



It's the Law:

Sexual Orientation Discrimination & Bullying Laws

Presented by:

Rebekah Cook, Attorney

Oregon School Boards Association



Agenda

- Oregon Equality Act
- Oregon's Bullying Laws
- Constitutional Issues
- Prevention Strategies



Oregon Equality Act (SB 2)

- Effective date: January 1, 2008
- Prohibits discrimination based on sexual orientation in:
 - ◆ Housing
 - ◆ Employment
 - ◆ Public Accommodations
 - ◆ Public Services
 - ◆ Education



Oregon Equality Act: Educational Provisions ORS 659.850

- “Discrimination” means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on:
 - ◆ **race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.**



Oregon Equality Act

- “Sexual orientation” means an individual’s:
 - ◆ actual or perceived heterosexuality,
 - ◆ homosexuality,
 - ◆ bisexuality or
 - ◆ gender identityregardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.



Oregon Equality Act

- “Discrimination” does not include enforcement of an otherwise valid dress code or policy, as long as the code or policy provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual.



Oregon Equality Act

■ Remedies

- ◆ Implement school's complaint procedure
- ◆ Seek legal counsel
- ◆ File complaint with the Oregon Bureau of Labor & Industries



Practical Application

- What about the use of bathrooms or locker rooms by transgender students?
 - ◆ How does the Oregon Equality Act apply to this situation?
- What about a school's curriculum? Can a student complain about sexual orientation discrimination?



Oregon's Bullying Laws

ORS 339.351-339.364

- ORS 339.351 Defines Harassment
- ORS 339.351 Findings
- ORS 339.356 Requires school districts adopt a policy
- ORS 339.359 Prevention Task Forces encouraged
- ORS 339.362 Retaliation Prohibited
- ORS 339.364 Victim may seek redress under other laws



Definition of “harassment, intimidation or bullying”: ORS 339.351(2)

- “Harassment, intimidation, or bullying” means any act that substantially interferes with a student’s:
 - ◆ Educational benefits;
 - ◆ Opportunities; or
 - ◆ Performance.
- Must occur:
 - ◆ On or immediately adjacent to school grounds;
 - ◆ At any school sponsored activity;
 - ◆ On school provided transportation; or
 - ◆ At any official bus stop.
- Must have the effect of:
 - ◆ Actually causing physical harm to the student or the student’s property;
 - ◆ Knowingly placing the student in reasonable fear of physical harm to the student or student’s property; or
 - ◆ Create a hostile educational environment.



Definition of Cyberbullying: ORS 339.351(1)

- Cyberbullying means the use of any electronic communication device to “harass, intimidate, or bully.”



Oregon's Bullying Laws

- ORS 339.356 requires that school districts adopt a policy prohibiting harassment, intimidation or bullying and cyberbullying.
 - ◆ OSBA's Sample Policy JFCF
 - ◆ Enforcement Mechanism



Anti-bullying Policy- FAQ

- What happens if a student violates the school district policy? Is there uniform method of punishment for anti-LGBT harassment?
- Is there a standard reporting method for anti-LGBT harassment?
- Must teachers intervene if they witness a student calling another student a "fag?"



Anti-bullying Policy- FAQ

- What if a student confides to a teacher that other teachers are not intervening? Can the school district make teachers take action?
- Are school districts required to educate teachers and administrators about what to do if they witness anti-LGBT (or other) bullying?
- Who within each school district is responsible for enforcement of that district's policy? The school board? The superintendent?
- If parents want to encourage their school district to adopt a more rigorous policy or enforce its existing policy, who would they approach?



Bullying & Sexual Orientation Discrimination

- In the definition of bullying the Oregon Legislature did not:
 - ◆ List motivating factors (i.e. sexual orientation); or
 - ◆ Define characteristics of the victim.
- Effect:
 - ◆ Broad definition of bullying with the most potential to protect against sexual orientation discrimination.



Bullying & Sexual Orientation Discrimination

- Why does the failure to specifically list sexual orientation result in greater protection?
 - ◆ To illustrate this point it is important to look at the three types of legislation that states can pass on this point.



Three categories of bullying laws

- Lack of motivating factors. (Oregon)
 - ◆ Focus is on inappropriate conduct.
 - ◆ Broad definition of bullying that should protect students based upon actual or perceived orientation.

- Definition includes the victim's sexual orientation as a motivating factor.
 - ◆ Hard to prove motivating factor.
 - ◆ Potential requirement of repeat bullying.
 - ◆ More vulnerable to First Amendment challenges.

- No definition of bullying.
 - ◆ Protection depends upon each district's definition of bullying and whether or not they decide to prohibit sexual orientation discrimination.



First Amendment Issues.

- If sexual orientation is listed as a motivating factor the statute may be void for being unconstitutionally vague.
 - ◆ *Saxe v. State College Area School District*
 - ◆ Unconstitutionally vague because might be punished for preaching about religious beliefs.
 - ◆ Focus on motive rather than effect = more susceptible to a First Amendment attack.
 - ◆ Result:
 - ◆ Statutes prohibiting “bullying” may have a better chance of surviving a constitutional challenge than those that focus on motives and the victim’s characteristics.
 - ◆ Focus on effect/injury to victim rather than motivation.



What can I do about a student speaking against homosexuality?

- *Zamecnik v. Indian Prairie Sch. Dist.*
 - ◆ United States District Court, ND Ill
 - ◆ Facts: Following a “day of silence” to express tolerance of gays, where students and some faculty wore t-shirts expressing their support for GSA, two students with Christian religious beliefs wanted to have a “day of truth” and wear t-shirt that said “Be Happy, Not Gay.”



What can I do about a student speaking against homosexuality?

- Court's Decision:
 - ◆ Schools can take into consideration pedagogical concerns and their basic educational mission when restricting student speech
 - ◆ Ex: Mission to teach tolerance
 - ◆ Can prohibit ***negative statements***
 - ◆ i.e. Be Happy, **Not Gay** – not okay, can censor “Not Gay”
 - ◆ Cannot prohibit ***positive statements***-viewpoint discrimination
 - ◆ i.e. Be Happy, **Be Straight** – is okay



Prevention Techniques

- Review District Policies & School Rules
 - ◆ Harassment/Bullying/Hazing
 - ◆ Sexual Harassment
 - ◆ Cyberbullying
 - ◆ Discrimination
- These should be publicized to parents and students



Prevention Techniques

- Adopt and Publicize Confidential Reporting System
 - ◆ System should allow students to report victimization.
 - ◆ “Bully box”- anonymous reporting
 - ◆ Hero v. Snitch Training



Prevention Techniques

- Assess School Climate with Confidential Survey
- Discover Problem Areas (“Hot Spots”)
 - ◆ Increase Staff Monitoring ASAP
 - ◆ Notice of Problem Without Subsequent School Action Creates Liability
- Identify victims as soon as possible



Prevention Techniques

- Take Reports Seriously
 - ◆ Don't discredit any report of harassment
- Need for immediate intervention
 - ◆ Stop perpetrators immediately
 - ◆ Provide Support for Both Perpetrator and Victim
- Ask Questions



Prevention Techniques

■ Parent Education

- ◆ Meeting with parents of bullies and victims after incident.
- ◆ Send home letters regarding school policy and classroom rules about bullying.



Prevention Techniques

- Classroom Strategies
 - ◆ Classroom Rules Against Bullying
 - ◆ Consequences for following rules
 - ◆ Reward students for positive, inclusive behavior
- Assign bullies tasks during unsupervised time.



Prevention Techniques

- Classroom Strategies (cont.)
 - ◆ Weave anti-bullying theme into curriculum
 - ◆ Role Playing
 - ◆ Relevant literature with message that bullying is unacceptable at school
 - ◆ Hold class meetings for students to talk about bullying issues



Prevention Techniques

- Make referrals to counseling staff when appropriate for bully or victim.
- Contact law enforcement if true threat.



Prevention Techniques

- Contracts re: Hazing/Harassment
 - ◆ Athletic Participation
 - ◆ Extracurricular participation



Questions?

Contact Information:

1-800-578-6722

Rebekah Cook, rcook@osba.org