

May 19, 2011

Dear Senator:

Senate Bill 137, Michigan's response to our state's growing concern about the impact of bullying on the academic, social, physical and economic well-being of students, is before the Senate for consideration. As president of Michigan NOW I am writing to ask you to offer to amend this bill to include protection for students who are bullied because they are "different." This is the kind of bullying that often leads to suicide, and is different than the bullying we may assume is the problem.

The following language will suffice to amend this bill and make it a stronger bill to protect all students in Michigan, and to demonstrate a commitment to the wise use of school resources.

*"A bullying policy developed under the requirements of this law shall include, but not be limited to, bullying that is motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression; or a mental, physical, or sensory disability or impairment; or by any other distinguishing characteristic".*

The legislature of the State of Oregon recognized that their law requiring the development of an effective bullying policy by schools in Oregon was not effective. In 2009 the Oregon legislature adopted an amendment to their law to include an enumeration of protected classes. As stated above, the enumeration "...shall include, but not be limited to..." these students.

In a supportive statement for the amendment made in the Oregon House Education Committee work session, a legislator noted that bullying of these students was "a special kind of bullying, mobbing and group bullying against somebody different, as opposed to bullying as an exercise of power – one student on another." And, as was further observed, often the bullying of a different kind of child was easily dismissed as understandable and normal. These children are different and "that's what kids do." The amendment was unanimously passed out of committee and on to adoption.

Under guidance offered by the Office of Civil Rights of the U.S. Department of Education, educators and others are reminded that federal laws such as the Civil Rights Act, the Americans With Disabilities Act, and Title IX of the Civil Rights Act, have been interpreted by our courts to include protection for students who are being bullied because of their distinguishing characteristics. School districts and institutions have been held liable for their failure to implement these protections. I will include a listing of such cases as a footnote to this letter.

In a recent settlement with the West Branch-Rose City Area Schools, the U.S. Department of Justice directed the district to provide staff training on Title IX, sexual harassment, and anti-gay harassment after a student left school after experiencing

systematic anti-gay harassment. Students are also to receive anti-harassment (including anti-gay harassment) education. This case speaks to the importance of enumeration. If school districts are not protecting all of their students from harassment, they may be subject to a federal investigation.

It seems to me that, in a climate of economic challenge for our state and our school districts, spending money to defend bad policy is a bad investment. Residents of the State of Michigan surely look to their legislators and governor to lead where local school boards may be uninspired to lead. Further, it seems that money could be better used to fund our schools, not our lawyers.

Michigan NOW is not averse to educating the public as to their rights to bring suit under these federal protections. In fact, we are currently endeavoring to join with other organizations and reach across the state to do just that. An informed citizenry is an asset to our government.

I look forward to hearing from you and welcome any questions.

Sincerely,

Bobbie C. Walton, President  
Michigan NOW  
810-658-1957

NOTES: *Canon v. University of Chicago* (1979) set a precedent in granting private rights of action.

*Alexander v. Yale University* (1980): first sexual harassment case which involved students and faculty; sexual harassment found to constitute sex discrimination under Title IX.

*Franklin v. Gwinnett Public Schools* (1992) found that monetary awards for punitive and compensatory damages can be awarded in cases of sexual harassment.

*Nabozny v. Podlesny* (1996, U.S. Court of Appeals, 7th Circuit): ruled in favor of student who was subjected to anti-gay harassment.

*Henkle v. Gregory* (1995, U.S. Court of Appeals, 7th Circuit) decided in student's favor on anti-gay peer harassment. Prior to the settlement decision, the district offered to pay damages including Henkle's attorneys' fees and court costs. Part of the settlement included that the district revise their policy on harassment, that they train students and staff on harassment, and that they acknowledge students' freedom to discuss their sexual orientation.

*Gebser v. Lago Vista Independent School District* (1998): a school's "actual knowledge" and "deliberate indifference" were required to impose liability on a school district.

*Davis v. Monroe County Board of Education* (1999): the court first *explicitly* addressed the issue of school liability for *peer* sexual harassment.

Monroe Standard:

1. School officials have *actual knowledge* of the harassment
2. School officials demonstrate *deliberate indifference* to harassment or take actions that are *clearly unreasonable*
3. School officials have substantial control over both the harasser and the context in which the harassment occurs
4. The harassment is so *severe, pervasive, and objectively offensive* that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school

*Montgomery v. Independent School District No 709* (2000) gender non-conformity behavior decided in favor of students.

*Doe v. Brockton School Comm* (2000) Transgender youth in schools, school liable for placing restrictions on student dress (sex discrimination).

*Ray v. Antioch Unified School District* (2000, California Northern District Court) found that harassment based upon a student's perceived sexual orientation is a form of sexual harassment.

*Schroeder v. Maumee Board of Education* (2003, Ohio Northern District Court), using Title IX protections, school was liable for showing deliberate indifference to the verbal and physical harassment of a student who demonstrated advocacy for gay students in the school; targeting a person for harassment based upon perceived sexual orientation based upon gender stereotyping is a form of sex discrimination.

*Flores v. Morgan Hill* (2003, 9th circuit), school district was required to revise its policies to explicitly prohibit harassment and discrimination based on sexual orientation and gender.

*Doe v. Bellefonte School District* (2004) gender non-conformity, serves as a model for how schools should respond in cases of harassment (this case decided in school's favor)

*Theno v. Tonganoxie Unified School District* (2005). Student subjected to persistent and severe verbal anti-gay harassment (gender identity harassment). Student awarded \$440,000

*Patterson v. Hudson Area Schools* (2009, U.S. Court of Appeals, 6th Circuit): School districts can be held liable for “deliberate indifference” to peer sexual harassment based upon sexual orientation, real or perceived. Plaintiffs' son was harassed by other students, beginning sixth grade which ultimately resulted in sexual assault. The district was aware that the verbal reprimands of a few students were not stopping the overall harassment.

*J. L. v. Mohawk County* (2010, Northern District of New York, out of court settlement) federal prosecutors used Title IX in order to broker a settlement in a lawsuit brought by a gay teen against his Mohawk, New York school district. The high school student in this case was bullied for acting effeminate. School officials knew about the problem and refused to intervene. One teacher allegedly told the student to hate himself every day until he changed. The school district has agreed to pay \$50,000, legal fees, and the cost of therapy. The district will also put staff through anti-harassment training, retain an expert on harassment and discrimination to review policies and procedures, etc.