**Background Reading for Presentation on the Legal Rights of Lesbian, Gay, Bisexual, Transgender Students to Access Education at the University of Sao Paulo.**

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**LGBT Rights in U.S. Public Schools: When Civil Rights and Religious Beliefs Collide**

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**Introduction**

Society’s views of sexual orientation and gender identity have certainly evolved in recent years.[[1]](#footnote-1) As this has occurred, public schools have been forced to address several related issues, which have sometimes led to litigation. Many of the controversies involve competing rights between students’ religious beliefs and other students’ civil rights. In the past, students’ and families’ sincerely held religious beliefs sometimes conflicted with the rights of racial minorities.[[2]](#footnote-2) Although religious objections related to race are no longer socially acceptable, the issue of competing rights has resurfaced again with a new focus on sexual orientation and gender identity. Specifically, students have relied on their sincerely held religious beliefs when wearing a homophobic t-shirt to school, when challenging anti-bullying policies, or when questioning school-curriculum choices. Also, there are underlying religious arguments in recently proposed laws and policies that many argue impede the civil rights of transgender students.

While students’ individual religious liberties should remain protected in public schools, these same individuals should not be able to regulate the civil liberties of others. As U.S. Supreme Court Justice Anthony Kennedy recently observed: “no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons. . . in protecting their own interests.”[[3]](#footnote-3) This article examines four specific areas of competing rights as they relate to sexual orientation and gender identity in K-12 public schools, including bullying/harassment, student speech, curriculum, and transgender access issues.

**Student Bullying and Harassment**

Researchers have documented that lesbian, gay, bisexual and transgender (LGBT) students are bullied and harassed at higher numbers than the rest of the student population in school.[[4]](#footnote-4) A 2015 National School Climate survey discovered that 85% of LGBT students reported harassment in school.[[5]](#footnote-5) According to the study, 71.5% of LGBT students avoided school functions because they felt unsafe or uncomfortable.[[6]](#footnote-6) The Centers for Disease Control and Prevention (CDC) found that there are 1.3 million high school students who identify as LGBT (8% of the high school population).[[7]](#footnote-7) Within this group, more than 40% of the LGBT students said they have considered committing suicide in the last year and 30% have attempted suicide. At the same time, the CDC reported that 15% of straight students have considered suicide and 6% have attempted.[[8]](#footnote-8) In order to address the mistreatment of LGBT students, many school districts across the country have included sexual orientation and/or gender identity within their anti-harassment or anti-discrimination policies. Some parents object to programs and policies that attempt to shield LGBT students from bullying and harassment because they believe such programs “conflict with their deeply held religious beliefs that homosexuality is sinful. . .”[[9]](#footnote-9) With the goal of safeguarding religious liberties, it is sometimes recommended that LGBT rights and protections be limited. [[10]](#footnote-10) Legal scholar, Nancy Knauer, contends that religious liberty requests can be “deceptively evenhanded” and that religious liberty arguments can present a “power flip” where the religious objectors become the victims.[[11]](#footnote-11) William Eskridge, a professor at Yale Law School, maintains that sometimes Christian fundamentalists support forms of state discrimination against LGBT persons, “on the ground that full equality for gays would mean fewer liberties for themselves.”[[12]](#footnote-12)

In addition to parents objecting for religious reasons, some religious-based groups have attempted to derail anti-bullying policies by claiming they are unnecessary.[[13]](#footnote-13) One commentator observes:

Most bullying prevention programs consider a variety of reasons for bias and harassment in school: for example, discrimination due to a student’s race, age, gender, religion, or physical and mental abilities. When Religious Right activists deride ‘special rights’ or “special protections,” they try to make gay students appear more powerful than others, including their bullies. Their real objective is to drive teachers, school officials, and policymakers to intentionally ignore the problem of bullying against gay and gay-perceived students and create or maintain a policy of inaction.[[14]](#footnote-14)

Matt Barber, the Associate Dean of Liberty University School of Law, referred to anti-bullying programs as “Alinksy-style, homo-fascist tactics to stifle any dissent.”[[15]](#footnote-15) According to Barber, suicide rates among gays is high because they know “what they are doing is unnatural, is wrong, is immoral.”[[16]](#footnote-16) Family Research Council President, Tony Perkins, explained to *National Public Radio* that problems experienced by LGBT youth are their fault and not due to bullying, and that being gay is abnormal. He asserted that “these young people who identify as gay or lesbian, we know from the social science that they have a higher propensity to depression or suicide because of that internal conflict.”[[17]](#footnote-17) Such efforts to ban protections for LGBT students through school policy are misguided. In fact, it appears that LGBT students may need even more protection when compared to other groups that have been historically marginalized in public schools. A 2016 study revealed that while 57.6% of students feel unsafe at school due to the personal characteristic of sexual orientation, 13% of students felt unsafe due to their religion and 7.4% felt unsafe due to their race.[[18]](#footnote-18)

Two court decisions discussed below illustrate not only the harassment LGBT students can experience in schools, but also the legal issues that arise when such harassment is not addressed. One of the cases discussed below includes a Title IX claim. Title IX is part of the Education Amendments of 1972, and it states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.”[[19]](#footnote-19) Congress enacted this law in order to prohibit using federal money to support discriminatory practices with educational institutions that receive federal funds, and to give individual citizens effective protection against those practices.[[20]](#footnote-20) In cases involving LGBT harassment, students sometimes argue that they have been discriminated against on the basis of sex.

In both cases, the students alleged violations under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws,”[[21]](#footnote-21) requiring that similarly situated individuals be treated the same.[[22]](#footnote-22) Given patterns of past discrimination, courts have interpreted the Equal Protection Clause as requiring the state to provide more justification for the use of some classifications of individuals than others. In so doing, the Court uses different levels of scrutiny for different classes of people.[[23]](#footnote-23) There are three different levels of judicial scrutiny (i.e., strict scrutiny, intermediate scrutiny, and rational basis). For example, race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest.[[24]](#footnote-24) With strict scrutiny, an explicit racial classification will be permissible only when it is narrowly tailored to achieve a compelling governmental interest.

The next level is intermediate scrutiny, which is the standard used when the government makes sex-based classifications. Under this level of scrutiny, the government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[[25]](#footnote-25) For example, if the problem being targeted is female participation in advanced science courses, school officials might decide to adopt a policy where female students can pursue single-sex science courses. If this were the case, the district would need to demonstrate that the policy is substantially related to addressing that particular problem (e.g., underrepresentation of females in advanced science courses).

The third level of judicial scrutiny is referred to as rational basis, which requires that the classification is rationally related to a legitimate state interest.[[26]](#footnote-26) Disability and socio-economic status, for example, fall under this level of review. Some also argue that sexual orientation falls under this level of scrutiny.

Under these levels of scrutiny, it is clear that it is easier to create a government classification that negatively impacts gay students than it is to create a government policy that negatively impacts students of color. Courts should not permit LGBT students to experience discrimination in public schools by applying this lower level of scrutiny. Legal scholar, Kenji Yoshino, has noted that there is a gap between the “perceived illegitimacy of race discrimination and that of sex discrimination” and that there is a “prioritization of race discrimination over sex discrimination, and of sex discrimination over orientation discrimination.”[[27]](#footnote-27) From a school policy perspective, all students who have been historically marginalized in schools should be protected. Despite the lower level of scrutiny involved, there are certainly rational or important governmental reasons why sexual orientation should be included in school anti-discrimination policies alongside race, ethnicity, national origin, gender, religion and disability. The two decisions discussed below further explain why such policies are necessary.

In *Nabozny v. Podlesney*,[[28]](#footnote-28) a student from Wisconsin claimed that he was harassed by other students based on his gender and sexual orientation and that school officials failed to protect him.[[29]](#footnote-29) He sued under the Equal Protection Clause (pursuant to 42 U.S.C.S. § 1983). Nabozny claimed that his classmates called him a faggot, spit on him and struck him on several occasions.[[30]](#footnote-30) Although the principal was informed about the harassment, he allegedly took no action. After Nabozny reported these incidents, the harassment continued and, during class, a student pretended to mock rape him as twenty others watched and laughed. The other attacks reportedly continued and nothing was done by school officials to address the harassment.[[31]](#footnote-31)

After Nabozny attempted suicide, he finished his eighth grade year in a Catholic School. The Catholic School only offered classes through eighth grade and his family could not afford private school, so he therefore returned to the public school for ninth grade.[[32]](#footnote-32) In ninth grade, Nabozny was assaulted in the bathroom and was urinated on after being pushed into the stall. The guidance counselor agreed to change Nabozny’s schedule to minimize his exposure to the perpetrators. In so doing, the counselor placed him in a special education classroom with two of the perpetrators; Nabozny attempted suicide again.[[33]](#footnote-33) In tenth grade, eight boys beat him in the hallway for 5-10 minutes and Nabozny suffered from internal bleeding. When Nabozny reported this incident to a school official in charge of discipline, he was told he deserved such a beating because he was gay. He eventually moved to Minneapolis where he was diagnosed with PTSD.[[34]](#footnote-34)

The district court dismissed his equal protection claim because there was no evidence that he was treated differently based on his gender.[[35]](#footnote-35) The Seventh Circuit reversed, finding that school officials had aggressively disciplined male-on-female battery and harassment but failed to address this harassment. According to the circuit court, the Equal Protection Clause requires “the state to treat each person with equal regard, as having equal worth, regardless of his or her status.”[[36]](#footnote-36) The court stressed that the question is not, as the school district argued, whether school officials “are required to treat every harassment complaint the same way.”[[37]](#footnote-37) Rather, the question is whether “they are required to give male and female students equivalent level of protection” which they are required to do absent an important governmental objective.[[38]](#footnote-38) Thus, the court found that a reasonable person standing in the school district’s position would have understood that school officials’ non-action was unlawful. The court highlighted that when school officials laughed at Nabozny’s pleas for help, it was “simply indefensible.”[[39]](#footnote-39) As for Nabozny’s sexual orientation claim against the school district, the court was unable to find any rational basis for permitting one student to assault another student based on the victim’s sexual orientation.[[40]](#footnote-40) The court again found that a reasonable person in the school district’s position would have concluded that the discrimination Nabozny experienced based on his sexual orientation was unconstitutional.

The second illustrative court case includes a student who experienced similar treatment in school. In *Henkle v. Gregory*, a gay student was allegedly harassed and intimidated by classmate at his high school in Nevada. [[41]](#footnote-41) Students in the school referred to Henkle as “fag” “butt pirate” “fairy” and “homo,” and they lassoed him around the neck and suggested dragging him behind a truck.[[42]](#footnote-42) The administration allegedly took no action against the perpetrators. Another incident occurred during Henkle’s English class where students called him a fag and drew sexually explicit pictures. Although the English teacher knew about the harassment, she told Henkle that his sexuality was of a private matter.[[43]](#footnote-43) After other horrific events, he was transferred to the alternative school where the principal told him to quit acting like a fag. Upon Henkle’s request, he was transferred to another high school where the harassment continued; he was punched in the face and called derogatory names. No action was taken at this high school either.[[44]](#footnote-44) Henkle wanted to transfer back to the alternative school, but the principal refused to take him despite there being space. Henkle therefore attended a community college but then was not eligible for a high school diploma.[[45]](#footnote-45) He filed a lawsuit alleging violations of the First (free speech) and Fourteenth (equal protection) Amendments as well as Title IX violations. Although his Title IX and Equal Protection Clause claims were dismissed, the court refused to dismiss his First Amendment claim.[[46]](#footnote-46) Lambda Legal reports that the parties reached a settlement agreement in 2002.[[47]](#footnote-47)

If Jamie Nabozny or Derek Henkle would have been terrorized in this way because of their skin color, it would have been easier to argue for protections under the Fourteenth Amendment’s Equal Protection Clause because race is subject to a higher level of scrutiny than sex or sexual orientation. Such distinctions, especially as they play out in the K-12 school context where all students should feel valued, do not translate into sound education policy. U.S. Supreme Court Chief Justice Roberts has asserted in a K-12 public school case involving race and equal protection that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”[[48]](#footnote-48) The Court should also find that the way to stop discriminating on the basis of sexual orientation is to stop discriminating on the basis of sexual orientation.

Additionally, students who were harassed in this way because of their race would likely have been protected under state and federal laws. It is indeed astonishing that only eighteen states have passed anti-bullying and/or anti-harassment laws that include sexual orientation and gender identity, and only thirteen states and the District of Columbia have anti-discrimination laws that provide protections for LGBT students.[[49]](#footnote-49) Also, unlike for racial minorities, religious minorities, and individuals with disabilities, there is no *specific* federal protection that exists for LGBT students who experience discrimination in schools.

It is unfortunate that whether protections are needed for LGBT students is still being debated; the *Washington Post* reported in January 2017 that a school board in Virginia declined to consider policies that would ban discrimination based on sexual orientation and gender identity because the law is “unsettled” and because of possible changes under the Trump administration.[[50]](#footnote-50) This approach is misguided because school officials can, within the confines of the law, carefully craft religiously-neutral school policies that prohibit discrimination against the LGBT students. To allow harassment against other groups, such as racial or religious minorities based on religious objections, is equally unconscionable. Religious liberty arguments within this context of the public school require some limitations – similar to those applied to race. For example, in a case involving a K-12 private school that prohibited African Americans from enrolling based on religious beliefs, the Supreme Court found that the public interest in eradicating racial discrimination trumped school officials’ sincerely held religious beliefs.[[51]](#footnote-51) There are as equally strong public interest reasons to eradicate discrimination based on sexual orientation.

**Student Speech**

Difficult questions often arise in schools when student expression denigrates or attacks another student’s core being in public school.[[52]](#footnote-52) For example, imagine that a student wears a confederate flag belt buckle with the slogan “White Pride” during a school-sponsored Martin Luther King celebration. What if a student wears a button that says “Christianity is a Lie” during a religious tolerance day or a t-shirt that says “God Created Adam and Eve, Not Adam and Steve” on the National Day of Silence? Would school officials be able to prohibit this expression? Students who wear such attire might argue that they have the right under the First Amendment’s Free Speech Clause to offer another viewpoint, or that they have the First Amendment right to express their sincerely held religious beliefs in public school -- even when that expression might denigrate religious, racial, or sexual minorities.[[53]](#footnote-53) Civil rights and religious rights are at the core of some of these examples.

Under the First Amendment, public school students have rights to express themselves, but these rights are not absolute. For example, in *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court ruled that “students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” unless the speech creates a material and substantial disruption in the school. [[54]](#footnote-54) In *Tinker*, the Court also noted that student speech could be limited if it interfered with the rights of others to be let alone.[[55]](#footnote-55) In sum, students’ private, political speech is protected unless it creates a material and substantial disruption in the school (i.e., *Tinker’s* first prong) and/or if it collides with the rights of others (i.e., *Tinker’s* second prong).

Three other U.S. Supreme Court cases allow other limitations to student expression in schools as well. In *Bethel Sch. Dist. No. 403* *v.* *Fraser,* the Supreme Court analyzed whether school officials could curtail a student’s speech at a school-sponsored assembly.[[56]](#footnote-56) The student plaintiff in this case was speaking about a friend who was running for student council, and in his speech he used an explicit sexual metaphor. The Court ruled in favor of the school district, finding the student’s speech not protected because it was offensive, and observed that “schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, offensive speech and conduct.”[[57]](#footnote-57) The Court also asserted that public schools “must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”[[58]](#footnote-58)

Likewise, in *Hazelwood Sch. Dist. v. Kuhlmeier*, students alleged that their principal violated their First Amendment rights when he censored two pages of the school newspaper.[[59]](#footnote-59) Holding in favor of the school district, the U.S. Supreme Court held that student speech in school-sponsored expressive activities could be curtailed if their actions are reasonably related to legitimate pedagogical concerns.[[60]](#footnote-60) The Court also observed that students’ rights “must be applied in light of the special characteristics of the school environment.”[[61]](#footnote-61) Finally, in the *Morse v. Frederick* decision, the Supreme Court ruled in favor the school district, finding that school officials may discipline students for speech at school-sponsored events that promote illegal drug use.[[62]](#footnote-62) Significantly, the Court reasoned that school personnel must sometimes take reasonable “steps to safeguard those entrusted to their care.”[[63]](#footnote-63)

School officials and courts have relied on these four student-expression cases when interpreting student-speech policies. These four decisions allow student speech in public schools to be limited when it is disruptive (*Tinker*), interferes with the rights of others (*Tinker*), is lewd and vulgar (*Bethel*), is school-sponsored (*Hazelwood*), and when it promotes illegal activities (*Morse*). Speech that denigrates another student’s core being should also be limited. In addition to First Amendment free speech claims, students who wear shirts with racist or homophobic messages also contend that they have rights under the Free Exercise Clause of the First Amendment. Under the Free Exercise Clause, “Congress shall make no law . . . prohibiting the free exercise [of religion].”[[64]](#footnote-64)

Four illustrative federal lower court opinions are discussed below to explain how U.S. Supreme Court precedent has applied in cases involving competing rights and homophobic speech. In *Chambers v. Babbitt*, a student in Minnesota wore a sweatshirt to school that said “Straight Pride.”[[65]](#footnote-65) School officials asked him to remove the sweatshirt based on safety concerns and prior incidents in the school that promoted intolerance; a group of students had approached the principal to explain that they were upset with this sweatshirt.[[66]](#footnote-66) Chambers argued that it was an expression of his religious belief. The federal district court granted the student’s motion for a preliminary injunction in order to protect his freedom of speech because school officials failed to demonstrate that there was a reasonable belief that a substantial disruption occurred.[[67]](#footnote-67)

However, the court rejected Chambers’ claims that school personnel were promoting homosexuality when they made a “conscious and commendable effort” to create an environment that promoted tolerance and respect for diversity at the school.[[68]](#footnote-68) At the same time, the court relied on the first prong of the *Tinker* decision to embrace the constitutional guarantee to freedom of expression. The court observed:

Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by “Straight Pride.” While the sentiment behind the "Straight Pride" message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own. The Court does not disregard the laudable intention of Principal Babbitt to create a positive social and learning environment by his decision, however, the constitutional implications and the difficult but rewarding educational opportunity created by such diversity of view point are equally as important and must prevail under the circumstances.[[69]](#footnote-69)

A federal district court in Ohio weighed in on this issue as well. In *Nixon v. Northern Local School District Board of Education*,[[70]](#footnote-70) a middle school student wore a t-shirt to school that he purchased at a church camp.[[71]](#footnote-71) The front of the shirt included the following text:

INTOLERANT

Jesus said ... I am the way, the truth and the life.

John 14:6

The back of the shirt displayed these statements:

Homosexuality is a sin!

Islam is a lie!

Abortion is murder!

Some issues are just black and white![[72]](#footnote-72)

When Nixon wore the t-shirt to school, a guidance counselor told him to turn it inside out. He refused, and was escorted to the principal’s office where an assistant principal insisted that he remove it or turn it inside out before returning to class. School officials contacted his father, who refused to tell his son to remove it.[[73]](#footnote-73)

When his father met with the school superintendent and the principal about a week later, they explained that the shirt violated school policy.[[74]](#footnote-74) The school district's student handbook stated that clothing “that disrupts the educational process,”[[75]](#footnote-75) and clothing “with suggestive, obscene, or offensive or gang related words and/or pictures,” could also be prohibited.[[76]](#footnote-76) The handbook also said that “any actions or manner of dress that interfere with school activities or disrupt the educational process are unacceptable.”[[77]](#footnote-77) Nixon had worn other shirts to school in the past with religious messages but had never been disciplined. The previous religious shirts, however, did not denigrate other students; they included such messages as WWJD (i.e., What Would Jesus Do). Once this policy was reviewed with the father, he was told that if Nixon returned to the school wearing the t-shirt, he would be suspended.[[78]](#footnote-78)

Although school officials agreed that the shirt did not cause disruption, they posited that the shirt had the potential to cause a disruption because the school community includes Muslims, gays and those who have had abortions.[[79]](#footnote-79) Within a few months, the Nixon family filed a lawsuit in a federal court, complaining that Nixon’s First Amendment rights had been violated. The court found that school officials’ fear of disruption fell short of the *Tinker* standard. [[80]](#footnote-80) Instead, the court reasoned that school officials were motivated by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”[[81]](#footnote-81)

The court also disagreed with the defendants’ allegation that Nixon’s t-shirt “invaded on the rights of others.”[[82]](#footnote-82) “[T]here is no evidence,” the court declared, “that James' silent, passive expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone.”[[83]](#footnote-83) Specifically, with regard to *Tinker’s* second prong, the court found that “defendants point to no authority interpreting what ‘invasion on the rights of others’ really entails. In fact, the Court is not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school's regulation of student speech.”[[84]](#footnote-84) School officials also defended their actions under the Court’s *Bethel* decision*,*[[85]](#footnote-85) claiming that the message on Nixon’s t-shirt fit the *Bethel* standard of “plainly offensive.”[[86]](#footnote-86) The district court rejected this argument as well. Specifically, the court asserted that “[n]one of the actual words on James' shirt compare in offensiveness to the sexually explicit, vulgar, and plainly offensive words expressed in the *Bethel* line of cases.”[[87]](#footnote-87) While the content might be politically offensive to some who would read it, the court reasoned, politically offensive speech is properly analyzed under *Tinker*.[[88]](#footnote-88) Thus, the federal district court granted Nixon’s motion for a preliminary and permanent injunction against the school district, and prohibited school officials from preventing Nixon from wearing his t-shirt unless there was evidence that it caused substantial disruption to school activities or that a substantial disruption was likely to occur.[[89]](#footnote-89)

Two federal circuit courts of appeals have also addressed similar issues. In *Harper v. Poway*,[[90]](#footnote-90) the Ninth Circuit analyzed a case involving a student who wore a shirt that said “I will not accept what God has condemned” and “Homosexuality is shameful” (citing a Bible passage) and another shirt stating “Be Ashamed . . . Our school has embraced what God has Condemned” and “Homosexuality is shameful.”[[91]](#footnote-91) He wore this shirt on the National Day of Silence, which is a day of action to protest the bullying LGBT students experience.[[92]](#footnote-92) School personnel asserted that the shirt created a hostile environment for other students in the school and was inflammatory. In fact, there was disruption created by the shirt and students were suspended, but Harper was not disciplined for his shirt.[[93]](#footnote-93) Harper ultimately filed a motion for a preliminary injunction to be permitted to wear the shirt to school, but the federal district court denied the student’s motion.[[94]](#footnote-94) Relying on *Tinker*, the district court highlighted evidence in the record to show that school personnel could reasonably forecast a substantial disruption or a material interference with school activities.

Then Ninth Circuit affirmed the district court’s decision to deny Harper’s motion for a preliminary injunction. Instead of relying on *Tinker’s* substantial disruption standard, it applied *Tinker’s* second prong (i.e., the “rights of other students” and “to be secure and to be let alone.”)[[95]](#footnote-95) The court held that under *Tinker*, Harper’s shirt impinged upon the rights of the other students in the school. The Ninth Circuit observed that:

[H]is T-shirt ‘collides with the rights of other students’ in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to ‘be secure and to be let alone.’ Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[[96]](#footnote-96)

The court also cited social science research to support its decision. Specifically, much of the research addressed the harms LGBT students experience in schools due to harassment. Interestingly, the court compared the issue to racial harassment and observed that “[w]hile the Confederate flag may express a particular viewpoint, [i]t is not only constitutionally allowable for school officials to limit the expression of racially explosive views, it is their duty to do so.”[[97]](#footnote-97)

The Ninth Circuit declined the *en banc* request to rehear this case. One judge wrote a concurrence to this denial of the request and criticized the dissent in *Harper*. He wrote:

The dissenters still don't get the message - or Tinker! Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply "unpleasant and offensive." It strikes at the very core of the young student's dignity and self-worth. Similarly, the example Judge Kozinski offers, a T-shirt bearing the message, "Hitler Had the Right Idea" on one side and "Let's Finish the Job!" on the other, serves to [2]  intimidate and injure young Jewish students in the same way, as would T-shirts worn by groups of white students bearing the message "Hide Your Sisters - The Blacks Are Coming."[[98]](#footnote-98)

Subsequently, the U.S. Supreme Court agreed to hear this case. The Court vacated and remanded to the Ninth Circuit with direction to dismiss the appeal as moot; positing that the district court had already entered final judgment.[[99]](#footnote-99) As a result, the decision has limited precedential value.

The Seventh Circuit took a different approach to a similar issue. In *Nuxoll v. Indian Prairie Sch. Dist. #204*[[100]](#footnote-100) and *Zamecnik v. Indian Prairie Sch. Dist.*,[[101]](#footnote-101) two high school students from Illinois claimed that their First Amendment rights had been violated when school officials opposed their expression related to homosexuality by disciplining one of the students for wearing a t-shirt that said “Be Happy, Not Gay” on the day after the National Day of Silence. School personnel thought the words “not gay” could create disruption in the school and therefore asked the student to cross out “not gay.” The student filed a motion for a preliminary injunction against the school district, arguing that school officials violated their First Amendment rights when school policy prohibited them from making “derogatory comments” that referred to race, ethnicity, religion, gender, sexual orientation or disability. The students contended that the First Amendment allowed them to make negative comments about others as long as they did not use inflammatory or fighting words.[[102]](#footnote-102) Denying the student’s request for the injunction, the federal district court held that this expression was contrary to the school’s legitimate educational mission under *Hazelwood v. Kuhlmeier*.[[103]](#footnote-103) The court also reasoned that the policy’s purpose was to maintain a civilized educational environment and it had enforced the policy in an even handed manner. The court stressed that the student had not demonstrated a reasonable probability that his free speech rights had been violated.

In 2008, the Seventh Circuit Court of Appeals reversed the district court’s decision to deny the student’s motion for a preliminary injunction because even though there had been incidents of harassment involving gay students, there was not enough evidence indicating that this speech would cause a substantial disruption. The court also discussed viewpoint neutrality and recognized that on the National Day of Silence those with different viewpoints should be able to voice opinions. Additionally, Judge Posner asserted that the slogan “Be Happy Not Gay” was only “tepidly negative,”[[104]](#footnote-104) and that there was no evidence that the derogatory comments were directed at a specific individual. The court remanded the case back to the district court to grant the student’s motion for a preliminary injunction. When the case reached the Seventh Circuit again it upheld the district court’s decision that granted summary judgment to the students.[[105]](#footnote-105) The court did not find the speech to be considered fighting words and also cautioned that eighteen-year-old students should not be raised in intellectual bubbles or be able to rely on a hurt feelings defense.[[106]](#footnote-106)

The *Chambers*, *Nixon* and *Nuxoll/Zamecnik* decisions relied on *Tinker’s* “substantial disruption” standard. It is clear from these holdings that the courts required evidence of a substantial disruption in the school before they would curtail the students’ rights under the First Amendment. In these cases, there was only fear of substantial disruption, which did not meet the requirement set forth under *Tinker’s* first prong (i.e., substantial disruption). If courts insist on relying on *Tinker’s* first prong, it could certainly be arguable that a substantial disruption is created when students do not feel safe attending school as a result of denigrating speech that attacks their core being.[[107]](#footnote-107) Indeed, student expression that denigrates other students, whether related to sexual orientation, religion, or race, has the potential to create psychological harm, which should be considered a form of disruption as it impacts personal well-being and academic growth.[[108]](#footnote-108)

To the contrary, in *Harper*, the Ninth Circuit applied *Tinker’s* second prong. The *Harper* court got it right. Already vulnerable students, whether racial, religious, or sexual minorities, should not need to wait until a substantial disruption occurs to prohibit speech that denigrates others in public schools. First, speech that denigrates other students should not be considered political speech.[[109]](#footnote-109) To be certain, when school officials permit political debate about whether or not sexual orientation (or race or religion) is acceptable in schools, it is really a debate about a student’s self-worth and identity.[[110]](#footnote-110) Gilreath posits that these anti-gay t-shirts are a type of “anti-identity” speech that deny the victim existential status.[[111]](#footnote-111) The concurring judge in *Harper* correctly observed that such speech “strikes at the very core of the young student’s dignity and self-worth.”[[112]](#footnote-112) In sum, when Muslims, Christians, gays, African Americans or Latinas are told that they are not welcome in school, this is simply not political expression.[[113]](#footnote-113)

Further, in a school context, waiting for a disruption to occur with regard to speech that denigrates another student’s core-being is highly problematic for other reasons.[[114]](#footnote-114) For example, do we really believe that LGBT students, a population that oftentimes hides in the closet because they are ostracized in school, will create a substantial disruption in speaking out against homophobic speech? Would one black student at an all-white school need to create a substantial disruption about a confederate flag before school officials could address the problem? Should it fall on the shoulders of the one Muslim student at the school to create a substantial disruption when someone wears an “Islam is a lie” shirt to school? Moreover, the substantial disruption policy could play out unevenly in the same school district. To illustrate, if there are two Jewish students enrolled in a school, it would be less likely that there would be a material disruption created if someone wore a swastika t-shirt to school, however, across town (within the same school district with a larger Jewish population), that same anti-semitic shirt could be banned if there was a critical mass of Jewish students who created a disruption over the shirt. While the speech identified in the example with only two Jewish students might not cause the most conspicuous disruption, the speech could certainly cause a substantial disruption to the two students whose self-worth is being questioned by the anti-semitic t-shirt. In other words, the substantial disruption standard does not work in a school when the minority is truly in the minority. Moreover, this is not good education policy.[[115]](#footnote-115)

Indeed, *Tinker’s* second prong is the most applicable to cases involving homophobic speech.[[116]](#footnote-116) The court in *Nixon* rejected the second prong of *Tinker* because the Supreme Court has never thoroughly explained it,[[117]](#footnote-117) but other circuit courts have relied upon it.[[118]](#footnote-118) Consistent with the Fourth, Ninth, and Tenth circuits, speech that denigrates seems to be protected under *Tinker’s* second prong.[[119]](#footnote-119) Further, the *Bethel*, *Hazelwood*, and *Morse* decisions also offer assistance in this area. As noted, the *Bethel* Court insisted that public school personnel “must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”[[120]](#footnote-120) Specifically, both *Hazelwood* and *Morse* give deference to school officials in maintaining a civil environment as well. These decisions permit speech that denigrates a student’s core being to be limited.

**Curricular Issues**

The 2010 U.S. Census reported that there are 594,000 same-sex couple households in the U.S. and that 6 million children and adults have an LGBT parent.[[121]](#footnote-121) At the same time, the U.S. Supreme Court in *Obergefell v. Hodges* found that the U.S. Constitution guarantees the rights of same-sex couples to marry.[[122]](#footnote-122) Indeed, it is reasonable to assume that based on the number of same-sex households in the U.S., combined with the *Obergefell v. Hodges* decision, LGBT persons should not be excluded from the public school curriculum. Some states encourage the inclusion of LGBT persons in the curriculum, but these policies have not been without controversy. For example, a school district in California is currently engaged in a debate about how much students should learn about the LGBT community in schools. California has a law (the FAIR Act) that encourages schools to discuss the contributions of individuals with disabilities and the LGBT community in the curriculum.[[123]](#footnote-123)

Similar to the anti-bullying and free speech issues discussed, curricular choices have been legally contested.[[124]](#footnote-124) When challenged, school personnel must balance parents’ interests in directing their children’s religious upbringing against school interests, like fostering an educated student body and making all students feel welcome.[[125]](#footnote-125) In several instances parents have claimed that some parts of the curriculum offend their sincerely held religious beliefs.[[126]](#footnote-126) To illustrate, parents have challenged the school curriculum including books used in class such as “King & King” and “Heather Has Two Mommies” because these books are teaching kids that “homosexuality” is acceptable, which contradicts the Bible.[[127]](#footnote-127) Such challenges are not surprising, as similar issues arose in the 1950s when interracial marriage was not always included in the curriculum.[[128]](#footnote-128) Of course, under the First Amendment’s Free Exercise Clause, families have the right to teach their children about animus toward LGBT persons or racial minorities. But when these religious beliefs cross over and begin affecting state-sponsored policy in public schools, there are limitations.[[129]](#footnote-129) The case below provide one illustrative example.

In *Parker v. Hurley,* the First Circuit Court of Appeals addressed the topic of same-sex couples being discussed at an elementary school.[[130]](#footnote-130) In this case, parents alleged, amongst other claims, that books describing same-sex families violated their right to practice their religion under the Free Exercise Clause of the First Amendment. One family filed a lawsuit challenging the books sent home with kindergarten and first-grade students. The books depicted diverse families, including families comprised of parents of the same gender. The second family took issues with a story book read to a second grade class that detailed a marriage between two princes. The parents did not challenge that these books were used by the school district as part of a nondiscrimination curriculum, but instead challenged on the grounds that the families were not given any prior notice and were not allowed to opt-out from the instruction.[[131]](#footnote-131)

The court recognized that these books offended the families’ sincerely held religious beliefs, but at the same time did not find that their constitutional rights were burdened. The free exercise of religion, the court posited, did not require public schools to "shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."[[132]](#footnote-132) The court also explained that exposure to the books does not prevent the parents from raising their children under their religious beliefs. The *Parker* case illustrates some of the challenges related to accommodating the faith doctrine of all students in public schools.[[133]](#footnote-133)

Not all school districts have decided to adopt a non-discrimination curriculum as was the case in *Parker*. There are currently eight states that have passed laws that prohibit teachers from discussing gay and transgender issues in schools and they are oftentimes linked to religious freedom arguments.[[134]](#footnote-134) Some of these laws, for example, would prevent discussion about HIV or AIDS in schools.[[135]](#footnote-135) These laws and related polices are also being legally challenged. For example, a motion for a preliminary injunction was recently filed against the Utah State Board of Education to prohibit the Board from enforcing school policies that target LGBT students and prohibit positive discussions about sexual orientation in schools. [[136]](#footnote-136) The lawsuit contends that Utah’s policies violate rights to free speech under the First Amendment, the Equal Protection Clause of Fourteenth Amendment, and Title IX.[[137]](#footnote-137)

These laws ­– as they relate to the curriculum – are harmful because they stigmatize LGBT students and discriminate against them by treating them differently than other similarly-situated students in the school. For example, there are no similar laws that ban discussing heterosexual individuals in a positive manner.[[138]](#footnote-138)  Also, as suggested by Lambda Legal, these laws prevent students from obtaining important health information in school.[[139]](#footnote-139) Fortunately, courts have analyzed several cases, which have helped define the roles of parental rights and religion in public schools. [[140]](#footnote-140) These decisions suggest that public school personnel must balance free speech and free exercise rights while at the same time guarding against Establishment Clause violations. Although a parent may have a religious objection to some curricular decisions, courts have found that the curriculum does not burden the student’s right to freely exercise religious beliefs because by discussing AIDS or evolution in the curriculum, for example, students are not required to accept what is taught if their religious views conflict.[[141]](#footnote-141)

**Legislation and Transgender Students**

New controversies have materialized involving proposed state legislation that supporters assert protects religious beliefs while opponents argue are only tools to discriminate against LGBT persons.[[142]](#footnote-142) Interestingly, similar religious liberty arguments were used to exclude racial minorities in the past.[[143]](#footnote-143) However, those religious beliefs that were used to maintain racial segregation and oppose interracial marriage[[144]](#footnote-144) are no longer socially acceptable. Today, however, religious beliefs are being used to justify discrimination against the LGBT population in a similar manner.[[145]](#footnote-145) The ACLU reports that, in 2016, about two-hundred bills have been proposed in state legislatures that could lead to discrimination against LGBT individuals; half of those bills invoke religion or religious beliefs as justification to refuse services to gay people.[[146]](#footnote-146) Sometimes the "religious freedom" legislation is drafted to allow exceptions to nondiscrimination laws, which would permit businesses, individuals, and government employees to refuse service to someone by claiming a "sincerely held religious belief."[[147]](#footnote-147) Some of these proposed laws have implications for schools. In fact, some of the legislation specifically targets transgender students in public schools. For example, South Dakota’s Governor vetoed a bill that would have forced LGBT students to use restrooms that align with their sex assigned at birth.[[148]](#footnote-148)

In North Carolina, HB2, or the Public Facilities Privacy and Security Act, bans people from using public restrooms that align with their gender identity.[[149]](#footnote-149) Critics say this law discriminates against transgender individuals and puts them in danger. The law was a response to Charlotte's nondiscrimination ordinance, which permitted transgender individuals to use public restrooms that align with their gender identity.[[150]](#footnote-150) HB2 was legally challenged and the court granted the transgender plaintiff’s motion for a preliminary injunction based on the Title IX claim, but dismissed the plaintiff’s motion for a preliminary injunction on the Equal Protection claim.[[151]](#footnote-151)

Similarly, HB 1523 in Mississippi stated three “sincerely held religious beliefs or moral convictions” entitled to special legal protection. They included that marriage should be recognized as a union between one man and one woman; sexual relations are properly reserved to marriage; and that male or female refer to an individual’s immutable biological sexes objectively determined by anatomy at the time of birth.[[152]](#footnote-152) The bill further enumerated that the State of Mississippi would not “discriminate” against those people who act pursuant to sectarian belief. The law was challenged. In *Barber v. Bryant*, the federal district court found that “HB 1523 grants special rights to citizens who hold one of three ‘sincerely held religious beliefs or moral convictions’ reflecting disapproval of lesbian, gay, transgender, and unmarried persons,” and that the Equal Protection Clause is violated by the HB 1523’s permission of arbitrary discrimination against LGBT individuals.[[153]](#footnote-153) The court noted that these bills were passed in direct response to the *Obergefell v. Hodges* decision.[[154]](#footnote-154) The Court reasoned that “[i]t is therefore difficult to accept the State’s implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer.”[[155]](#footnote-155)

As noted above, the proposed legislation could certainly have implications for transgender students. According to various media reports, school districts across the country are addressing issues related to access and transgender students.[[156]](#footnote-156) Although there has not been much litigation, federal courts in Wisconsin[[157]](#footnote-157) and Ohio[[158]](#footnote-158) as well as the Fourth Circuit Court of Appeals have all examined these issues in the K-12 context. Likewise, the U.S Department of Education under the Obama Administration observed that discrimination based on gender identity was a violation of Title IX.[[159]](#footnote-159) As a result, school officials are navigating these issues when the law is not entirely settled. Some have argued that accommodating transgender students conflict with their sincerely held religious beliefs, while others argue that there are privacy and safety concerns.[[160]](#footnote-160)

A decision from the Fourth Circuit Court of Appeals highlights many of these issues. The case was filed on behalf of a transgender boy who argued that school officials violated his rights under the Equal Protection Clause and Title IX when a school policy did not allow him to use the restroom that aligned with his gender identity.[[161]](#footnote-161) In this case, Gavin Grimm, who was assigned the sex at birth of female, explained that before age six, he refused to wear female clothing and by age twelve recognized that he felt more like a boy.[[162]](#footnote-162) Several of his friends in ninth grade knew he felt this way and acknowledged that he presented himself as a boy. In ninth grade he also told his parents that he was transgender, and at that time, a psychologist diagnosed him with gender dysphoria, suggesting hormone therapy. Gender dysphoria has been described as the distress one experiences when the body does not reflect the sex assigned at birth. The psychologist gave him a “Treatment Documentation Letter” highlighting that he was being treated for gender dysphoria and should be treated as a boy in every way, including access to the restroom in school.[[163]](#footnote-163)

He eventually changed his legal name to Gavin and modified his records at school to indicate his new name. At this time, his family began to refer to him using male pronouns.[[164]](#footnote-164) While Gavin initially agreed to use a bathroom in the nurse’s office and took gym class through a home school program, he eventually requested and the principal agreed to let him use the male restroom because his teachers and the vast majority of his peers accepted him as a boy. For seven weeks, Gavin used the male’s restroom, however, during this time, the school board received complaints from some adult community members who were concerned with privacy. As a result, a Resolution was introduced that addressed restroom and locker room policies for all students. Before the resolution passed, the school district took steps to address some concerns, including the installation of three unisex single-stall restrooms, raising the doors and walls around the bathroom stalls, and adding partitions between the urinals.[[165]](#footnote-165) After the school board passed the Resolution, it required students to use restrooms and locker rooms that aligned with a student’s gender identity or use an alternative private facility.[[166]](#footnote-166) Gavin was informed that he would be disciplined if he used the boys’ restrooms.

Gavin eventually began hormone treatment, which resulted in an overall more masculine appearance.[[167]](#footnote-167) According to Gavin, due to his more masculine appearance, girls in the school were uncomfortable with him using the female restroom. Gavin subsequently filed a motion for a preliminary injunction, alleging violations under the Equal Protection Clause and Title IX.[[168]](#footnote-168) The federal district court denied Gavin’s motion for a preliminary injunction and granted the school district’s motion to dismiss the Title IX claim.[[169]](#footnote-169) With regard to the preliminary injunction, the court did not find that the balance of hardships weighed in his favor, noting that Gavin failed to show that his using the male restroom would not infringe upon the privacy rights of the other students.[[170]](#footnote-170) It dismissed the Title IX claim because it found that the Department’s Guidance was not consistent with Title IX’s regulations. Specifically, the court highlighted that under Title IX’s regulations,[[171]](#footnote-171) school officials may provide separate restroom and locker room facilities on the “basis of sex” and that such facilities provided for students of one sex shall be “comparable” to such facilities provided for students of the other sex.[[172]](#footnote-172) Gavin’s attorney interpreted the regulation to mean that sex is determined with reference to one’s gender identity, but school officials interpreted sex as it relates to genitalia. The district court found that the regulations require that the facilities only be comparable.

On appeal, the Fourth Circuit Court of Appeals examined Title IX’s implementing regulation, which it noted, clearly permits restrooms and locker rooms to be segregated by sex.[[173]](#footnote-173) Reversing the district court’s dismissal of the Title IX claim, the federal appellate court held that the district court did not give the Department’s interpretation of the regulation appropriate deference. Specifically, as noted above, Title IX’s implementing regulation (34 C.F.R. § 106.33) includes language about permitting segregated bathrooms based on sex. The Fourth Circuit found, however, that the regulation is “silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms.”[[174]](#footnote-174) The court relied upon a January 2015 letter from the Office for Civil Rights, which indicated that“[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”[[175]](#footnote-175)

Also, while relying on earlier Supreme Court precedent, the Fourth Circuit reasoned that the Department’s interpretation of the regulation should be given deference because the Department’s interpretation of its own regulation should have controlling weight.[[176]](#footnote-176) While the federal district court interpreted Title IX’s regulations to permit school officials to segregate restrooms based on sex assigned at birth, the Fourth Circuit deferred to the U.S. Department of Education’s interpretation of its own regulation of Title IX – that sex is determined based on gender identity. Although this regulation clearly refers to males and females, the Fourth Circuit observed that the statute does not address how school officials should determine whether a transgender student is male or female for the purpose of creating restroom access policies.[[177]](#footnote-177)

The Fourth Circuit declined to rehear this decision *en banc*.[[178]](#footnote-178) On remand, the preliminary injunction was granted, but in July 2016 the preliminary injunction was stayed.[[179]](#footnote-179) In October 2016, the U.S. Supreme Court granted certiorari and will hear this case in the coming term.[[180]](#footnote-180) With the new administration, it is quite possible that the U.S. Department of Education will take a different approach to Title IX’s applicability to discrimination based on gender identity.

As states continue to consider religious liberty exceptions that impact LGBT persons, including transgender students in schools, they will certainly need to balance the competing rights of religious liberty arguments and civil rights. The U.S. Supreme Court has cautioned about the slippery slope involving religious liberties. In *Reynolds v. U.S.* the Court asked, “[s]uppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”[[181]](#footnote-181) The Court in *Reynolds* also asserted that “professed doctrines of religious belief” are not “superior to the law of the land.”[[182]](#footnote-182) Further, in another decision involving religious liberty, Justice Scalia observed:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind – ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination law, drug laws, and traffic laws, to social welfare legislation such as minimum wage law child labor laws, animal cruelty laws, environmental protection laws, and laws providing the equality of opportunity for the races. The First Amendments’ protection of religious liberty does not require this.[[183]](#footnote-183)

Perhaps in striking that balance, courts should ensure that one’s individual religious liberty is protected, but in doing so, should not regulate the liberty rights of others.[[184]](#footnote-184) This thought was captured in an exchange within the *Obergefell* decision. To illustrate, in Justice Alito’s dissent in *Obergefell*, he cautioned that we should not “vilify Americans who are unwilling to assent to the new orthodoxy” and that “those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.” [[185]](#footnote-185) Justice Kennedy, however, wrote that “no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons. . . in protecting their own interests.”[[186]](#footnote-186) The *Obergefell* majority clearly states that “the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to voice their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from acting on those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals.”[[187]](#footnote-187) Further, while there is a deep commitment to religious freedom in the U.S., as Knauer notes, this has generally been applied to religious clergy and religious organizations.[[188]](#footnote-188) She argues that these exemptions “do not extend the same degree of protection to individual objectors who are not exempt from generally applicable laws.”[[189]](#footnote-189) Also, some of this proposed legislation to expand free exercise protections are constrained by the Establishment Clause.[[190]](#footnote-190) Moreover, what some state legislatures are proposing with religious exemptions, according to Knauer, represents a radical expansion of how religious liberty has generally been treated in the past by the U.S. Supreme Court in other contexts.[[191]](#footnote-191)

**Conclusion**

The examination of these issues is important as LGBT rights continue to be debated in public schools. In trying to create welcoming learning environments for *all*, it is sometimes difficult for school officials to balance the competing rights of students’ religious liberties and students’ civil rights. While student’s *individual* religious liberties should remain protected, individuals should not try to regulate the liberty of *others* in a public school. There are strong public interest arguments that call for the eradication of discrimination based on sexual orientation and gender identity in all aspects of public schooling. Similar religious liberty arguments that were used within the context of race should also be rejected within this context.

As discussed above, with regard to anti-discrimination policies, LGBT students should receive the same protections as other historically marginalized groups in schools. There is a need to help this population feel safe and there is no rational reason to exclude them from school anti-discrimination policies. Also, it is possible to craft school policy within the confines of the law -- in the same way that already protects racial and religious minorities and students with disabilities. With regard to student expression, homophobic, racist, and anti-religious speech that interferes with the rights of other students should not be considered political speech. While political speech should remain protected, speech that denigrates another student’s core being, whether based on animus toward LGBT students or religious minorities, is unacceptable in the public school context. Also, *Tinker’s* second prong provides that students have the right to be let alone in school. Finally, religious liberty arguments should be limited in both the context of the curriculum and legislation that constrains LGBT rights. As several federal courts have noted, when LGBT persons are included in the curriculum, schools are not requiring students who have religious objections to agree with or affirm the content. Likewise, as the U.S. Supreme Court has observed, the doctrine of equal dignity prohibits public officials from demeaning LGBT individuals.

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   [Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. Rev. 749](https://advance.lexis.com/api/document/collection/analytical-materials/id/5K68-M0N0-00CV-P155-00000-00?context=1000516) (2016). [↑](#footnote-ref-1)
2. [William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657](https://advance.lexis.com/api/document/collection/analytical-materials/id/52NV-KC00-00CW-G0HW-00000-00?context=1000516) (2011) (explaining how religious beliefs were used to justify slavery and racial segregation); *see also*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding decision to deny tax exempt status to K-12 private school and university that discriminated against black students in admissions based upon religious beliefs); Complaint at 3–11, Goldsboro Christian Schs. v. United States, 461 U.S. 574 (1983) (No. 81-1) (arguing in K-12 school case that God "separated mankind into various nations and races," and that this separation "should be preserved in the fear of the Lord."); see Stephen L. Carter, God's Name in Vain: The Wrongs and Rights of Religion in Politics 92-93 (2000) (outlining Biblical arguments used to maintain racial inequality). [↑](#footnote-ref-2)
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4. Joseph G. Kosciw et al., *The 2015 National School Climate Survey. The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in our Nation’s Schools,* GLSEN (2016), https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf. [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. *Health Risks Among Sexual Minority Youth*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/healthyyouth/disparities/smy.htm (last updated Aug. 11, 2016). [↑](#footnote-ref-7)
8. *Id*. [↑](#footnote-ref-8)
9. *Teacher Tolerance or Attacking Religion?*, Nat’l Educ. Assoc. (May 20, 2006), http://www.nea.org/home/13990.htm. [↑](#footnote-ref-9)
10. *See* Knauer, *supra* note 1 at 753. [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. Eskridge, *supra* note 2 at 658. [↑](#footnote-ref-12)
13. AllenMcw, *The Religious Right’s War on LGBT Youth and their Support for Bullying*, Dailykos (July 19, 2015), http://www.dailykos.com/story/2015/7/19/1403610/-The-Religious-Right-s-War-on-LGBT-Youth-and-their-Support-for-Bullying. [↑](#footnote-ref-13)
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18. *See Kosciw et al*., *supra* note 4 at 12. [↑](#footnote-ref-18)
19. 20 U.S.C. § 1681(a). [↑](#footnote-ref-19)
20. *See* Suzanne E. Eckes & John Minear, *Friday Night Lights*, Principal Leadership, 10–12 (2015). [↑](#footnote-ref-20)
21. U.S. Const. amend. XIV, §1. [↑](#footnote-ref-21)
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24. Suzanne Eckes & Stephanie McCall, *The Potential Impact of Social Science Research on Legal Issues Surrounding Single-Sex Classrooms and Schools*, 50 Educ. Administration Quarterly 195 (2014). [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. *Id*. [↑](#footnote-ref-26)
27. [Kenji Yoshino, *Covering*, 111 Yale L.J. 769](https://advance.lexis.com/api/document/collection/analytical-materials/id/44YP-TD00-00CW-71JR-00000-00?context=1000516), 875 (2002). [↑](#footnote-ref-27)
28. [Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996)](https://advance.lexis.com/api/document/collection/cases/id/3S4X-1H20-006F-M25M-00000-00?context=1000516). [↑](#footnote-ref-28)
29. Nabozny also included claims under the Fourteenth Amendment’s due process clause, which will not be discussed. [↑](#footnote-ref-29)
30. *Nabozny*, 92 F.3d at 451. [↑](#footnote-ref-30)
31. *Id*. [↑](#footnote-ref-31)
32. *Id*. at 452. [↑](#footnote-ref-32)
33. *Id*. [↑](#footnote-ref-33)
34. *Id*. [↑](#footnote-ref-34)
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36. *Id*. at 456. [↑](#footnote-ref-36)
37. *Id*. [↑](#footnote-ref-37)
38. *Id.* [↑](#footnote-ref-38)
39. *Id*. at 455. [↑](#footnote-ref-39)
40. *Id*. at 450. [↑](#footnote-ref-40)
41. [Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001)](https://advance.lexis.com/api/document/collection/cases/id/4441-CV90-0038-Y2V3-00000-00?context=1000516). [↑](#footnote-ref-41)
42. *Id*. at 1069. [↑](#footnote-ref-42)
43. *Id*. at 1070. [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. *Id*. at 1071. [↑](#footnote-ref-45)
46. *Id*. at 1078. [↑](#footnote-ref-46)
47. *Henkle v. Gregory*, Lambda Legal, http://www.lambdalegal.org/in-court/cases/henkle-v-gregory (last visited Feb. 16, 2017). [↑](#footnote-ref-47)
48. Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). [↑](#footnote-ref-48)
49. *State* *Maps*, GLSEN, http://www.glsen.org/article/state-maps (last visited Feb. 16, 2017). [↑](#footnote-ref-49)
50. Moriah Balingit, *Citing Trump and Unsettled Law, School Board Declines to Add LGBT Protections for Employees*, [Wash. Post](https://www.washingtonpost.com/local/education/citing-trump-and-unsettled-law-school-board-declines-to-add-lgbt-protections-for-employees/2017/01/25/c16dae7e-e332-11e6-a547-5fb9411d332c_story.html?utm_term=.9ab8f5eb88e1) (Jan. 25, 2017), https://www.washingtonpost.com/local/education/citing-trump-and-unsettled-law-school-board-declines-to-add-lgbt-protections-for-employees/2017/01/25/c16dae7e-e332-11e6-a547-5fb9411d332c\_story.html?utm\_term=.53411affa4fa. [↑](#footnote-ref-50)
51. *See Bob Jones Univ*., 461 U.S. at 574. [↑](#footnote-ref-51)
52. Suzanne E. Eckes, *Homophobic Expression in K-12 Public Schools: Legal and Policy Considerations Involving Speech that Denigrates Others,* Berkeley J. Educ., 1­–47 (forthcoming)*.* [↑](#footnote-ref-52)
53. *Id*. [↑](#footnote-ref-53)
54. 393 U.S. 503 (1969)*.* [↑](#footnote-ref-54)
55. *Id*. at 508. [↑](#footnote-ref-55)
56. 478 U.S. 675 (1986). [↑](#footnote-ref-56)
57. *Id*. at 683. [↑](#footnote-ref-57)
58. *Id*. at 681. [↑](#footnote-ref-58)
59. 484 U.S. 260 (1988). [↑](#footnote-ref-59)
60. *Id.* at 273. [↑](#footnote-ref-60)
61. *Id*. at 266. [↑](#footnote-ref-61)
62. 551 U.S. 393 (2007). [↑](#footnote-ref-62)
63. *Id*. at 397. [↑](#footnote-ref-63)
64. U.S.Const. amend. I. [↑](#footnote-ref-64)
65. [145 F. Supp. 2d 1068 (D. Minn. 2001)](https://advance.lexis.com/api/document/collection/cases/id/4355-2XX0-0038-Y158-00000-00?context=1000516). [↑](#footnote-ref-65)
66. *Id*. at 1069. [↑](#footnote-ref-66)
67. Richard Fossey, Todd DeMitchell, & Suzanne Eckes, Sexual Orientation, Public Schools, and the Law (Education Law Association 2007). [↑](#footnote-ref-67)
68. *Chambers,* 145 F. Supp. 2d at 1073. [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. 383 F. Supp. 2d 965 (S.D. Ohio 2005). [↑](#footnote-ref-70)
71. *Id*. at 967. [↑](#footnote-ref-71)
72. *Id*. [↑](#footnote-ref-72)
73. *Id*.

    [↑](#footnote-ref-73)
74. *Id*. [↑](#footnote-ref-74)
75. *Id*.

    [↑](#footnote-ref-75)
76. *Id*.

    [↑](#footnote-ref-76)
77. *Id*.

    [↑](#footnote-ref-77)
78. *See* Fossey et al., *supra* note 67. [↑](#footnote-ref-78)
79. *Id.* at 967. [↑](#footnote-ref-79)
80. *Id*. at 972. [↑](#footnote-ref-80)
81. *Id*. at 974 (quoting Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 509 (1969)). [↑](#footnote-ref-81)
82. *Id*. [↑](#footnote-ref-82)
83. *Id*.

    [↑](#footnote-ref-83)
84. *Id*. at 974. [↑](#footnote-ref-84)
85. 478 U.S. 675 (1986). [↑](#footnote-ref-85)
86. *Id*. [↑](#footnote-ref-86)
87. Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 n.10 (S.D. Ohio 2005). [↑](#footnote-ref-87)
88. *Id*. at 969.

    [↑](#footnote-ref-88)
89. *Id*. at 975. [↑](#footnote-ref-89)
90. 445 F.3d 1166 (9th Cir. 2006). [↑](#footnote-ref-90)
91. 345 F. Supp. 2d 1096, 1100 (S.D. Cal. 2004). [↑](#footnote-ref-91)
92. *Harper*, 445 F.3d at 1171 n3. [↑](#footnote-ref-92)
93. *Id*. at 1172. [↑](#footnote-ref-93)
94. *Harper*, 345 F.Supp.2d 1096. [↑](#footnote-ref-94)
95. *Harper*, 445 F.3d at 1177 (quoting Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 508 (1969)). [↑](#footnote-ref-95)
96. *Id.* at 1178. [↑](#footnote-ref-96)
97. *Id*. at 1184­–85. [↑](#footnote-ref-97)
98. *Harper*, 455 F.3d at 1053. [↑](#footnote-ref-98)
99. Harper v. Poway Unified Sch. Dist*.,* 549 U.S. 1262 (2007). [↑](#footnote-ref-99)
100. [523 F.3d 668 (7th Cir. 2008)](https://advance.lexis.com/api/document/collection/cases/id/4SBX-1F60-TXFX-936S-00000-00?context=1000516). [↑](#footnote-ref-100)
101. [636 F.3d 874 (7th Cir. 2011).](https://advance.lexis.com/api/document/collection/cases/id/5294-CN61-JCNJ-100R-00000-00?context=1000516)  [↑](#footnote-ref-101)
102. *Id*. at 875. [↑](#footnote-ref-102)
103. *See* [Zamecnik v. Indian Prairie Sch. Dist., 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. 2007)](https://advance.lexis.com/api/document/collection/cases/id/4NHM-SM20-TVTV-12R5-00000-00?context=1000516). [↑](#footnote-ref-103)
104. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 676 (7th Cir. 2008). [↑](#footnote-ref-104)
105. [Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874 (7th Cir. 2011)](https://advance.lexis.com/api/document/collection/cases/id/5294-CN61-JCNJ-100R-00000-00?context=1000516). [↑](#footnote-ref-105)
106. *Id*. [↑](#footnote-ref-106)
107. *See* Eckes, *supra* note 52. [↑](#footnote-ref-107)
108. *Id*. [↑](#footnote-ref-108)
109. *See* Eckes, *supra* note 52; Cheshire Calhoun, *Sexuality Injustice*, 9 Notre Dame J. L., Ethics & Pub.Pol’y 241 (1995): Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1696 (1993); Steven J. Macias,  [*Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, 49 San Diego L. Rev. 791](https://advance.lexis.com/api/document/collection/analytical-materials/id/575C-5KK0-00CW-F0B5-00000-00?context=1000516) (2012). [↑](#footnote-ref-109)
110. Macias, *supra* note 109. [↑](#footnote-ref-110)
111. Shannon Gilreath, [*Tell Your Faggot Friend He Owes Me $500 for my Broken Hand: Thoughts on a Substantive Equality Theory of Free Speech*, 44 Wake Forest L. Rev. 557](https://advance.lexis.com/api/document/collection/analytical-materials/id/4WJ1-D720-00CW-40TB-00000-00?context=1000516) (2009). [↑](#footnote-ref-111)
112. Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053 (9th Cir. 2006). [↑](#footnote-ref-112)
113. *See* Eckes, *supra* note 52. [↑](#footnote-ref-113)
114. *Id*. [↑](#footnote-ref-114)
115. *Id*. [↑](#footnote-ref-115)
116. *See* Eckes, *supra* note 52 [↑](#footnote-ref-116)
117. Nixon v. N. Local Sch. Bd. of Educ., 383 F.Supp. 2d 965, 974 (S.D. Ohio 2005); Allison S. Fetter-Harrott, *Anti-Gay Student Speech and the First Amendment: A Data-Based Examination of Court Reliance on Social Science Research and the Doctrinal Definition of Tinker’s Substantial Disruption Standard* (Doctoral dissertation, Indiana University, 2014), *available at*

     http://ezproxy.lib.indiana.edu/login?url=http://search.proquest.com/docview/1548319740?accountid=11620; Martha *[McCarthy, Curtailing Degrading Student Expression: Is a Link to a Disruption Required?](https://advance.lexis.com/api/document/collection/analytical-materials/id/4XWK-6230-00CV-S00F-00000-00?context=1000516)* [38 J. L. & Educ., 607–621 (2009).](https://advance.lexis.com/api/document/collection/analytical-materials/id/4XWK-6230-00CV-S00F-00000-00?context=1000516)  [↑](#footnote-ref-117)
118. *See* Kowalski v. Berkley Cty. Schs., 652 F.3d 565 (4th Cir. 2011); [West v. Derby Unified Sch. Dist. No. 260*,* 206 F.3d 1358 (10th Cir. 2000)](https://advance.lexis.com/GoToContentView?requestid=264e4ce0-d22e-d52f-436e-15d274d3fe3&crid=499f54b3-e1a1-43f7-ba2a-c53de7288940); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006). [↑](#footnote-ref-118)
119. *See* Eckes, *supra* note 52. [↑](#footnote-ref-119)
120. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 681 (1986). [↑](#footnote-ref-120)
121. Daphne Lofquist, *Same-Sex Couple Households*, U.S. Census Bureau (Sept. 2011), http://www.census.gov/prod/2011pubs/acsbr10-03.pdf. [↑](#footnote-ref-121)
122. [135 S. Ct. 2584 (2015)](https://advance.lexis.com/api/document/collection/cases/id/5G9F-J651-F04K-F077-00000-00?context=1000516). [↑](#footnote-ref-122)
123. *Email Over LGBT School Curriculum Sparks Debate in Conejo Valley*, CBS Los Angeles (Jan. 17, 2017, 6:27 PM), http://losangeles.cbslocal.com/2017/01/17/851482/. [↑](#footnote-ref-123)
124. *See, e.g.,* Brown v. Hot, Sexy and Safer Prods., 68 F.3d 525, 538-39 (1st Cir. 1995) (rejecting parents’ claim that health curriculum violated sincerely held religious beliefs). [↑](#footnote-ref-124)
125. *Id*. [↑](#footnote-ref-125)
126. *Id*. [↑](#footnote-ref-126)
127. *See* Bradley Hagerty, *supra* note at 17. [↑](#footnote-ref-127)
128. Jeffry Bybord & William Russel, *The New Social Studies: A Historical Examination of Curriculum Reform*, 2 Soc. Studs. Res. & Prac. 38 (2007). [↑](#footnote-ref-128)
129. *See* Knauer, *supra* note at 1. [↑](#footnote-ref-129)
130. [514 F.3d 87, 102 (1st Cir. 2008)](http://www.lexis.com/research/buttonTFLink?_m=62ca10fdb5f0247ad6a8c692c26503b6&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2011%20BYU%20Educ.%20%26%20L.%20J.%20237%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=207&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b514%20F.3d%2087%2cat%20102%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAl&_md5=4dea6ba76d674f6e0b5491480d160eaa). [↑](#footnote-ref-130)
131. Suzanne Eckes & Allison Fetter-Harrott, *Religion and the Public School Curriculum*, *in* International Perspectives on Education, Religion and Law 28 (Charles J. Russo ed., 2014). [↑](#footnote-ref-131)
132. *Id*. at 106. [↑](#footnote-ref-132)
133. *Id*. [↑](#footnote-ref-133)
134. *See* GLSEN Maps, *supra* note 49. [↑](#footnote-ref-134)
135. *Id*. [↑](#footnote-ref-135)
136. McKenzie Romero, *Equality Utah Asks for Injunction on ‘Anti-Gay’ School Laws as Lawsuit Proceeds*, Deseret News (Jan. 26, 2017, 9:58 PM), http://www.deseretnews.com/article/865671949/Equality-Utah-asks-for-injunction-on-anti-gay-school-laws-as-lawsuit-proceeds.html. [↑](#footnote-ref-136)
137. *Id*. [↑](#footnote-ref-137)
138. *See* *#DontEraseUs: FAQ About Anti-LGBT Curriculum Laws*, Lambda Legal, <http://www.lambdalegal.org/dont-erase-us/faq> (last visited Feb. 16, 2017). [↑](#footnote-ref-138)
139. *Id*. [↑](#footnote-ref-139)
140. *See, e.g*., Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (rejecting parents claims that student should not be required to participate in health curriculum based on religious beliefs); Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (finding that requiring student to participate in reading program did not burden the student’s right to freely exercise his religious beliefs because he was not required to profess a creed). [↑](#footnote-ref-140)
141. *See id*. [↑](#footnote-ref-141)
142. Ashley Fantz, *North Carolina, Mississippi Measures have Companions Elsewhere in U.S.,* CNN (Apr. 7, 2016, 12:47 AM), http://www.cnn.com/2016/04/06/us/nationwide-bill-religious-freedom-sexual-orientation/. [↑](#footnote-ref-142)
143. When U.S. Senator Robert Byrd led a filibuster against the Civil Rights Act of 1964, he quoted the Bible to support segregation in public accommodations and asserted that “In Leviticus, chapter 19, verse 19, we find the words: ‘Ye shall keep my statutes. Thou shalt not let thy cattle gender with a diverse kind: thou shalt not sow thy field with mingled seed.’ God’s statutes, therefore, recognize the natural order of the separateness of things.” 88 Cong. Rec. 13,207 (1964) (statement of Sen. Robert Byrd); *see also* Eskridge, *supra* note 2 (arguing that the same conflict between religious beliefs and civil rights played out in the context of race); Joseph Crespino, *Civil Rights and the Religious Right*, in Rightward Bound: Making America Conservative in the 1970s, at 90-97 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (explaining that private religious academies opened to oppose *Brown v. Board of Education* and racial integration). [↑](#footnote-ref-143)
144. *See, e.g.,* President Truman in 1963 explained when opposing interracial marriage that "the Lord created it that way." Mike Tolson, In Resistance To Same-Sex Marriage, Echoes of 1967, Houst. Chron. (July 5, 2015), http://www.houstonchronicle.com/local/gray-matters/article/In-resistance-to-same-sex-marriage-echoes-of-1967-6365105.php; When the U.S. Supreme Court struck down Virginia’ Act to Preserve Racial Integrity in *Loving v. Virginia*, 388 U.S. 1 (1967), only 20% of the U.S. population approved of interracial marriage. Many rejected interracial marriage based on their sincerely held religious beliefs. [↑](#footnote-ref-144)
145. *See* Knauer, *supra* note 1 at 776. [↑](#footnote-ref-145)
146. *Id*.; 2016).0 (West . Ann. , 2017)ionstive.our second parenthetical for footnote 137. Therefore, keepng yees and hiring managers)*see also*, *Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, https://www.aclu.org/other/past-anti-lgbt-religious-exemption-legislation-across-country?redirect=anti-lgbt-religious-exemption-legislation-across-country (last visited Feb. 17, 2017). [↑](#footnote-ref-146)
147. *Id*. [↑](#footnote-ref-147)
148. Greg Botelho & Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (Mar. 2, 2016, 1:51 AM), http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/. [↑](#footnote-ref-148)
149. 2016 N.C. Sess. Laws 3 § 1.3 (codified as amended at N.C. Gen. Stat. Ann. § 143-760 (West 2016)). [↑](#footnote-ref-149)
150. *See* Fantz, *supra* note 142. [↑](#footnote-ref-150)
151. [Carcaño v. McCrory, 315 F.R.D. 176 (M.D.N.C. 2016)](https://advance.lexis.com/api/document/collection/cases/id/5KJJ-8DS1-F04D-R3XT-00000-00?context=1000516). [↑](#footnote-ref-151)
152. 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016). [↑](#footnote-ref-152)
153. *Id*. [↑](#footnote-ref-153)
154. *Id*. at 691. [↑](#footnote-ref-154)
155. *Id*. at 700. [↑](#footnote-ref-155)
156. *See e.g.*, Katie Rogers, *Transgender Students and ‘Bathroom Law’s in South Dakota and Beyond*, N.Y. Times (Feb. 25, 2016), <http://www.nytimes.com/2016/02/26/us/transgender-students-and-bathroom-laws-in-south-dakota-and-beyond.html?_r=0> (U.S. Dep’t of Education threatened to withhold federal funds after school officials refused student’s request to use restroom that aligned with her gender identity); Nathaniel Siddall, *Transgender Student’s Use of School Restroom Sparks Debate in Manchester*, Daily Tribune (Feb. 19, 2015, 8:22 AM), <http://www.dailytribune.com/social-affairs/20150219/transgender-students-use-of-school-restroom-sparks-debate-in-manchester> (after school transgender policy adopted, parent argued that other students would feel uncomfortable or threatened” if a transgender student used the restroom that aligned with her gender identity); Dana Farrington, *Texas Lt. Gov. Targets Fort Worth Schools Chief Over Transgender Guidelines*, NPR (May 10, 2016, 12:08 PM), <http://www.npr.org/sections/thetwo-way/2016/05/10/477481119/texas-lt-gov-targets-fort-worth-schools-chief-over-transgender-guidelines> (the Lieutenant Governor encouraged the superintendent in Fort Worth to resign after he created inclusive policies for transgender students). [↑](#footnote-ref-156)
157. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730 (7th Cir. 2016) (upholding lower court’s decision denying the school district’s motion to dismiss in a case involving a transgender student who was not permitted to use the restroom that aligned with his gender identity). [↑](#footnote-ref-157)
158. Bd. of Educ. v. U.S. Dep’t of Educ., 2016 U.S. Dist. LEXIS 131474 (S.D. Ohio Sept. 26, 2016) (student’s motion for a preliminary injunction was granted when the federal district court ruled that she was likely to succeed on both her Title IX and equal protection claims related to restroom access). [↑](#footnote-ref-158)
159. Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. Dep’t of Justice and U.S. Dep’t of Educ. (May 13, 2016),

     http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf. [↑](#footnote-ref-159)
160. Suzanne Eckes, *The Restroom and Locker Room Wars: Where to Pee or Not to Pee*, J. LGBT Youth, 1 (forthcoming). [↑](#footnote-ref-160)
161. G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016). [↑](#footnote-ref-161)
162. [G.G. v. Gloucester Cty. Sch. Bd., 132 F.Supp.3d 736 (E.D. Va. 2015)](https://advance.lexis.com/api/document/collection/cases/id/5GY6-KVK1-F04F-F0DR-00000-00?context=1000516). [↑](#footnote-ref-162)
163. *Id*. [↑](#footnote-ref-163)
164. *Id*. at 739. [↑](#footnote-ref-164)
165. *Id*. at 740. [↑](#footnote-ref-165)
166. *Id.* at 740–42. [↑](#footnote-ref-166)
167. *Id*. at 741. [↑](#footnote-ref-167)
168. *Id*. at 742. [↑](#footnote-ref-168)
169. *Id*. at 750–53. [↑](#footnote-ref-169)
170. *Id*. [↑](#footnote-ref-170)
171. mplaint at 3-rsity nolds v. U.iss. 2016).cond parenthetical for footnote 137. Therefore, keepng yees and hiring managers)[34 C.F.R. § 106.33](https://advance.lexis.com/document/?pdmfid=1000516&crid=de6a567d-c0f9-42a9-b8b9-0951d965cf73&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5GY6-KVK1-F04F-F0DR-00000-00&pddocid=urn%3AcontentItem%3A5GY6-KVK1-F04F-F0DR-00000-00&pdcontentcomponentid=6414&pdteaserkey=sr1&ecomp=_thhk&earg=sr1&prid=e663ddb2-0572-4d03-a6ce-c26450eae392). [↑](#footnote-ref-171)
172. Eckes, *supra* note 160. [↑](#footnote-ref-172)
173. G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016). [↑](#footnote-ref-173)
174. *Id*. at 720. [↑](#footnote-ref-174)
175. *Id*. at 714. [↑](#footnote-ref-175)
176. *See* Auer v. Robbins, 519 U.S. 452 (1997) (allowing deference to federal agency to interpret its own regulation). [↑](#footnote-ref-176)
177. *See* *G.G.*, 822 F.3d at 737­­–40. [↑](#footnote-ref-177)
178. G.G. v. Gloucester Cty. Sch. Bd., 824 F.3d 450 (4th Cir. 2016). [↑](#footnote-ref-178)
179. Gloucester Cty. Sch. Bd. v. G.G., 136 S.Ct. 2442 (2016). [↑](#footnote-ref-179)
180. Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 369 (2016). [↑](#footnote-ref-180)
181. 98 U.S. 145, 166 (1878). [↑](#footnote-ref-181)
182. *Id*. at 167. [↑](#footnote-ref-182)
183. Emp’t Div. v. Smith, 494 U.S. 872, 888–89 (1990). [↑](#footnote-ref-183)
184. *See* Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. Ill. L. REV. 840, 878 (2014). [↑](#footnote-ref-184)
185. [135 S. Ct. 2584, 2642–43 (2015).](https://advance.lexis.com/api/document/collection/cases/id/5G9F-J651-F04K-F077-00000-00?context=1000516)  [↑](#footnote-ref-185)
186. Burwell v. Hobby Lobby Stores, 134 S. Ct. 2571, 2786–87 (2014) (J. Kennedy concurring). [↑](#footnote-ref-186)
187. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. 16 (2015). [↑](#footnote-ref-187)
188. Knauer, *supra* note 1 at 759–60. [↑](#footnote-ref-188)
189. *Id*. [↑](#footnote-ref-189)
190. *Id.* at 787. [↑](#footnote-ref-190)
191. *See* Emp’t Div. v. Smith, 494 U.S. 872 (1990) (rejecting that the government needed to show a compelling government interest in a Free Exercise Clause claim but later overturned through federal legislation); Reynolds v. United States, 98 U.S. 145 (1878) (rejecting religious liberty argument of plaintiff who argued it was his religious duty to practice bigamy); *see also*, United States v. Lee, 455 U.S. 252 (1982) (finding no free exercise violation by refusing to allow a social security exemption for an Amish employer); Estate of Thorton v. Caldor, 472 U.S. 703 (1985) (finding a state law that gave employees an absolute right not to work on the Sabbath violated the Establishment Clause); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (rejecting student’s claim that taking a required course in military science offended the student’s sincerely held religious beliefs). [↑](#footnote-ref-191)