

States Can Strengthen Legal Protections for Students Against Harassment

Schools are failing to protect students from harassment.

Students today experience harassment at extraordinary rates. For example:

- **SEXUAL HARASSMENT:** 21% of girls ages 14–18 have been kissed or touched without their consent.¹ 10% of PK–12 students experience sexual misconduct by a school employee by the time they graduate from high school.² 26% of women, 23% of transgender and gender-nonconforming students, and 7% of men are sexually assaulted during their time in college.³
- **ANTI-LGBTQI+ HARASSMENT:** 83% of LGBTQI+ students ages 13–21 experience harassment based on their sexual orientation, gender identity, or gender expression each school year.⁴
- **PREGNANCY-BASED HARASSMENT:** 64% of pregnant or parenting girls ages 14–18 report not feeling safe at school as a barrier to attending school, compared with 32% of girls overall.⁵
- **RACE-BASED HARASSMENT:** Race-based harassment comprises 45% of reported hate crimes at institutions of higher education⁶ and 23% of all reported harassment in K-12 schools.⁷
- **DISABILITY-BASED HARASSMENT:** Students with disabilities are two to three times more likely to be harassed or bullied than their nondisabled peers.⁸

Yet students who report harassment are often ignored or punished by their schools instead of receiving help. When schools fail to address harassment, students suffer many educational harms, including lower grades, lower attendance, lost scholarships, reduced school completion rates, and emotional distress.

Federal laws do not adequately protect students from harassment.

Unfortunately, the federal courts have created harsh litigation standards that place significant obstacles in the way of students seeking to hold their schools accountable under federal civil rights laws⁹ when schools fail to address harassment and protect students' access to education. Under federal court standards, a student victim of harassment must prove:

- 1. THE HARASSMENT WAS “SEVERE AND PERVASIVE.”** Different federal courts have held that these incidents are not “severe and pervasive”: forced kissing and groping (not “severe”¹⁰); oral rape (not “severe” because it was not vaginal rape¹¹); vaginal rape (not “pervasive”¹²). Similarly, a federal court held that it was not “severe and pervasive” when a Black girl suffered repeated physical abuse and derogatory comments about her skin color from her classmates at school for 1.5 years.¹³
- 2. AN “APPROPRIATE OFFICIAL” HAD “ACTUAL NOTICE” OF THE HARASSMENT.** Federal courts have been inconsistent in who they consider to be an “appropriate official,” holding that schools are not responsible for addressing harassment when these types of employees know about the harassment: professors, teachers, teacher’s aides, athletics coaches, guidance counselors, security guards, bus drivers, vice principals, principals, superintendents, or even anyone who is not a school board member.¹⁴ In addition, some federal courts have held that schools do not have “actual notice” of harassment even when officials hear repeated “rumors” that a teacher is “dating” multiple high school students or know that a teacher has previously abused other students.¹⁵
- 3. THE SCHOOL HAD “SUBSTANTIAL CONTROL” OVER THE HARASSMENT.** Many federal courts have held that schools have no control over harassment that occurs off campus, even if both the victim and harasser are students or employees at the school, which means that these schools have no legal obligation to address the victim’s complaints of harassment.¹⁶
- 4. THE SCHOOL RESPONDED WITH “DELIBERATE INDIFFERENCE” TO THE HARASSMENT.** Proving a school’s “deliberate indifference” is notoriously difficult. For example, a federal court held that a school did not respond with deliberate indifference when it took minimal action to address harassment experienced by three Black sisters, which actually resulted in the harassment continuing for more than a decade, including the sisters being called the n-word and finding a noose next to their car.¹⁷ Similarly, several federal courts have held that schools did not respond with deliberate indifference when they suspended or expelled students after they reported rape;¹⁸ when a school did not discipline a professor who admitted to harassing a student until eight more victims came forward;¹⁹ and when a school closed its investigation to ensure that the athlete-harasser could transfer to another university with a clean record.²⁰
- 5. THE STUDENT WAS HARASSED AGAIN AFTER THE SCHOOL LEARNED ABOUT THE FIRST INCIDENT OF HARASSMENT.** In four states (Kentucky, Michigan, Ohio, and Tennessee), institutions of higher education are not liable for ignoring student-on-student sexual harassment unless the victim is harassed again after the school had notice of the first incident.²¹ A federal appellate court has also suggested that this rule could apply in seven other states (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota).²²
- 6. THE STUDENT SUFFERED A NON-EMOTIONAL INJURY.** In 2022, the Supreme Court ruled that students who experience disability discrimination (including harassment) cannot sue their schools under federal civil rights laws for the emotional distress they suffered.²³ While the Court’s ruling did not address sex discrimination, many federal courts across the country have applied this restriction to sex-based harassment.²⁴ But many student victims of harassment cannot point to other resulting harms, such as lost wages or physical injuries, which means they may not have any meaningful remedy in court.

States can protect students from harassment by passing a state version of the federal SAFER Act.

States can take action to create stronger, uniform protections for students against harassment based on sex, race, color, national origin, disability, age, and more by passing a state version of the federal Students’ Access to Freedom & Educational Rights (SAFER) Act. The SAFER Act was introduced in Congress in 2022²⁵ and has been endorsed by nearly 100 organizations.²⁶ But federal passage of the SAFER Act may take some time, and state lawmakers can act now to codify protections for students in their state.

**Under federal court standards,
a school is liable for not responding appropriately
to harassment if these requirements are met:**

**Under the SAFER Act standards,
a school is liable for not responding appropriately
to harassment if these requirements are met:**

1. The harassment is “**severe and pervasive.**”

1. The harassment “**negatively alters**” the victim’s ability to participate in school or receive an educational benefit.

2. An “**appropriate official**” has “**actual notice**” of the harassment.

2. An agent or employee at school “**knew or should have known**” about the harassment; and is either authorized to address it, required to report it to the school, or someone the victim believes falls into these two categories.

3. The school has “**substantial control**” over the harassment (which often excludes off-campus incidents).

3. **No restriction.** The school must respond “regardless of where the harassment occurs” if the harassment “negatively alters” the victim’s ability to participate in school or receive an educational benefit (see #1 above). Depending on the school’s relationship to the reported harasser, the school’s response could be limited to supportive measures, or it could include an investigation or other form of accountability for the harassment (see #4 below).

4. The school responds with “**deliberate indifference**” to the harassment.

4. The school fails to respond with “**reasonable care.**” Reasonable care means the school: (1) trains staff and has a policy on harassment; (2) offered supportive measures to the victim; (3) investigated the harassment (if requested by the victim); and (4) took any other necessary actions.

5. *In some states:* The victim is **harassed again** after the school knew about the first incident.

5. **No restriction.** The school must respond once it knows about the first incident of harassment.

6. *In some states:* The victim has a **non-emotional injury.**

6. **No restriction.** The victim can sue for emotional distress.

In addition, states can offer other protections against harassment. These provisions can be tailored to the unique needs of a state:

- **SUPPORTIVE MEASURES:** Require schools to notify students who report experiencing harassment about supportive measures (e.g., a safety plan, adjustments to homework/exams, counseling).
- **ANTI-RETIATION:** Prohibit schools from punishing complainants for school policy violations that occur during the harassment (e.g., drug/alcohol use, consensual sexual activity, self-defense) or that occurs after the harassment as a result of it (e.g., being late or absent, expressing trauma symptoms, talking about the harassment with other students). Prohibit schools from punishing complainants for making a “false report” of harassment without actual evidence that it was false.
- **TRAINING:** Require schools to conduct annual training on harassment for all staff, and require the state’s department of education to provide grants to schools for such training.
- **ENFORCEMENT:** Allow the state’s department of education to levy fines against schools that violate a state civil rights law.
- **TRANSPARENCY:** Require the state’s department of education or attorney general to publish a list of schools that are being or have been investigated or sanctioned for violating a state civil rights law, as well as any related findings or resolution agreements.
- **DATA COLLECTION:** Require the state’s department of education to conduct an anonymous climate survey in schools about students’ experiences with and attitudes toward harassment and to publish the results online.²⁷

Learn more about the SAFER Act!

If you would like to learn more about the SAFER Act or review a model bill, please contact Elizabeth Tang (etang@nwlc.org) at the National Women’s Law Center.

FOOTNOTES

- 1 Kayla Patrick & Neena Chaudhry, National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 3 (2017), https://nwl.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence-1.pdf.
- 2 Billie-Jo Grant et al., *A Case Study of K-12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation* (Sep. 15, 2017), <https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf>.
- 3 David Cantor et al., Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct ix* (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aaucampus-climate-survey-2019>.
- 4 Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools 19- 20* (2021), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.
- 5 Kelli Garcia & Neena Chaudhry, National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), https://nwl.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf.
- 6 National Center for Education Statistics, *Hate Crime Incidents at Postsecondary Institutions 4-5* (May 2022), https://nces.ed.gov/programs/coe/pdf/2022/a22_508.pdf.
- 7 U.S. Department of Education, Office for Civil Rights, *2015-16 Civil Rights Data Collection: School Climate and Safety* 5 (2019), <https://eric.ed.gov/?id=ED600123>.
- 8 C. A. Marshall et al., *Disabilities: Insights from across fields around the world, Vol. 1. The experience: definitions, causes, and consequences* (2009), <https://psycnet.apa.org/record/2009-11004-000>.
- 9 Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq. (prohibiting discrimination based on age); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq. (prohibiting discrimination based on disability); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (prohibiting discrimination based on sex, including sexual orientation, gender identity, and pregnancy); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (prohibiting discrimination based on race, color, and national origin).
- 10 *Carabello v. N.Y.C. Dep't of Educ.*, 928 F. Supp. 2d 627, 635, 643 (E.D.N.Y. 2013).
- 11 *Doe v. Gwinnett Cnty. Sch. Dist.*, No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *1, *12-13 (N.D. Ga. Sept. 1, 2021).
- 12 *Kollaritsch v. Mich. State Univ. Bd. Of Trustees*, 944 F.3d 613, 620 (6th Cir. 2019).
- 13 *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517, 519-21 (3d Cir. 2011).
- 14 E.g., *Kesterson v. Kent State Univ.*, 967 F.3d 519 (6th Cir. 2020) (athletics coach); *Salazar v. S. San Antonio Indep. Sch. Dist.*, 953 F.3d 273, 275 (5th Cir. 2017) (principal); *Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1292 (10th Cir. 2017) (campus security guard); *Hill v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015) (teacher's aide); *Santiago v. Puerto Rico*, 655 F.3d 61, 66 (1st Cir. 2011) (principal); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009) (guidance counselor, teacher); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 362 (3d Cir. 2005) (principal); *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 173-74 (3d Cir. 2002) (guidance counselor); *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (principal); *D.V. by & through B.V. v. Pennsauken Sch. Dist.*, 247 F. Supp. 3d 464, 475 (D.N.J. 2017) (school psychiatrist); *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 1286-87, 1298-300 (M.D. Ala. 2014) (teachers, bus driver); *Rasnick v. Dickenson Cnty. Sch. Bd.*, 333 F. Supp. 2d 560, 565 (W.D. Va. 2004) (anyone who was not a school board member); *Litman v. George Mason Univ.*, 131 F. Supp. 2d 795, 799 (E.D. Va. 2001), *aff'd in part, vacated in part on other grounds*, remanded, 92 F. App'x 41 (4th Cir. 2004) (professor).
- 15 *McCoy v. Bd. of Educ., Columbus City Sch.*, 515 F. App'x 387, 392 (6th Cir. 2013) (previous abuse); *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (previous abuse); *Pantastico v. Dep't of Educ.*, 406 F. Supp. 3d 865, 874-75 (D. Haw. 2019) (previous abuse); *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 175 (D. Mass. 2016) ("dating").
- 16 *Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1118 (10th Cir. 2008).
- 17 *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 402-06, 410-11 (5th Cir. 2015).
- 18 *Doe v. Gwinnett Cnty. Sch. Dist.*, No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *4, *14 (N.D. Ga. Sept. 1, 2021); *A.P. v. Fayette Cnty. Sch. Dist.*, No. 3:19-CV-109-TCB, 2021 WL 3399824, at *1, *4 (N.D. Ga. June 28, 2021), *aff'd*, No. 21-12562, 2023 WL 4174070 (11th Cir. June 26, 2023).
- 19 *Wills v. Brown Univ.*, 184 F.3d 20, 41-42 (1st Cir. 1999) (Lipez, J., dissenting).
- 20 *Doe v. Univ. of Notre Dame Du Lac*, No. 3:17CV690-PPS, 2018 WL 2184392, at *2 (N.D. Ind. May 11, 2018).
- 21 *Wamer v. Univ. of Toledo*, 27 F.4th 461, 463 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 444 (2022); *Doe ex rel. Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 35 F.4th 459, 468 (6th Cir. 2022); *Doe v. Sch. Dist. No. 1, Denver, Colo.*, No. 1:19-cv-01210, 2020 WL 209854, at *2 (D. Colo. 2020).
- 22 *Doe v. Bd. of Trustees of the Nebraska State Colls.*, No. 22-1814, 2023 WL 5211568, at *4 (8th Cir. 2023).
- 23 *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (prohibiting emotional distress damages under Section 504 and the Affordable Care Act).
- 24 E.g., *Party v. Arizona Bd. of Regents*, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, at *4 (D. Ariz. Dec. 6, 2022); *Doe v. City of Pawtucket*, No. 17-365-JJM-LDA, 2022 WL 4551953, at *3 (D.R.I. Sept. 29, 2022); *Doe v. Bd. of Regents of Univ. of Nebraska*, No. 4:20CV3036, 2022 WL 3566990, at *4 (D. Neb. Aug. 18, 2022); *Doe 1 v. Curators of Univ. of Missouri*, No. 19-CV-04229-NKL, 2022 WL 3366765, at *3 (W.D. Mo. Aug. 15, 2022); *Bonnewitz v. Baylor Univ.*, No. 6:21-CV-00491-ADA-DTG, 2022 WL 2688399, at *4 (W.D. Tex. July 12, 2022).
- 25 S. 5158, 117th Cong. (2022); H.R. 9387, 117th Cong. (2022).
- 26 National Women's Law Center, *Ensuring Students Are Protected From Discriminatory Harassment* (Dec. 1, 2022), <https://nwl.org/resource/the-safer-act-students-access-to-freedom-educational-rights>.
- 27 The Violence Against Women Reauthorization Act of 2022 requires institutions of higher education to conduct climate surveys on some forms of sex-based harassment (sexual harassment, sexual assault, dating violence, domestic violence, and stalking) but not on other types of harassment. 20 U.S.C. § 11611-6.