Guidance for Drafting State Safe Schools Legislation

Basic Elements:

(1) Groups Covered

- The statute should cover students, teachers, employees, and staff.

**EXAMPLES:**

“It is an unfair discriminatory practice (1) to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . sexual orientation . . .” Minn. Stat. Ann. § 363.03, Subd. 5 (emphasis added).

“No person shall be subjected to harassment by school employees or students on the basis of actual or perceived . . . sexual orientation, [or] gender.” N.Y. Dignity for All Students Act (“DASA”), § 13(a) (emphasis added). See also § 13(b).1

(2) Categories Covered

- The statute should provide for protection from harassment and discrimination on the basis of sexual orientation and gender identity.2
  - Gender identity could be included as a separate category, or could be included in the definition of gender or sexual orientation.

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1 Although the N.Y. Dignity for All Students Act has not yet been enacted, we have included references to its language because the bill is very comprehensive.

2 An additional issue to keep in mind is the need to ensure protection for students who are discriminated against because their parents are or are perceived to be lesbian, gay, bisexual, or transgender. To our knowledge, there are no statutes that explicitly prohibit this type of discrimination.

Generally speaking, however, statutes that have been written to prohibit discrimination or harassment against any person on the basis of race, color, sex, sexual orientation, gender identity etc. have been interpreted to cover discrimination against a person on the grounds that the person associates with an individual who falls within one of the protected categories. See, e.g., Indiana Civil Rights Com’n v. Alder, 714 N.E.2d 632 (Ind. 1999); Minneapolis v. State, 310 N.W.2d 485 (Minn. 1981); West Virginia Human Rights Com’n v. Wilson Estates, Inc., 202 W. Va. 152, 503 S.E.2d 6 (W. Va. 1998); Winchell v. English, 62 Cal. App. 3d 125, 133 Cal. Rptr. 20 (citing cases). Thus, statutes written this way (or something similar, such as prohibiting discrimination “on account of . . .”) are likely to prohibit harassment directed at a student because the student has (an) LGBT parent(s).

A statute is less likely to be interpreted to cover such associational discrimination if the statute is worded to prohibit discrimination against any person because of the sexual orientation (or other protected category) “of such person.” See generally Civil Rights: Actionability Under State Statutes of Discrimination Because of Complaining Party’s Association With Persons of Difference Race, Color, or the Like, 35 A.L.R. 3d 859.
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- “Actual or perceived” should modify all protected categories.

**EXAMPLES:**

“No person shall be subjected to harassment by school employees or students on the basis of actual or perceived . . . sexual orientation, [or] gender . . .” N.Y. DASA, § 13(a). See also § 13(b).

“‘gender’ means actual or perceived sex and shall include a person’s gender identity or expression.” N.Y. DASA, § 12(h).

“‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Minn. Stat. Ann. § 363.01, Subd. 45.

**(3) Types of Schools Covered**

- The statute should cover all grade levels -- k-12 and, if possible, post-secondary.
  - Post-secondary schools can be covered within the same statute (see NJ), or by way of a separate statute (see CA).
- Ideally, the statute should cover public and private schools.
  - If the statute does cover private schools, it may be advisable or necessary to include a religious exemption.

**EXAMPLES:**

“‘Educational institution’ means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, and a business, nursing, professional, secretarial, technical, vocational school; and includes an agent of an education institution.” Minn Stat. Ann. § 363.01, Subd. 15 (emphasis added).

“A place of public accommodation’ shall include . . . any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey . . .” N.J. Stat. Ann. 10:5-5(l) (emphasis added).

“It is the policy of the State of California to afford all persons, . . . regardless of any basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state. . .” Cal. Educ. Code § 66251 (emphasis added). Compare Cal. Educ. Code § 200 (applying to “educational institutions of the state”).

“This article shall not apply to an educational institution which is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” Cal. Educ. Code § 220.5 (emphasis added).

**(4) Activities Covered**

- The statute should cover any activity or program occurring on the grounds of a covered institution during the hours in which school is in session, all school-related and school-
sponsored programs or activities, and transportation on a school bus to or from school or a school-related or school sponsored program or activity.

**EXAMPLES:**

“No person shall be subjected to harassment . . . in any activity or program occurring on the grounds of a public educational institution during the hours in which school is in session, in any program or activity conducted by a public educational institution or one of its agents, or during transportation by school bus.” N.Y. DASA, § 13(a). See also N.Y. DASA, § 13(b) (re: discrimination).

(5) **Prohibited Conduct**

- The statute should prohibit discrimination and harassment.
- The statute should also prohibit retaliation against any person who reports discriminatory or harassing behaviors (this provision is sometimes referred to as a “whistle-blower” clause).

**EXAMPLES:**

“No person shall be subjected to harassment . . . No person shall be subjected to discrimination . . .”

N.Y. DASA, § 13(a); 13(b) (emphasis added).

“Protection of people who report discriminatory behaviors, practices or act, harassment or acts of hate violence. Any person having reasonable cause of suspect . . ., who in good faith reports such information . . ., or otherwise initiates, testifies, participates or assists . . . shall have immunity from any civil liability that may arise . . . and no school district or school district employee shall take, request or cause a retaliatory action against any such person . . .” N.Y. DASA, § 18.

(6) **Implementing Policies and Procedures**

- The statute should authorize the State Board of Regents (or its equivalent) to promulgate rules and regulations to implement the statute.

**EXAMPLES:**

“The regents from time to time may adopt, promulgate, amend or rescind rules and regulations to effectuate the purposes and provisions of this section.” N.Y. DASA § 16.

(7) **Severability and Construction Clause**

- The statute should include a severability clause.
- It is also helpful to have a sentence stating that the statute is to be liberally construed.

**EXAMPLES:**

“Severability and construction. The provisions of this title shall be severable, and if any court of competent jurisdiction declares any phrase, clause, sentence or provisions of this title to be invalid, or its applicability to any government agency, person or circumstance is declared invalid, the remainder of the title and its relevant applicability shall not be affected. The provisions of this title shall be liberally construed to give effect to the purposes thereof.” N.Y. DASA § 16.
Other Important Elements:

(1) School District Policies

- The statute should require all school districts to adopt anti-harassment/non-discrimination policies consistent with the statute.
- Ideally, the statute should require the policy to include enforcement mechanisms, and should require the school board to provide notice of the policy to the school community.
  - If it is not possible to include these requirements directly in the statute, the statute should authorize the State Board of Education (or its equivalent body) to adopt regulations, and these requirements should be included in these implementing regulations.

EXAMPLES:

“Directing all school districts to establish and implement policies and procedures intended to create a school environment . . . that is free from discriminatory behaviors, practices, or acts, harassment, and acts of hate violence.” N.Y. DASA, § 14(a) (emphasis added).

“A school board must adopt a written . . . policy that conforms with sections 363.01 to 363.15. The policy shall apply to pupils, teachers, administrators, and other school personnel, include reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy . . . The policy must be conspicuously posted throughout each school building, given to each district employee and independent contractor at the time of entering into the person’s employment contract, and included in each school’s student handbook on school policies. Each school must develop a process for discussing the school’s . . . policy with students and school employees.” Minn. Stat. Ann. § 121A.03, Subd. 2.

“Each school district shall adopt a policy prohibiting harassment, intimidation, or bullying . . . [and] each school district’s policy shall, at a minimum include each of the following components: . . .” Wash. Safe Schools Bill, § 3(1) and 3(2).

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(2) Employee Training

- The statute, or its implementing regulations, should require school employee training programs to include information about preventing and responding to discrimination and harassment.

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3 As with N.Y. DASA, although the Washington bill has not yet been enacted, we have included references to its language because it provides a useful model.
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EXAMPLES:
“(b) Establishing guidelines to be used in school employee training programs to discourage the development of discriminatory behaviors, practices, or acts, or harassment and that are designed to raise the awareness and sensitivity of school employees to potentially discriminatory behaviors, practices, or acts, harassment, and acts of hate violence.
(c) Establishing guidelines to be used in school employee training programs and designed to enable school employees to prevent and respond to discriminatory behavior, practices, or acts, harassment, and acts of hate violence.” N.Y. DASA, § 14(b), (c).

(3) Curriculum
- The statute, or its implementing regulations, should require schools to incorporate LGBT issues into the curriculum in an age-appropriate way.

EXAMPLES:
“Establishing guidelines relating to the development of nondiscriminatory instructional and counseling methods, and requiring that at least one staff member at every school be thoroughly trained to handle human relations in the areas of . . . sexual orientation [and] gender.” N.Y. DASA, § 14(d).

Enforcement:

(1) Private Cause of Action
- Ideally, the statute should provide a private cause of action to sue in state or federal court.
- The statute may also allow provide for an administrative remedy – such as allowing a party to file a complaint with the Commissioner of Education, State Board of Regents, or its equivalent.
  - It is also helpful to make clear that any remedies specifically provided by the statute do not waive one’s right to pursue other remedies.

EXAMPLES:
“It is the intent of the Legislature that . . . the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.” Cal. Educ. Code § 201(g).

“Sections 2 through 5 of this act shall not be interpreted to prevent a victim from seeking redress under any other available law either civil or criminal. Sections 2 through 6 of this act do not create or alter any tort liability.” Wash. Safe Schools Bill, § 6.

IMPORTANT CAVEATS:
Because education statutes have complex and interrelated relationships with other statutes, such as employment and public accommodations – relationships which vary
by state – activists are strongly advised to consult an attorney familiar with this area of law before making any decisions about enforcement provisions.

In addition, when considering whether and how to draft a private cause of action, activists should also analyze the various state immunity doctrines in place in their state – such as qualified immunity, and tort immunities.

(2) Relief

- Ideally the statute should provide that monetary damages, injunctive relief, and any other appropriate relief may be awarded for a violation of the statute.
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