-sex

313. Remafedi, *supra* note 15, at 223.

314. Coleman & Remafedi, *supra* note 103, at 36.

315. Uribe, *supra* note 99, at 169.

316. Marinoble, *supra* note 235, at 258-59.

317. Hulsebosch & Koerner, *supra* note 203, at 269.

318. For more information on leadership and change see LEE G. BOLMAN & TERENCE E. DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP 127-30 (1991); Jim Collins, *Turning Goals Into Results: The Power of Catalytic Mechanisms*, HARV. BUS. REV., July-Aug. 1999, at 71-79; and Robert Hogan et al., *What We Know About Leadership: Effectiveness and Personality*, 49 AM. PSYCHOLOGIST 493 (1994).

319. See, e.g., Coombs, *supra* note 5.

peer harassment. First, a school must consider issues of religious diversity. Second, a school should consider how its harassment policy interacts with protections of student speech afforded by the First Amendment.

At the outset, schools should be aware that many persons hold religious beliefs that homosexuality is wrong.³²⁰ School personnel must avoid silencing religious diversity; rather, they should acknowledge and embrace it.³²¹ Schools also must acknowledge that there is tremendous diversity of opinion regarding sexual minority issues among and within religious denominations.³²² Students have a right to express religious beliefs in school; however, that right is qualified.³²³ Students may not engage in religious expression that is "disruptive" or coercive.³²⁴ In addition, student religious beliefs should not create a license to engage in harassing conduct, for such harassment would infringe on the rights and liberties of other students (including religious liberty and freedom of conscience). Schools should be prepared, if needed, to teach students how to discuss religious views on controversial issues, such as the status of sexual minorities, in a manner suitable to a civilized, diverse society.

In addition, schools must protect free speech rights of students and faculty members.³²⁵ Contrary to some assumptions, however, freedom of speech does not provide immunity from a sexual harassment policy.³²⁶ The United States Supreme Court, referring specifically to Title VII's prohibition on sex discrimination has recognized that "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach

320. See Anderson, *supra* note 104, at 151; Doty, *supra* note 195.

321. Roy, *supra* note 298, at 210.

322. GAY LESBIAN, AND STRAIGHT EDUC. NETWORK, *supra* note 239, at 7.

323. See, e.g., Perry A. Zirkel, *Student Evangelism*, NASSP BULL., Jan. 1999, at 104.

324. FIRST AMENDMENT CTR., A TEACHER'S GUIDE TO RELIGION IN THE PUBLIC SCHOOLS 7 (1999).

325. See OFFICE OF CIVIL RIGHTS, *supra* note 11, at 12,045-046; Doty, *supra* note 195, at 47-50; McBride, *supra* note 1, at 555-64; see generally Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N. DAK. L. REV. 205 (1999).

326. Todd A. DeMitchell & Richard Fossey, *At the Margin of Academic Freedom and Sexual Harassment: An Analysis of Silva v. University of New Hampshire*, 111 EDUC. L. REP. 13, 32 (1996) ("The mere invocation of the talisman of academic freedom should not be enough to automatically overcome the legitimate interest of eradicating sex discrimination.").

of a statute directed at conduct rather than speech.”³²⁷ Due to resulting harms, sexually harassing speech, therefore, is arguably not entitled to First Amendment protection. Furthermore, although students may have certain liberties to express ideas in school settings, a long line of U.S. Supreme Court cases indicates that schools may permissibly limit student speech when it becomes disruptive,³²⁸ such as sexual harassment. Some lower courts, notably the Third Circuit in *Saxe v. State College Area School District*, however, have invalidated harassment policies on First Amendment grounds.³²⁹ Although the *Saxe* court did acknowledge that a school has a compelling interest in preventing harassment,³³⁰ it took issue with the breadth of the school’s policy. Assuming that the *Saxe* court correctly stated the law,³³¹ a policy against harassment must be narrowly tailored and drafted with precision.³³² *Saxe* should not give schools license to avoid or abandon harassment policies.

A further problem with sexual harassment is that it occurs cumulatively.³³³ It may be some time before words and actions become sufficiently “severe and pervasive” to constitute hostile sexual harassment. Thus, certain speech may only become harassing speech after the occurrence of subsequent events. At a certain point, protected, seemingly harmless speech, when viewed in a broader context and at a later date, becomes transformed into proscribable harassment. This is unusual as speech is typically either protected or not protected at the moment of utterance. How long, then, must a school wait before intervening? Must one allow a pattern of speech to reach nonprotected status before taking action? At

327. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); see Jon Gould, *Title IX in the Classroom: Academic Freedom and the Power to Harass*, 6 DUKE J. GENDER L. & POL’Y 61, 69-70 (1999) (discussing *R.A.V.*).

328. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

329. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); see Perry A. Zirkel, *Only Sticks and Stones?* 83 PHI DELTA KAPPAN 175 (2001) (discussing *Saxe* case).

330. *Saxe*, 240 F.3d at 209-10.

331. Other authorities appear to have reached differing conclusions on whether anti-harassment policies violate the first amendment. See Zirkel, *supra* note 327, at 176 n.8 (citing cases). For what it may be worth, the author takes the position that they do not, based on the interaction of the *Tinker-Fraser-Kuhlmeier* trilogy and *R.A.V.*

332. The policy in *Saxe* was stunningly broad. In particular, the challenged policy also referred to harassment based on “clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc.” *Saxe*, 240 F.3d at 203.

333. See McBride, *supra* note 1, at 555.

some point, a school should be allowed to intervene before speech becomes sufficiently severe to constitute harassment. If it must wait, then the harm to be prevented (deprivation of educational opportunity) has already occurred.

The task of balancing these competing interests is difficult, but may not be avoided. Fundamentally, the First Amendment guarantees of free speech and religious freedom are bedrock principles in a pluralistic society. It would be a perverse application of First Amendment principles if they were used, instead of protecting diversity of viewpoints and speakers, to protect words and deeds employed to coerce conformity, preserve privilege, and defeat pluralism,³³⁴ especially in a learning environment.³³⁵ As stated by Laurence Tribe, the “first amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical.”³³⁶

IV. CONCLUSION

Two recent cases illustrate the importance of taking action to prevent same-sex peer sexual harassment. In *Ray v. Antioch Unified School District*, the plaintiff alleged that he was harassed and battered by a fellow student because of a perception that he was gay and further alleged that the school district was indifferent to his fate.³³⁷ The facts in *Montgomery v. Independent School District Number 709*³³⁸ are even more disturbing. In *Montgomery*, plaintiff’s male peers verbally harassed him (calling him, among other things, “fag,” “gay boy,” “bitch,” “queer,” “pansy,” and “freak”) and physically assaulted him (including several instances of unwanted male-on-male sexual touching) because of his perceived sexual orientation.³³⁹ Plaintiff’s alleged that teachers were indifferent to his plight; in fact, he alleged that one school employee (a bus driver) facilitated the peer harassment. In both cases, the trial

334. *See id.* at 564 n.255 (noting that one author observed “that schools selectively use the First Amendment to protect boys’ speech while suppressing that of girls” (citing Nan Stein, *Is it Sexually Charged, Sexually Hostile, or the Constitution? Sexual Harassment in K-12 Schools*, 98 EDUC. L. REP. 621, 625 (1995))).

335. *See Gould, supra* note 327, at 81 (“Academic freedom is about education. When hostile behavior gets in the way of the educational process, academic freedom must give way to equal opportunity.”).

336. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 856 (2d ed. 1988).

337. *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

338. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000).

339. *Id.* at 1084. Plaintiff testified in a deposition that he was unsure of his sexual orientation. *Id.* at 1090 n.10.

court ruled that both plaintiffs were entitled to have their claims proceed to trial.³⁴⁰

If the two districts had aggressively confronted the harassment targeted towards Ray and Montgomery, they would have received two rewards. First, they would have severely limited any possible legal liability to Roy and Montgomery. Second, and more importantly, they would have provided Roy and Montgomery with a safe, nurturing school environment, conducive to academic and social growth. Confronting same-sex harassment and other symptoms of homophobia and heterosexism is more than legally required. It is, simply put, the right thing to do.

340. *Id.* at 1102; *Ray*, 107 F. Supp. 2d at 1171-72.