

# Title IX *40 years and counting*

fact sheet | June 2012

## The Next Generation of Title IX: Harassment and Bullying Based on Sex

**T**itle IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in schools that receive federal funding. All forms of sex-based harassment are prohibited, including sexual harassment, harassment based on a student's failure to conform to gender stereotypes, and sexual assault. It does not matter whether the harasser *intends* to harm or not, the harasser and target do not need to be of different sexes, and severe harassment does not necessarily require repeated incidents.

Title IX protects every person—boys and girls; men and women; students and employees—from sex-based harassment in schools and colleges that receive federal funding. This means that school districts or colleges may violate Title IX when sexual- or gender-based harassment by classmates (or peers) is so serious that it interferes with or limits a student's ability to participate in or benefit from the school or school activities, and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.

### Title IX at 40: The Road Traveled

Despite efforts to curb sexual- and gender-based harassment in schools, including sexual assault, these forms of sex discrimination are still prevalent in K-12 schools and colleges around the nation. The problem begins as early as elementary school. In a 2010 nationwide survey of elementary schools, nearly half of all teachers (48 percent) reported that they hear students make sexist remarks at their school. Harassment based on failure to con-

form to sex stereotypes, which Title IX prohibits, is also prevalent in students' early years. The same study found that one-third of students (33 percent) have heard kids at school say that girls should not do or wear certain things because they are girls, and 38 percent have heard their peers say that boys should not do or wear certain things because they are boys. Indeed, students who do not conform to traditional gender norms are more likely than their peers to say they are called names, made fun of, or bullied at school (56 percent versus 33 percent).<sup>1</sup>

Sex-based harassment continues into middle and high school. In a nationwide survey of students in grades 8-11, 81 percent reported experiencing sexual harassment during their school lives.<sup>2</sup> And in a recent survey of 7-12th grade students, nearly half (48 percent) experienced some form of sexual harassment during the 2010-11 school year, with a vast majority of those students (87 percent) reporting that the harassment had a negative effect on them.<sup>3</sup> Both studies found that girls were more likely than boys to have experienced harassment.<sup>4</sup>

And among lesbian, gay, bisexual, and transgender (LGBT) students, the numbers are even higher—in a study of LGBT students in grades 6-12, 85 percent of respondents reported being verbally harassed and 40 percent reporting being physically harassed at school because of their sexual orientation. Close to two-thirds (64 percent) were verbally harassed because of their gender expression.<sup>5</sup> Another study found that LGBT youth were twice as likely to have been verbally harassed at school as their non-LGBT peers.<sup>6</sup>

Sexual harassment, including assault, on college campuses is also a widespread problem. In a nationwide survey of college students, most respondents (89 percent) stated that sexual harassment occurs among students at their school, and nearly two-thirds (62 percent) said they had been sexually harassed.<sup>7</sup>

## Why It Matters:

### The Impact on Women and Girls

Sex-based harassment can be very damaging to the lives of women and girls, both in its emotional impact and in its impact on their education. Feeling unsafe at school has been correlated with declining academic performance, skipping school, and dropping out.<sup>8</sup> To illustrate, a recent survey found that nearly one-third (32 percent) of students who experienced harassment reported not wanting to go to school as a result of the harassment, and girls were more likely than boys to report harassment affecting them in this way.<sup>9</sup>

For girls and young women who drop of school due to sexual- or gender-based harassment, the long-term economic impact can be devastating. Young women who don't graduate from high school have higher rates of unemployment than men who drop out;<sup>10</sup> those who do get jobs make significantly lower wages than male dropouts.<sup>11</sup> Women lacking a high school degree are also more likely to have to rely on safety net programs than their male peers or men and women who have graduated from high school and college.<sup>12</sup> And although men at every level of education make more than women with similar educational backgrounds, the wage gap is particularly high among high school dropouts: the typical woman who starts but does not finish high school is paid only 71 percent of what her male counterpart is paid.<sup>13</sup> Female dropouts are more likely to live in poverty than both men and women with higher educational attainment.<sup>14</sup> And children raised in such situations may find it difficult to escape poverty themselves; studies have shown that being poor at birth is a strong predictor of future poverty status, and children in poverty have lower odds of experiencing upward mobility across generations.<sup>15</sup> Thus, the economic impact of sex-based harassment on women and their families can be overwhelming.

## Next Generation Issues

### Protecting Gender Non-Conforming Students

Title IX and other federal civil rights laws do not explicitly prohibit discrimination in schools on the basis of sexual orientation or gender identity, but when LGBT students are subjected to ha-

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## The Road Ahead

### Legislation pending in Congress would address bullying and harassment in schools.

The Student Non-Discrimination Act would establish a comprehensive federal prohibition against discrimination and harassment in public elementary and secondary schools based on a student's actual or perceived sexual orientation or gender identity. The Safe Schools Improvement Act would require schools and districts to develop and use comprehensive and effective student conduct policies that include clear prohibitions regarding bullying and harassment.

**Further guidance** to clarify the responsibilities of school districts and colleges in light of technological developments affecting bullying and harassment by OCR is warranted.

### Schools and colleges should create clear and accessible sexual harassment policies

to proactively protect and educate students and staff. These policies should define the types of harassment prohibited, including harassment based on someone's "actual or perceived sexual orientation and gender identity," and their association with someone of a particular sexual orientation or gender identity. Federal law currently prohibits harassment on the basis of race, color, national origin, sex, and disability, and state or local laws may include other protected characteristics.

harassment because of failure to conform to gender stereotypes—meaning harassment or bullying because a student does not conform to stereotyped notions of masculinity or femininity—Title IX applies. For example, gender-based harassment can include harassing a female student based on the belief that a girl should not take shop classes, or be a math whiz, or play a particular sport, or harassing a male student because he is on the dance team or exhibits effeminate mannerisms.

## Cyberbullying

Many forms of what people might consider bullying, hazing, or cyberbullying are actually sex-based harassment that is prohibited under Title IX. For example, prohibited harassment may include common behaviors such as using cell phones or the internet to target students by calling them sexually charged epithets like “slut” or “whore”; spreading sexual rumors; rating students on sexual activity or performance; disseminating compromising photographs or videos of a student; or circulating, showing, or creating emails or websites of a sexual nature. Conduct often dismissed as just “boys being boys” or “mean girls,” when severe, persistent, or pervasive, can actually be prohibited harassment.

In order to clarify schools’ obligations under Title IX with regard to harassment, the U.S. Department of Education’s Office for Civil Rights (“OCR”) issued a Guidance document in October 2010 specifying that Title IX prohibits sex-based bullying and harassment that interferes with a student’s education, *whether it is conducted in person or in electronic form*. The Guidance states that “bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”<sup>16</sup>

Some schools question whether they can react to cyberbullying that is done “off campus,” from home computers, cell phones, or elsewhere, because of concerns about students’ rights to free speech. However, Title IX applies to all programs and activities of the school, and includes, for example, conduct that takes place on school buses, during extracurricular activities, and when students are participating in a school’s athletics program.<sup>17</sup> In addition, courts have held that schools may discipline students for truly off-campus cyberspeech consistent with the First Amendment if it was reasonably foreseeable that the speech would create a substantial disruption in the school environment.<sup>18</sup>

- 1 GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK (GLSEN), PLAYGROUNDS AND PREJUDICE: ELEMENTARY SCHOOL CLIMATE IN THE UNITED STATES xvi-xvii (2012), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/002/2027-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2027-1.pdf).
- 2 AAUW EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 4 (2001), available at <http://www.aauw.org/learn/research/upload/hostile-hallways.pdf>.
- 3 CATHERINE HILL & HOLLY KEARL, AAUW, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (2011), available at <http://www.aauw.org/learn/research/upload/CrossingTheLine.pdf>.
- 4 HOSTILE HALLWAYS, *supra* note 2, at 4 (observing girls were more likely than boys to report experiencing harassment often or occasionally (83 percent versus 79 percent) or often (24 percent versus percent)); CROSSING THE LINE, *supra* note 3, at 2 (reporting 56 percent of girls reported being sexually harassed in the past school year, compared to 40 percent of boys).
- 5 GAY, LESBIAN & STRAIGHT EDUC. NETWORK (GLSEN), THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS xxi (2010), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1675-2.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf).
- 6 HUMAN RIGHTS CAMPAIGN, GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS (2012), available at [http://www.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America\\_Report.pdf](http://www.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf).
- 7 CATHERINE HILL & ELENA SILVA, AAUW EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005), available at <http://www.aauw.org/learn/research/upload/DTLFinal.pdf>.
- 8 HOSTILE HALLWAYS, *supra* note 2, at 36-38.
- 9 CROSSING THE LINE, *supra* note 3, at 22 (reporting 37 percent of girls did not want to go to school versus 25 percent of boys).
- 10 Bureau of Labor Statistics, Current Population Survey, available at <http://data.bls.gov/cgi-bin/srgate> (last visited May 10, 2012). In 2011, women 25 and older without a high school diploma had an unemployment rate of 14.8 percent, compared to 13.6 percent for men 25 and older without a high school diploma. Data were accessed using codes LNU04027675 (men) and LNU04027679 (women).
- 11 U.S. Census Bureau, Current Population Survey (CPS), 2011 Annual Social and Economic Survey, Table PINC-03:Educational Attainment – People 25 Years Old and Over, by Total Money Earnings in 2010, Work Experience in 2010, Age, Race, Hispanic Origin, and Sex, available at [http://www.census.gov/hhes/www/cpstables/032011/perinc/new03\\_000.htm](http://www.census.gov/hhes/www/cpstables/032011/perinc/new03_000.htm) [hereinafter Educational Attainment Table]. Earnings data are for men and women 25-64 who worked full time, year round. The typical woman who started, but did not finish high school had earnings of \$20,779, just 71 percent of her male counterpart’s earnings (\$29,076).
- 12 NWLC calculations using U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Survey, public-use microdata files. Calculations based on receipt of WIC, SSI, and TANF. Medicaid data from U.S. Census Bureau, Current Population Survey, CPS Table Creator, available at <http://www.census.gov/cps/data/cpstablecreator.html> (last visited May 10, 2012).
- 13 Educational Attainment Table, *supra* note 11.
- 14 U.S. Census Bureau, Current Population Survey, CPS Table Creator, available at <http://www.census.gov/cps/data/cpstablecreator.html> (last visited May 10, 2012). Data are for women ages 25-64. In 2010, women without a high school diploma had a poverty rate of 39 percent compared to 18 percent for women with a high school diploma, and less than five percent for women with a bachelor’s degree or higher. At all education levels, women were more likely than men to live in poverty.
- 15 See Harry J. Holzer, *Penny Wise, Pound Foolish: Why Tackling Child Poverty During the Great Recession Makes Economic Sense*, HALF IN TEN (Ctr. for Am. Progress, Washington, D.C.), Sept. 2010, at 3, available at [http://www.americanprogress.org/issues/2010/09/pdf/hit\\_childpoverty.pdf](http://www.americanprogress.org/issues/2010/09/pdf/hit_childpoverty.pdf); *Poverty Among Women and Families, 2000-2010: Extreme Poverty Reaches Record Levels as Congress Faces Critical Choices* (Nat’l Women’s Law Center, Washington, D.C.), Sept. 2011, at 1, available at <http://www.nwlc.org/sites/default/files/pdfs/povertyamongwomenandfamiliesin2010.pdf>.

16 U.S. DEP'T OF EDUCATION, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON BULLYING AND HARASSMENT 1 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

17 *Id.*

18 See, e.g., *Kowalski v. Berkeley Cmty. Schs.*, 652 F.3d 565, 572-74 (4th Cir. 2011), *cert. denied* by 132 S. Ct. 1095 (No. 11-461, Jan. 17, 2012) (upholding school's discipline of student for creating a website off campus that ridiculed a fellow classmate, since it was foreseeable that the speech would reach the school and the website involved substantial disruption and interference with the school's work); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc), *cert. denied* by *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (No. 11-502, Jan. 17, 2012) (assuming without deciding that a student may be disciplined by a school consistent with the First Amendment for cyber-speech created off-campus which causes a substantial disruption in school, or which could reasonably lead school officials to fear substantial disruption in school, though the speech in that particular case did not create such a disruption or fear of disruption); *Doninger v. Niehoff*, 527 F.3d 41, 50-53 (2d Cir. 2008), *cert. denied* by 132 S. Ct. 499 (No. 11-113, Oct. 31, 2011) (holding plaintiff did not demonstrate a clear likelihood of success on the merits of her First Amendment claim based on school's sanctions against her for off-campus blog post regarding school event because it created a foreseeable risk of substantial disruption to the work and discipline of the school); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002) ("[A] school district may, consistent with the First Amendment . . . , discipline a student for creating at home, and posting on the Internet, a web site that . . . contained derogatory, profane, offensive and threatening statements directed toward of the student's teachers and principal."); cf. *D.J.M. v. Hannibal Pub. Sch. Dist. #60*, 647 F.3d 754, 765-66 (8th Cir. 2011) (holding school did not violate First Amendment in disciplining student for instant messages sent from his home in which he talked about getting a gun and shooting fellow students and himself, both because it was reasonably foreseeable that the threats would cause a substantial disruption and because they constituted a true threat).