

The Anoka-Hennepin Lawsuit: How Anti-Gay Bullying Was Sex-Based and “Neutrality” Created a Hostile Environment

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During a period of less than two years, nine students and former students of the Anoka-Hennepin School District in Minnesota committed suicide.¹ At least four of them were the targets of anti-gay bullying.² In July of 2011, in the wake of this “suicide contagion,” five students filed a civil rights suit against Anoka-Hennepin for inaction against anti-gay bullying and for maintaining discriminatory school policies.³ These students had been called names, pushed into lockers and down stairs, urinated upon, physically attacked in the bathroom, and told to “kill yourself,” in reference to the recent suicides in the district.⁴ Their grades suffered and two of them became suicidal.⁵ The plaintiffs alleged violations of the Equal Protection Clause, Title IX, and the Minnesota Human Rights Act.⁶ At issue in the case was school employees’ ineffective response to reported harassment as well as the district’s “neutrality” policy, which required school employees to “remain neutral on matters regarding sexual orientation including but not limited to student-led discussions.”⁷ Ultimately, the case settled for \$270,000 plus an agreement to make changes in school district policy and procedures for dealing with harassment.⁸ Anoka-Hennepin agreed to replace the “neutrality policy,” hire an Equity Consultant and a Title IX

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1. Sabrina Rubin Ederly, *One Town's War on Gay Teens*, ROLLING STONE (Feb. 2, 2012), <http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202>.

2. *Id.*

3. Complaint ¶ 1, Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-cv-01999-JNE-SER (D. Minn. July 21, 2011) [hereinafter Doe Complaint]. Later, a sixth student filed an additional complaint based on anti-gay bullying. Complaint ¶ 1, E.R. v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-cv-02282-JNE-JSM (D. Minn. Aug. 10, 2011).

4. See *infra* Part I.A (discussing bullying in the Anoka-Hennepin complaint).

5. *Id.*

6. Doe Complaint, *supra* note 3, ¶ 12.

7. *Id.* ¶¶ 1–11.

8. *Agreement Reached on Harassment Lawsuit*, ANOKA-HENNEPIN SCH. DIST. 11 (Mar. 8, 2012), <http://www.anoka.k12.mn.us/education/components/whatsnew/default.php?sectiondetailid=233754&itemID=48062>; Consent Decree, Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 6, 2012), ECF No. 82, *available at* <http://www.justice.gov/usao/mn/downloads/Anoka-Hennepin%20FINAL%20Consent%20Decree.pdf>.

coordinator to assess district policies and remedy harassment, and allow the Department of Education's Office of Civil Rights to monitor the changes.⁹

Anoka-Hennepin is far from the only place where anti-gay harassment is common: the Gay, Lesbian and Straight Education Network (GLSEN) reports that nine out of ten LGBT students has been harassed at school.¹⁰ It is also not the only place with a policy that limits discussions of homosexuality in the classroom. Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah already have such statewide policies, and legislatures in Missouri and Tennessee are currently considering similar "Don't Say Gay" laws.¹¹

Through the story of the Anoka-Hennepin case, this paper will show how anti-gay bullying can violate Title IX and will examine how a "neutrality" policy contributes to this harassment. For the sake of this paper, the term "anti-gay" will be used to describe harassment that uses words like "gay," "lesbian," "fag," or "dyke" as insults, whether or not such harassment is legally understood to be based on sex, sexual orientation, both, or neither. Part I will discuss the difficulty of determining when anti-gay bullying is "sex-based," as illustrated by the facts alleged in the Anoka-Hennepin complaint. Part II will argue that identity development, gender performance, and masculinities theories can clarify why many cases of anti-gay harassment are based on sex/gender. Part III will address how "neutrality" policies contribute to "deliberate indifference" by discouraging school officials from intervening to stop harassment and by enabling conservative backlash strategies.

I. THE PROBLEM OF DEFINING "SEX-BASED" IN THE CONTEXT OF ANTI-GAY BULLYING

By its text, Title IX only protects against discrimination "on the basis of sex."¹² In *Davis v. Monroe County Board of Education*, the Supreme Court outlined additional elements required to hold a school district liable for student-on-student harassment: (1) the harassment is "so severe, pervasive,

9. See Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, *supra* note 8. The district's new Respectful Learning Environment Curriculum Policy is available online. See *New and Former Anoka-Hennepin Policies*, STAR TRIBUNE (Feb. 14, 2012), <http://www.startribune.com/printarticle?id=138267829>.

10. HARRIS INTERACTIVE & GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA, A SURVEY OF STUDENTS AND TEACHERS 4 (2005), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/500-1.pdf.

11. Poppy Harlow & Emily Probst, *Minnesota School District Investigated After Civil Rights Complaint*, CNN (July 20, 2011), http://articles.cnn.com/2011-07-20/us/minnesota.school.civil.rights.probe_1_sexual-orientation-civil-rights-federal-investigation?_s=PM:US; Julie Hubbard, *'Don't Say Gay' bill advances in the House*, THE TENNESSEAN (April 18, 2012), <http://www.tennessean.com/article/20120418/NEWS0201/304170105/-Don-t-Say-Gay-bill-advances-House>; Josh Nelson, *Bill Would Bar Talk of Sexual Orientation in Missouri Classrooms*, NEWS-LEADER.COM (April 24, 2012), <http://www.news-leader.com/apps/pbcs.dll/article?AID=2012304240030>.

12. 20 U.S.C. § 1681(a) (2006).

and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit;"¹³ (2) the school district had "actual knowledge" of the harassment;¹⁴ and (3) the school district "acts with deliberate indifference" to the harassment.¹⁵ The plaintiff in *Davis*, a girl, "was allegedly the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates," a boy.¹⁶ The harassment included sexual statements and attempts to touch her breasts and genital area.¹⁷ In this situation, the Supreme Court appears to have considered it so obvious that the harassment was "on the basis of sex" that the opinion merely cites the Title IX statute, without any discussion of this requirement.¹⁸

In contrast, the "based on sex" requirement has been a bar for some victims of anti-gay harassment.¹⁹ Some defendants may attempt to exploit this "sexual orientation loophole" as a defense in these cases by arguing that the harassment was based on sexual orientation rather than sex.²⁰ The loophole also exists in current federal guidance on sexual harassment in schools.²¹ Legislation to close this gap has been proposed, such as the Student Non-Discrimination Act (SNDA).²² But unless and until laws like SNDA pass, judges will need to decide at the summary judgment stage whether plaintiffs have alleged sufficient facts to show sex discrimination, and fact finders will need to determine at the trial stage whether those facts actually show sex discrimination.

Guidance from the Department of Education's Office of Civil Rights has attempted to clarify this distinction over time. In 1997, OCR published guidance on sexual harassment cases that included some anti-gay bullying under the purview of Title IX: "harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX."²³ However, this guidance also described harassment not covered under Title IX: "students heckle another student with comments based on the student's sexual orientation (e.g., 'gay students are not welcome at this table in the cafeteria'), but their actions or language do not involve sexual

13. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

14. *Id.* at 642–43; *see also* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

15. *Davis*, 526 U.S. at 633.

16. *Id.*

17. *Id.*

18. *See id.* at 638–39.

19. *See, e.g.*, *Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601, 623 (E.D.N.Y. 2011).

20. *See* *Montgomery v. Ind. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1089–90 (D. Minn. 2000); *see also* Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 208–16 (2005) (discussing the sexual orientation loophole in Title VII cases).

21. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034-01 (Mar. 13, 1997) [hereinafter *Sexual Harassment Guidance*].

22. Student Non-Discrimination Act, H.R. 998, 112th Cong. (2011).

23. Sexual Harassment Guidance, *supra* note 21.

conduct.”²⁴ The 1997 guidance also said that gender-based harassment, defined as “[a]cts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving sexual activity or language,” could constitute a hostile environment in combination with sexual harassment.²⁵

A Dear Colleague Letter from October 2010 does more to define gender-based and sexual harassment, potentially providing more protection against anti-gay harassment. In the section on gender-based harassment, the letter gave a hypothetical example of a gay high school student who was harassed with both homophobic slurs and insults about his failure to conform to standards of masculinity.²⁶ OCR explained that the school’s failure to eliminate a hostile environment of gender based harassment, defined as harassment for “failing to conform to stereotypical notions of masculinity or femininity,” would violate Title IX.²⁷ Because the harassment was “based in part on the student’s failure to act as some of his peers believed a boy should act,” the school was obligated “to investigate and remedy [the] overlapping sexual harassment or gender-based harassment.”²⁸ The Dear Colleague Letter also gives several examples of “sexual in nature” harassment: “touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.”²⁹ In accordance with the 1997 guidance, those examples of sexual harassment should apply equally to plaintiffs of all sexual orientations.

Although the Dear Colleague Letter helps victims of anti-gay bullying by affirming schools’ duties to act when harassment is gender-based or of a sexual nature, it does not give a thorough explanation of how schools or courts are supposed to identify this kind of harassment. In real cases, it can be a convoluted process to determine the cause of harassment.

A. *Bullying in the Anoka-Hennepin Complaint*

Four of the five students in the Anoka-Hennepin case brought Title IX sex discrimination claims, alleging that their harassment was gender-based.³⁰ Because these students also brought sexual orientation discrimination claims under state law and § 1983 denial of equal protection,³¹ details

24. *Id.*

25. *Id.*

26. U.S. Dep’t. of Educ. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: BULLYING, at 7 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague201010.pdf> [hereinafter DEAR COLLEAGUE LETTER].

27. *Id.* at 7–8.

28. *Id.* at 8.

29. *Id.* at 6.

30. Doe Complaint, *supra* note 3, ¶¶ 181–208.

31. *Id.* ¶¶ 141–80, 209–43.

from their complaint provide an opportunity to consider the overlap between and differentiation of sex-based discrimination and sexual orientation discrimination.

K.R., a 14-year-old boy, likes to listen to Lady Gaga, wear red sparkly heels, and put scarves over his head like long hair.³² He does not identify as gay.³³ In the hallways, other students said things like “you’re so gay” and “you dress gay,” and they called him names like “fag” and “ugly-ass bitch.”³⁴ Other students insulted him for listening to “girl songs” and for bringing a purse to school, one saying, “[Y]ou’re a guy—act like it.”³⁵ One boy targeted K.R. for physical harassment, slapping him, shoving him into the wall, and pushing him down the stairs; another threatened, “[I]f you tell anyone about this, I’ll fucking kill you.”³⁶ Another boy urinated on him in the bathroom; when he reported this incident, the associate principal said, “[I]t was probably water.”³⁷ K.R. eventually transferred out of the school district to escape the harassment.³⁸

D.F., a 14-year-old boy who identifies as gay, was harassed throughout middle school.³⁹ Other students shouted “fag,” “fat boy,” and “wimp” at him in the hallway, referring both to his sexuality and to the fact that he doesn’t participate in sports.⁴⁰ During seventh grade, D.F. was subjected to “daily—if not hourly” harassment, and one student would throw notes at him in class that said, “get out of our school fag” and “we don’t want a fag living here.”⁴¹ After he transferred to a different school in the district, the verbal harassment continued, and D.F. was also physically harassed.⁴² Once when he was in the bathroom, another student pulled D.F.’s hair and hit him on the head with a binder hard enough to give D.F. significant head pain.⁴³ Because D.F. felt unsafe at school, his grades went down, and he began to have emotional problems with anger and anxiety.⁴⁴

B.G., a 14-year-old girl, identifies as bisexual and describes herself as “very tomboyish,” and “not girly.”⁴⁵ At two different middle schools in the district, students called her names like “dyke,” “queer,” “faggot,” “guy,” “freak,” “transvestite,” “bitch,” “cunt,” “slut,” “whore,” “skank,” “prostitute,” and “hooker.”⁴⁶ In reference to her friend Samantha, one of

32. *Id.* ¶¶ 16, 47.

33. *Id.* ¶ 47.

34. *Id.* ¶¶ 48–49.

35. *Id.* ¶ 48.

36. *Id.* ¶ 49.

37. *Id.* ¶ 50.

38. *Id.* ¶ 55.

39. *Id.* ¶¶ 17, 57–72.

40. *Id.* ¶¶ 57–58.

41. *Id.* ¶ 61.

42. *Id.* ¶¶ 67–68.

43. *Id.* ¶¶ 68–69.

44. *Id.* ¶ 60.

45. *Id.* ¶¶ 18, 74.

46. *Id.* ¶¶ 75, 79.

the LGBT students who committed suicide, B.G.'s classmates asked her, "[W]hy don't you go kill yourself, too?"⁴⁷ Students tripped her, pushed her into a trashcan, and shoved her into lockers.⁴⁸ A male student also harassed her by "making an obscene gesture toward her in the computer lab, flicking his tongue between two fingers, an apparent reference to lesbian sexual acts."⁴⁹ B.G.'s grades went down, and she suffered from mental health issues serious enough to require a month in a full-time outpatient program.⁵⁰

For D.M.-B., a 14-year-old boy, constant harassment began in fifth grade.⁵¹ D.M.-B. identifies as straight, but he has been the target of bullying because his fathers are gay, he is small for his age, and he participates in gymnastics, which some students consider a "girls' sport."⁵² D.M.-B. was called names like "Gaymian," "gay boy," and "fag";⁵³ put down for participating in a "girls' sport" and taunted as being "flexible enough to suck his own penis";⁵⁴ and harassed by other boys who made "mock sexual come-ons" by touching D.M.-B. in a sexually suggestive way and then calling him "fag boy" or shoving him.⁵⁵ Two different students singled out D.M.-B. for regular harassment: first D.G.,⁵⁶ then J.R.⁵⁷ D.G. and his friends called D.M.-B. names during the period between classes, and D.G. also physically harassed D.M.-B., once stabbing him in the neck with a pencil and once choking him up against the wall in the bathroom.⁵⁸ J.R. and his friends called D.M.-B. names during lunch, and J.R. would frequently try to provoke D.M.-B.: "In a typical exchange, J.R. would push D.M.-B., who would tell him to stop. J.R. would respond, 'what are you going to do about it, pussy?' and push him again."⁵⁹ J.R. also spread a rumor that he had seen D.M.-B. "kissing a guy."⁶⁰ D.M.-B. had been an honor roll student, but as a result of the harassment, his grades went down, he slept poorly, and he had to see a private counselor to deal with his emotional distress.⁶¹

Each of these sets of allegations includes some reference to gender stereotypes. K.R. wore gender non-conforming accessories and his harassers accused him of "dress[ing] gay." D.F. didn't play sports like other boys, and he was called a "wimp." B.G. considers herself a "tomboy" and was called

47. *Id.* ¶ 77.

48. *Id.* ¶ 80.

49. *Id.* ¶ 82.

50. *Id.* ¶ 84.

51. *Id.* ¶¶ 19, 88.

52. *Id.* ¶ 87.

53. *Id.* ¶ 100.

54. *Id.* ¶ 98.

55. *Id.* ¶ 111.

56. *Id.* ¶ 88.

57. *Id.* ¶ 120.

58. *Id.* ¶¶ 93, 95, 97.

59. *Id.* ¶ 120.

60. *Id.* ¶ 121.

61. *Id.* ¶¶ 101, 122.

“guy,” “freak,” and “transvestite.” D.M.-B. was harassed for being interested in a “girls’ sport.” But each fact pattern also contains anti-gay slurs, and two of the plaintiffs identify as LGB. How should a fact-finder determine when the harassment is “overlapping” and when it isn’t—especially when determining whether the sex-based harassment was “severe and pervasive”?

In the Anoka-Hennepin case, OCR also filed an intervening complaint against the school district that addresses the experiences of the four above-mentioned plaintiffs as well as harassment experienced by other students in the district.⁶² In this complaint, OCR defined sexual harassment as “harassment of a sexual nature” and gender-based harassment as “non-sexual harassment of a person because of the person’s sex, including harassment based upon gender identity and expression . . . [such as] harassment based on the person’s nonconformity with gender stereotypes, regardless of the actual or perceived sex, gender identity, or sexual orientation of the harasser or target of the harassment.”⁶³ In addition to descriptions of how the students are gender non-conforming, the complaint uses comments like “You’re a guy—act like it”⁶⁴ and insults like “he/she”⁶⁵ to mark the harassment as gender-based. But according to OCR, once the context of gender-based harassment is established, insults like “fag” and “gay” can also be gender-based.⁶⁶ This seems to remain true even if a student identifies as gay. The OCR complaint does not say which students identify as LGB, although it does say that some students identify as straight.⁶⁷ However, Student E appears to be the same person as D.F. in the individual plaintiffs’ case.⁶⁸ D.F. identifies as gay,⁶⁹ and OCR lists “gay” and “fag” as gender-based insults used by Student E’s harassers.⁷⁰ Similarly, and in accordance with the 1997 guidance, OCR’s complaint considers harassment that references or simulates homosexual activity to be sexual harassment.⁷¹

OCR’s intervention in this case is commendable, and it demonstrates a positive direction toward understanding anti-gay harassment as actionable

62. Complaint-in-Intervention, No. 11-cv-01999-JNE-SER and No. 11-cv-02282-JNE-SER (D. Minn. March 5, 2012) [hereinafter OCR Complaint].

63. *Id.* ¶ 1 n.1.

64. *Id.* ¶ 16a.

65. *Id.* ¶¶ 16d, 16e.

66. *See, e.g., id.* ¶ 24 (“Male students in the District report that they are called pejorative words such as “girl,” “he-she,” “fag,” or “gay” on a daily basis because of their failure to conform to male stereotypes”).

67. *Id.* ¶¶ 16b, 16f–h.

68. A number of facts are the same, for example: both Student E and D.F. attended one middle school from 2008-2010 and another from 2010-2011; both were called “wimp”; and both made a list of harassers that filled two pages. OCR Complaint, *supra* note 61, ¶ 16e; Doe Complaint, *supra* note 3, ¶¶ 57, 58, 63.

69. Doe Complaint, *supra* note 3, ¶ 57.

70. OCR Complaint, *supra* note 61, ¶ 16e.

71. *E.g., id.* ¶ 16e (a harasser “put his hand around his mouth and made it look as if he was performing fellatio”); ¶ 16f (a harasser asked, “How big was it in your mouth last night?”); ¶ 16g (a harasser asked, “Did you get butt-fucked last night?”).

under Title IX. Because the Dear Colleague Letter on bullying was sent out less than two years ago, few courts have had the opportunity to apply the “overlap” rationale to anti-gay harassment cases. The Anoka-Hennepin case shows that it can be employed in a broad way to allow more plaintiffs to bring cases, but because that case settled, it did not provide an opportunity for understanding OCR’s theoretical justifications for the “overlap” rationale. The next section argues that performance theory and masculinities theory can provide the theoretical underpinnings to make an “overlap” rationale more convincing.

II. USING GENDER THEORY TO INFORM LEGAL INTERPRETATIONS

Adolescents in middle and high school—both the bullies and the bullied—are experiencing a critical time of identity exploration and formation. Understanding one’s own sexual orientation and gender identity is a part of this process.⁷² Studies of LGB youth identity development sometimes categorize this process into a series of milestones—first same-sex attractions, first self-labeling, first same-sex sexual contact, and first disclosure—that generally occur over a 10-year period, from age 8 to age 18.⁷³ This age range is only a generalization, and many youth may experience these milestones on a different timeline or in a different order.⁷⁴ Furthermore, youth who say they are straight may also experience same-sex attractions, periods of sexual identity questioning, and same-sex sexual contact, and youth may change their self-described sexual identity over time.⁷⁵ In social science, there are a variety of unsatisfactory ways to try to determine who is gay: asking questions about sexual orientation (defined as feelings, thoughts, fantasies), sexual behavior, or sexual identity produce different numbers of gay teenagers.⁷⁶ Especially in this context of identity development, gender, sex, and sexual orientation tend to intermingle. A theory of what makes peer harassment “based on sex” must account for this reality.

By instructing schools to address cases of “overlapping” sexual/gender harassment and sexual orientation harassment, OCR’s Dear Colleague Letter on bullying takes a step in the right direction. Even before this guidance letter, some courts considering anti-gay bullying cases at the summary judgment stage have likewise referred to identity development or seemed to require only that plaintiffs show it is possible the harassment was based on

72. See JANE KROGER, IDENTITY DEVELOPMENT: ADOLESCENCE THROUGH ADULTHOOD 48–50, 69–70, 98–101 (2000).

73. Ritch C. Savin-Williams & Lisa M. Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 ARCHIVES OF SEXUAL BEHAVIOR 607, 608–11, 618 (2000) (reviewing similar studies and reporting results of current study).

74. *Id.* at 608.

75. See generally RITCH C. SAVIN-WILLIAMS, *Who’s Gay?*, in THE NEW GAY TEENAGER 23–48 (2005).

76. *Id.*

gender stereotypes. For example, in *Montgomery v. Independent School District No. 709*, the court noted that the plaintiff's harassment began in kindergarten and reasoned that since he probably did not have a sexual orientation at that age, it was more plausible that students harassed him based on a "perception that he did not engage in behaviors befitting a boy."⁷⁷ In *Seiwert v. Spencer-Owen Community School Corporation*, the court held for the plaintiff when it was "reasonable to infer from the facts" that the plaintiff was harassed because his actions led fellow students to think he was gay, and there was no other reason offered for the harassment.⁷⁸ Both of these decisions demonstrated an understanding that anti-gay harassment may conflate appearance, mannerisms, or other behaviors with sexual orientation.

A. *Performance Theory Approach*

Performance theory provides a way to understand the dynamics of this harassment, especially in the context of adolescence. This theory understands sex, gender, and sexual orientation through behavior, not identity; as Judith Butler writes, "There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."⁷⁹ Butler also argues that dominant social discourse sees gender as a "metaphysical unity" of sex, gender, and desire, "truly known and expressed in a differentiating desire for an oppositional gender—that is, in a form of oppositional heterosexuality."⁸⁰ In other words, the norm is binary sex, inherently tied to binary gender, expressed through attraction to the opposite sex.

Whether or not one accepts Butler's theory that we are what we do, and whether or not one understands sex, gender, and sexual orientation as separate categories or inherently connected, the focus on performance explains how and why harassment "overlaps" different aspects of identity. For example, B.G. describes herself as both bisexual and "not girly at all." If she dresses in a way that is "not girly," moves in a way that is "not girly," and takes interest in activities that are "not girly," it makes sense to say she is performing a gender that she defines as "not girly." Others might perceive these actions as expressions of gender. But they also might perceive them as expressions of sexual orientation, operating off of the stereotype that a butch gender presentation means that she is a lesbian. If these students harass B.G., the harassment might be about both perceived gender and perceived sexual orientation identity. In addition, B.G. could be performing both her gender and her sexual orientation through her appearance and actions—perhaps acting "not girly" is a way for her to explore both at the same time. The inquiry becomes "metaphysical" indeed, and a court could

77. 109 F. Supp. 2d 1081, 1090 (D. Minn. 2001).

78. 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007).

79. JUDITH BUTLER, *GENDER TROUBLE* 34 (1990).

80. *Id.* at 31.

hardly be expected to categorize the harassment as solely based on gender or solely based on sexual orientation. Understanding them as “overlapping” makes sense.

The “overlap” rationale would also provide a better route for courts to understand anti-gay harassment related to sexual behavior. While OCR guidance since 1997 has said that “sexual in nature” harassment can violate Title IX regardless of the students’ sexual orientation, courts have not always understood harassment related to homosexual behavior in the same way as harassment related to heterosexual behavior. In *Tyrrell v. Seaford Union Free School District*, the plaintiff claimed that she was harassed after photos of another female student performing oral sex on the plaintiff were posted on the Internet.⁸¹ The facts alleged by the plaintiff appear to constitute a sexual assault: at the time the pictures were taken, the plaintiff was intoxicated and possibly drugged, and she did not remember what happened that night.⁸² She learned that another student had performed oral sex on her only when pictures of it, including a close-up of the plaintiff’s genitals, were posted on the Internet.⁸³ The pictures circulated around school, where other students called the plaintiff “lesbian” and “carpet muncher,” accused her of having herpes, “scream[ed] and curse[ed] at her . . . [told] her to leave school, and push[ed] her.”⁸⁴ This harassment involved spreading sexual rumors, making sexual comments, distributing sexually explicit pictures—all actions described as sexual harassment in OCR’s Dear Colleague letter⁸⁵—but the court ruled that the harassment was based on sexual orientation, not sex.⁸⁶

Although the plaintiff’s claims failed to meet other prongs of the Title IX peer harassment test,⁸⁷ this case demonstrates that courts may see the sexual orientation loophole as bigger than it is in OCR’s guidance. Had the plaintiff been photographed during sexual activity with a male student and then been the target of similar harassment, the court likely would have found the harassment to be sexual in nature. In Tyrrell’s case, the harassment was arguably based both on perceived sexual orientation and on sexual behavior. The harassment overlapped.

Gendered behavior performs gender; sexual behavior performs sexual orientation. But each kind of behavior can perform more than one identity category at the same time. Similarly, harassment that targets sexual orientation can also target gender, and harassment related to homosexual behaviors can be both “sexual in nature” and sexual orientation harassment. OCR is

81. 792 F. Supp. 2d 601, 608–09 (E.D.N.Y. 2011).

82. *Id.*

83. *Id.* at 608.

84. *Id.* at 609–10, 612.

85. DEAR COLLEAGUE LETTER, *supra* note 26, at 6.

86. Tyrrell, 792 F. Supp. 2d at 622–23.

87. The court also held that the plaintiff failed to meet the actual notice, deliberate indifference, and severe and pervasive harassment prongs. *Id.* at 623–29.

correct to note the potential for “overlap,” and courts’ response should be to see an entire pattern of harassment as potentially “based on sex” once the plaintiff establishes an ingredient of gender-based or sexual in nature harassment.

B. *Masculinities Theory Approach*

When boys harass other boys, masculinities theory shows how harassment can fit into a sex-specific pattern: masculinity contests. Frank Cooper describes masculinity contests: “a face-off between men where one party is able to bolster his masculine esteem by dominating the other. A prototypical masculinity contest is a bar fight. Men will glare at each other and ratchet up their challenges until one party backs down or is subdued.”⁸⁸ Masculinity theory understands manliness, or the qualities defining what it means to be a man, as socially constructed and varying throughout time and across cultures.⁸⁹ Even within one society, masculinities are multiple: hegemonic (dominant) and alternative masculinities describe different ways of being a man that vary by demographic categories like “race, class, age, ethnicity, [and] sexual orientation,” but are each ways of “not being like women.”⁹⁰ Masculinity contests, then, are an integral part of constructing different masculinities, rather than inherent “boys will be boys” behavior.⁹¹ Michael Kimmel argues that masculinity has a “homosocial element”—demonstrating one’s own masculinity for others to gain their approval—but is also characterized by homophobia.⁹² He writes, “Homophobia is the fear that other men will unmask us, emasculate us, reveal to us and the world that we do not measure up, that we are not real men;” “As adolescents, we learn that our peers are a kind of gender police constantly threatening to unmask us as feminine, as sissies.”⁹³ Boys may bully other boys to seek out a masculinity contest they know they will win, in order to affirm their masculinity. Repudiating femininity and homosexuality through bullying reinforces hegemonic masculinity.

Making a masculinities argument could change the outcome of an anti-gay bullying case. In two cases that produced jury verdicts for plaintiffs, the district courts’ opposite responses to school districts’ post-trial motions show that masculinity arguments can help courts see anti-gay bullying as based on sex. In *Theno v. Tonganoxie Unified School District No. 464*, the District of Kansas denied the school district’s renewed motion for judgment

88. Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674 (2009).

89. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182 (Peter F. Murphy ed., 2004).

90. *Id.* at 184–85.

91. *Id.* at 183.

92. *Id.* at 185–87.

93. *Id.* at 189, 190.

as a matter of law.⁹⁴ The plaintiff argued that he was harassed because he failed to conform to masculine stereotypes; the school district argued that the plaintiff was teased because he did not meet “*social* stereotypes, not gender stereotypes, inasmuch as his individual style and interests were considered ‘uncool’ by his peer group.”⁹⁵ The evidence showed that the plaintiff wore earrings and unusual hairstyles; that he participated in Tae Kwan Do rather than football or basketball; and that the harassment he experienced included epithets like “faggot,” “queer,” and “masturbator.”⁹⁶ The school district argued that there was no evidence that the plaintiff’s appearance or interests was atypical for a boy of his age, and they asserted that the insults directed toward the plaintiff were “akin to plaintiff having been called ‘geek,’ ‘weirdo,’ or ‘spaz,’” words ostensibly unrelated to sex or gender.⁹⁷

The court denied the school district’s motion because the evidence was sufficient to support a conclusion that the harassers chose to use “crude gestures, teasing, and name calling with sexual innuendos and undertones in an effort to debase and derogate his masculinity” and that the harassers “were motivated by his failure to conform to stereotypical gender expectations.”⁹⁸ When relating the testimony in support of this conclusion, the court focused on the ways the plaintiff was different from other students: his spiked hair and earrings, his interest in Tae Kwan Do, and the plaintiff’s self-description as not “the alpha male” or “the big time sports guy.”⁹⁹ The court considered the defense expert witness’ testimony especially telling.¹⁰⁰ Dr. Peterson, a forensic psychiatric expert, noted the plaintiff’s “nonconformity,” and his testimony about “masculine overcompensation” on cross-examination led the court to an inference that “[the plaintiff’s] masculinity was threatened by the type of harassment he suffered at school.”¹⁰¹ While the court did not see how the harassers’ masculinity was involved, it did understand that the harassment implicated the plaintiff’s masculinity and, therefore, sex.

In *Patterson v. Hudson Area Schools*, the Eastern District of Michigan overturned an \$800,000 judgment for a plaintiff who had suffered anti-gay harassment.¹⁰² The plaintiff’s harassment lasted from sixth grade until he left the school after ninth grade.¹⁰³ The plaintiff was subjected to anti-gay

94. 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005).

95. *Id.* at 1304 (emphasis in original).

96. *Id.* at 1304–07.

97. *Id.* at 1304.

98. *Id.* at 1307.

99. *Id.* at 1306.

100. *Id.* at 1306–07.

101. *Id.*

102. 724 F. Supp. 2d 682, 684 (E. D. Mich. 2010); Julie Edgar, *Jury Awards \$800K to Victim of ‘Pattern of Bullying’*, ON POINT (Mar. 29, 2010), [http://www.onpointnews.com/NEWS/Jury-Awards-\\$800K-to-Victim-of-Pattern-of-Bullying.html](http://www.onpointnews.com/NEWS/Jury-Awards-$800K-to-Victim-of-Pattern-of-Bullying.html).

103. *Patterson*, 724 F. Supp. 2d at 684–89.

slurs including “gay,” “fag,” and “queer”;¹⁰⁴ derided for having “man boobs” after he gained weight;¹⁰⁵ and called “Mr. Clean” in reference to his lack of pubic hair.¹⁰⁶ His school planner and locker were defaced with references to homosexual behavior, like “I ♥ penis” and drawings of a penis inserted into an anus.¹⁰⁷ The most extreme harassment was when the plaintiff was assaulted in the locker room by a student who “rub[bed] his penis and scrotum against the back of Plaintiff’s neck and side of Plaintiff’s face.”¹⁰⁸

The court said there was no evidence that the anti-gay insults stemmed from any of the following: (1) the plaintiff’s sexual orientation; (2) the plaintiff’s perceived sexual orientation; (3) “any sexual desire for Plaintiff”; (4) “a general hostility toward male students”; or (5) “treat[ing] female students differently/better than male students.”¹⁰⁹ Two teachers and a student also testified that words like “gay,” “fag,” and “queer” are frequently used “in a nonsexual manner.”¹¹⁰ The court understood the “man boobs” comment to be only “teasing” about weight gain, and it said there was no evidence that the “Mr. Clean” comments were actually about pubic hair, other than the plaintiff’s testimony that this was his understanding.¹¹¹ Regarding the sexually explicit defacement of the plaintiff’s planner and locker, the court said that while it was “colored with offensive sexual connotations,” there was no evidence that it was “based upon gender, sexual orientation, or perceived sexual orientation of the plaintiff.”¹¹² Even the locker room sexual assault was not harassment on the basis of sex, because, the court said, there was no evidence that the harasser “(1) acted out of sexual desire for Plaintiff, (2) had any general hostility toward males, or (3) treated males differently than females.”¹¹³

While any assessment of the facts of a case would be incomplete without seeing the trial record, the *Patterson* court obviously did not see the masculinity implications of the plaintiff’s harassment. (It also seems to ignore how sexually explicit drawings and sexual assaults are based on sex, as discussed previously.) A masculinities argument might have convinced the court that the harassers were treating male students differently from female students. It also could have described how words like “gay” and “fag” may be thought to be “nonsexual,” in that they don’t actually refer to sexual orientation or behavior, but when used to emasculate, they are gendered.

104. *Id.* at 684–88.

105. *Id.* at 685.

106. *Id.* at 685, 692.

107. *Id.* at 687–88.

108. *Id.* at 688.

109. *Id.* at 691.

110. *Id.* at 692.

111. *Id.* at 691–92.

112. *Id.* at 692–93.

113. *Id.* at 693.

A “boys will be boys” attitude may also lead school districts to minimize bullying of boys. There are many potential examples in the Anoka-Hennepin case. When K.R. was urinated upon, he reported it to an associate principal.¹¹⁴ She said, “It was probably water.”¹¹⁵ When D.F.’s teacher saw that students were throwing threatening notes at him, she simply threw them away and took no further action.¹¹⁶ After D.F. was pushed into a locker, an associate principal said “there was nothing she could do and advised D.F. to ‘try to stay out of people’s way.’”¹¹⁷ After D.M.-B. was stabbed in the neck with a pencil, an associate principal said she would “look into” the incident.¹¹⁸ His attacker continued to harass him and later choked him in the bathroom.¹¹⁹ D.M.-B.’s story in particular shows that the school was unwilling, not unable, to stop the harassment. When a classmate called him a “nigger,” the school immediately punished the classmate, and D.M.-B. was never called a racial slur again.¹²⁰

III. THE ROLE OF SCHOOL POLICIES

If a “boys will be boys” attitude explains some of the school district’s inaction in the Anoka-Hennepin case, a history of discriminatory school policies explains even more. The plaintiffs in this case repeatedly notified teachers and school administrators about ongoing harassment.¹²¹ In D.M.-B.’s case, his parents had multiple conversations with school officials about the harassment. Eventually, his parents were able to meet with school administrators and with district officials. In one meeting, the superintendent “acknowledged that the District had no systemic approach in place to address harassment of students who were LGBT or perceived to be LGBT.”¹²² In another meeting, the “school staff present agreed that the [neutrality policy] limits what the school can do to address anti-gay harassment.”¹²³

A. History of Anoka-Hennepin’s Policies

Before neutrality, there was “No Homo Promo.” In 1995, a health curriculum review led the Anoka-Hennepin School Board to adopt a new board directive: “We recommend that while respect be maintained toward all people, homosexuality not be taught/addressed as a normal, valid lifestyle and that district staff and their resources not advocate the homosexual

114. Doe Complaint, *supra* note 3, ¶ 50.

115. *Id.*

116. *Id.* ¶ 61.

117. *Id.* ¶ 62.

118. *Id.* ¶ 95.

119. *Id.* ¶ 97.

120. *Id.* ¶ 114.

121. *See generally id.*

122. *Id.* ¶ 107.

123. *Id.* ¶ 118.

lifestyle.”¹²⁴ Some teachers and staff nicknamed it “No Homo Promo.”¹²⁵ Teachers became wary of discussing homosexuality in any way, lest their actions be interpreted as “advocacy.”¹²⁶ While they could help students report bullying, they felt unable to offer personal support to LGBT students who suffered harassment: as one teacher said, “I could not talk to [Erik, a gay student] about [his sexual orientation] . . . I would have lost my job. I could be polite, listen, and lend a sympathetic ear. But I could say nothing.”¹²⁷ Erik was one of the nine students who committed suicide.¹²⁸

“No Homo Promo” ended in 2009 after the district settled a Minnesota Department of Human Rights (MDHR) complaint. The MDHR investigation found that two teachers harassed Alex Merritt, a high school student who they thought was gay. Diane Cleveland “singled him out on nearly a daily basis by making jokes, comments and innuendos about her perception of his sexual orientation”; Walter Filson “would repeat, add his own jokes, and allow other students in the class to joke about the boy’s perceived sexual orientation.”¹²⁹ The teachers’ harassment included implying that the student had “a thing for older men” when he expressed interest doing a report about Ben Franklin, saying that Alex “enjoys wearing women’s clothes,” and laughing and agreeing when a student suggested that molesting a deer was “something [Alex] would do.”¹³⁰ As part of the MDHR settlement, Anoka-Hennepin agreed to pay \$25,000 to Alex’s family and to review its policies; the teachers were disciplined but not fired.¹³¹

The district eliminated the 1995 directive and adopted a new policy, called the Sexual Orientation Curriculum Policy (SOCP).¹³² While it affirmed the district’s commitment to providing equal educational opportunities and preventing harassment, the SOCP continued to discourage teachers from discussing homosexuality. The policy stated,

Teaching about sexual orientation is not a part of the District adopted curriculum; rather, such matters are best addressed within individual family homes, churches, or community organi-

124. *Comprehensive timeline on issues related to Anoka-Hennepin’s Sexual Orientation Curriculum Policy*, ANOKA-HENNEPIN SCH. DIST. (May 4, 2012), <http://www.anoka.k12.mn.us/education/components/docmgr/default.php?sectiondetailid=233661&fileitem=103208&catfilter=29677> [hereinafter Background on SOCP].

125. Ederly, *supra* note 1.

126. *Id.*

127. Jessica Lussenhop, *Erik Turbenson suicide foreshadowed gay taunting trouble at Anoka-Hennepin*, CITY PAGES (Sept. 28, 2011), <http://www.citypages.com/content/printVersion/2272252/>.

128. *Id.*

129. *Anoka-Hennepin school district pays \$25,000 to settle charge that teachers harassed high school student because of his perceived sexual orientation*, Case of the Month: August 2009, MINN. DEPT. OF HUM. RTS., http://www.humanrights.state.mn.us/education/articles/case_month09-08.html [hereinafter Minn. Dept. Hum. Rts.]; Emily Johns, *In gay slur settlement, all are paying a price*, STAR TRIBUNE (Aug. 13, 2009), <http://www.startribune.com/local/stpaul/53189752.html>.

130. Minn. Dept. Hum. Rts., *supra* note 129.

131. *See id.*

132. Background on SOCP, *supra* note 124.

zations. Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student led discussions. If and when staff address sexual orientation, it is important that staff do so in a respectful manner that is age-appropriate, factual, and pertinent to the relevant curriculum. Staff are encouraged to take into consideration individual student needs and refer students to the appropriate social worker or licensed school counselor.¹³³

B. *When “Neutrality” Is Not Neutral*

The SOCP became known as the “neutrality policy,” but it was never neutral. Although the text of the policy could mean that staff should remain neutral about all varieties of sexual orientation, the policy was consistently interpreted to apply only to non-heterosexual orientations. As one former teacher said, “The policy is general to all issues of sexual orientation, but is only used against GLBT issues. In practice, no one is expected to remain neutral on the straight identity The gay population is the only population that the district singles out in policy, creating stigma in how staff perceive and even interact with gay kids.”¹³⁴ The plaintiffs’ complaint called it a “gag policy” and alleged it prevented teachers “from aggressively responding to anti-gay harassment,” in part because it “prohibit[ed] school staff from countering anti-gay stereotypes or presenting basic factual information about LGBT people, even when necessary to address anti-gay hostility within the student body.”¹³⁵ The teachers’ union president said

133. *New and former Anoka-Hennepin policies*, STAR TRIBUNE (Feb. 14, 2012), <http://www.startribune.com/local/north/138267829.html>. The full text of the Sexual Orientation Curriculum Policy is:

It is the primary mission of the Anoka-Hennepin School District to effectively educate each of our students for success. District policies shall comply with state and federal law as well as reflect community standards. As set forth in the Equal Education Opportunity Policy, it is the School District’s policy to provide equal educational opportunity and to prohibit harassment of all students. The Board is committed to providing a safe and respectful learning environment and to provide an education that respects the beliefs of all students and families. The School District employs a diverse and talented staff committed to serving students and families from diverse backgrounds. The School District acknowledges that one aspect of that diversity regards sexual orientation. Teaching about sexual orientation is not a part of the District adopted curriculum; rather, such matters are best addressed within individual family homes, churches, or community organizations. Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student led discussions. If and when staff address sexual orientation, it is important that staff do so in a respectful manner that is age-appropriate, factual, and pertinent to the relevant curriculum. Staff are encouraged to take into consideration individual student needs and refer students to the appropriate social worker or licensed school counselor.

134. Andy Birkey, *Anti-gay group organizes in Anoka-Hennepin schools as community deals with gay suicides*, THE MINNESOTA INDEPENDENT (Aug. 26, 2010), <http://minnesotaindependent.com/64047/anti-gay-group-organizes-in-anoka-schools-as-community-deals-with-gay-suicides>.

135. Doe Complaint, *supra* note 3, ¶ 9.

the policy generated “widespread confusion”: “You ask five people how to interpret the policy and you get five different answers.”¹³⁶

The 1995 Board Directive and the SOCP also enabled conservative backlash efforts. A district document notes that supporters of the 1995 directive made unsuccessful attempts to ban Gay Straight Alliance groups (GSAs), to stop teachers from wearing rainbow stickers on their name badge, and to remove public funding for an optional staff diversity training that included a discussion of LGBT issues. The fact that the district did not give in to these demands is unimpressive, since, as it notes in its own background materials, “equal access laws clearly permit GSA groups” and “a teacher’s individual free speech right permit” expressions like rainbow stickers.¹³⁷ In addition, a group of staff, students, and parents called the Gay Equity Team says that GSA advisors had to “battle[] to even form the groups,” sometimes receiving threats of disciplinary action, and that the district required the LGBT portion of the diversity curriculum to present “anti-LGBT perspectives.”¹³⁸ Conservatives have also exercised their free speech rights by organizing “Day of Truth” events, held after the LGBT “Day of Silence,” that promote gay conversion therapy.¹³⁹ The group of conservative Christians who successfully lobbied for the “No Homo Promo” policy in 1995 went on to ban books, campaign against a transgender teacher (who eventually resigned), and convince schools that displaying state-sponsored posters offering “a toll-free resource, referral and counseling service to LGBT students” would violate district policy.¹⁴⁰

OCR’s guidance has not addressed “neutrality” policies, but OCR’s complaint in the Anoka-Hennepin case leveled some significant criticisms of the district’s policies. OCR’s complaint alleged that Anoka-Hennepin’s policies and procedures violated Title IX because there were no prohibitions against gender-based harassment, no clear guidelines for addressing sex- and gender-based harassment, and no Title IX coordinator.¹⁴¹ In addition, its complaint alleges, “The implementation and interpretation of the District’s policies and procedures by District personnel have contributed to the hostile environment.”¹⁴² According to OCR, some Anoka-Hennepin staff failed to investigate sex-based harassment complaints in violation of district

136. Ederly, *supra* note 1.

137. Background on SOCP, *supra* note 124. For the legal sources of these conclusions see, e.g., Equal Access Act, 20 U.S.C. § 4071 (2012); *SAGE v. Osseo Area Sch.—Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

138. Gay Equity Team, *Anoka-Hennepin Gay Equity Team Responds to False and Manipulated Information on District Website* 1, 6, 7 (Aug. 4, 2011), <http://gayequityteam.org/wp-content/uploads/2011/08/GETDistrictLGBTwebresponse.pdf>.

139. See Ederly, *supra* note 1.

140. Andy Birkey, *Anoka-Hennepin schools’ long history in the culture war*, THE MINNESOTA INDEPENDENT (Aug. 26, 2011), <http://minnesotaindependent.com/86141/anoka-hennepin-schools-long-history-in-the-culture-war>.

141. OCR Complaint, *supra* note 62, ¶ 22.

142. *Id.* ¶ 23.

policy, and others “interpreted the District’s policies and procedures as prohibiting them from addressing sex-based harassment.”¹⁴³ As OCR concluded, “these interpretations of the District’s policies and procedures contribute to the hostile environment by allowing sex-based harassment to go unchecked.”¹⁴⁴ Though OCR did not cite any policy in particular, the facts indicate that the SOCP is what it had in mind. OCR’s complaint did not say that the SOCP violated Title IX on its face, but it essentially argued that it violated Title IX as applied.

CONCLUSION

Throughout the controversy generated by student suicides and the lawsuit, the Anoka-Hennepin School District maintained its official commitment to ending bullying and making school safe for all students while instructing teachers to follow the neutrality policy.¹⁴⁵ The facts of this case show that it was not possible to stop anti-gay bullying without talking about homosexuality. Behaviors that are actually sex-discriminatory were thought to be too difficult to deal with or written off as “expressing different viewpoints” or “boys will be boys.” When the official policy refuses to respect LGBT identities, students who are the targets of anti-gay bullying are ignored by the administration. As OCR has begun to recognize through its “overlap” rationale, this anti-gay bullying will often be sex/gender-based even when it is also based on sexual orientation. In reality, it is not possible for a school to repress all affirmations of LGBT students and also to fulfill its obligations under Title IX. The lessons from the Anoka-Hennepin case should be \$270,000 news to any school district with a “neutrality” gag-rule policy.

143. *Id.*

144. *Id.*

145. See, e.g., *In brief: Response to Rolling Stone article*, ANOKA-HENNEPIN SCH. DIST. (Feb. 6, 2012), <http://www.anoka.k12.mn.us/education/components/docmgr/default.php?sectiondetailid=233661&fileitem=116966&catfilter=11704>.