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## **DON'T FORGET THE SAFETY NET THAT ALL-GAY SCHOOLS PROVIDE IN CONSIDERING THE ISSUES RAISED BY ALL-FEMALE PUBLIC EDUCATION**

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**DON'T FORGET THE SAFETY NET THAT ALL-GAY  
SCHOOLS PROVIDE IN CONSIDERING THE ISSUES  
RAISED BY ALL-FEMALE PUBLIC EDUCATION**

*Kim Paula Kirkley\**

As we debate the question of single-sex schools, I am here to encourage everyone to also think about a related issue, schools set up to provide a public education for lesbian and gay youth who have been driven out of other public educational institutions.<sup>1</sup> They are an often forgotten group - those who are known or believed to be gay as well as those who do not conform to gender constructs. By gender non-conforming, I am speaking of boys considered "effeminate" and girls considered "too masculine." On the basis of these perceptions or based on a more direct, perceived or stated sexual orientation, gay and lesbian youth are harassed, physically abused, and driven from mainstream public schools.<sup>2</sup>

Schools for gay youth, such as the Harvey Milk School in New York City (HMI), are an extraordinary, temporary measure to serve these teenagers who have literally been driven out of public schools.<sup>3</sup>

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<sup>1</sup> See generally Donna Dennis & Ruth Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446 (1986) (criticizing public high school education for discriminatory practices against gays and lesbians, which frequently cause them to forfeit high school education altogether).

<sup>2</sup> In a survey of 2,074 gay adults conducted by the National Gay and Lesbian Task Force in 1984, forty-five percent of gay males and twenty percent of lesbians experienced physical or verbal assault in secondary school because they were perceived to be gay. MASS. DEPT. OF EDUC., MAKING SCHOOLS SAFE FOR GAY AND LESBIAN YOUTH 9 (1992).

<sup>3</sup> See *infra* note 17 and accompanying text.

This is a last-ditch effort to make sure that they get the public education that is their right.<sup>4</sup> Such schools have been set up to provide an education for this special group of youth, just as special schools have been set up to provide a single-sex education for a special group of students.<sup>5</sup> I am asking that we think about the parallel issues as well as the differences that go along with lesbian and gay youth, and consider how the resolution of the single-sex schools issue may also affect schools for gay youth.

Ultimately, of course, the goal is to eradicate homophobia and to provide gay young people an education along-side others.<sup>6</sup> In the meantime, however, there are students for whom the public school environments are so extremely hostile that sometimes their only chance is outside of the mainstream public school environment.

I would like to share with you Jamie Nabozny's story.<sup>7</sup> As a gay teenager in Wisconsin, Jamie was subjected to four years of abuse. He later sued the local school officials who had done nothing to

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<sup>4</sup> See *In Re Jeter, et. al.*, 366 N.Y.S.2d 783, 786 (1975) (finding that “[t]he Legislature of the State of New York has the duty to provide for the support and maintenance of a system of free common schools for the education of all children of the State.”).

<sup>5</sup> See Jonathan Kozul, *Saving Public Education: Progressive Educators Explain What It Will Take To Get Beyond The Gimmicks*, THE NATION, Feb. 17, 1997, at 7 (stating that “charter schools promise to be all things to all people by granting disparate groups the power to create schools distinct from the traditional public education system-- from born again Christians to civil rights leaders-- who are dissatisfied with public education have embraced the charter school concept.”).

<sup>6</sup> See Darren Rosenblum, *Geographically Sexual: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119 (1996) (citing as an example of this movement, the Rainbow curriculum introduced into the New York City School system which “[included] history and social science lessons about racial, ethnic, and sexual minorities”).

<sup>7</sup> See *Nabozny v. Podlesny*, 92 F.3d 446 (1996). “Jamie Nabozny was a student in the Ashland Public School District . . . throughout his middle school and high school years. During that time, Nabozny was continually harassed and physically abused by fellow students.” *Id.* at 449.

protect him.<sup>8</sup> Jamie submitted testimony to Congress about anti-gay violence. He states:

I went through over four years of daily verbal and physical abuse, including having pencils thrown at me, books knocked out of my hands, my chair being pulled out from under me, and being spit on. Often, the physical abuse got really bad. In seventh grade, after a teacher left the classroom, two boys wrestled me to the floor and acted out a rape on me while the rest of the class watched and laughed. In ninth grade, two boys knocked me to the floor and urinated on me. In tenth grade, about ten boys trapped me in a hallway and one kicked me in the stomach so bad that I had to go into the hospital later.

My parents kept calling and meeting with the school officials, but the response was that if I was gay, I should expect this kind of treatment. The school took no meaningful actions against the boys who were harassing me, they were sent the message that it was okay to keep harassing me. The school was teaching the value that disrespect for others is okay and that violence is okay.

Instead of disciplining the kids for beating me up, the school started treating me like I was the

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<sup>8</sup>*Id.* at 460 (The United States District Court for the Western District of Wisconsin granted summary judgment for the defendants and Nabozny appealed. The Court of Appeals for the Seventh Circuit, in relevant part, reversed, holding that “[A] reasonable fact-finder could find that the District and the defendants . . . violated Nabozny’s Fourteenth Amendment right to equal protection by discriminating against him based on his gender or sexual orientation. Further, the law establishing the defendants’ liability was sufficiently clear to inform the defendants at the time that their conduct was unconstitutional.”).

problem.<sup>9</sup>

Jamie attempted suicide three times and was hospitalized each time.<sup>10</sup> At sixteen he dropped out of school and began to live on the street.<sup>11</sup> Luckily, Jamie's family was able to find him. He later received his GED and initiated the first successful anti-gay student violence lawsuit.<sup>12</sup> After a federal grand jury in Eau Claire, Wisconsin unanimously found three Ashland, Wisconsin, school officials liable for not protecting Jamie while he was a student, they agreed to pay Jamie nearly \$1 million to settle the lawsuit.<sup>13</sup> But the public schools in Ashland, Wisconsin never provided him with equal access to an

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<sup>9</sup> *Nabozny v. Podlesny*, 92 F.3d 446, 451-2 (1996) (“[Podlesny told] Nabozny that if he was ‘going to be so openly gay,’ he should ‘expect’ such behavior from his fellow students. In the wake of Podlesny’s comments, Nabozny ran home. The next day Nabozny was forced to speak with a counselor, not because he was subjected to a mock rape in a classroom, but because he left school without obtaining the proper permission.”).

<sup>10</sup> *Id.* at 451-52 (stating that the Seventh Circuit documented two of these three suicide attempts.)

<sup>11</sup> *Id.* at 452 (following another hospital stay and a period living with relatives, Nabozny ran away to Minneapolis.)

<sup>12</sup> See Don Terry, *Suit Says Schools Failed To Protect a Gay Student*, N.Y. TIMES, Mar. 29, 1996, at A14 (stating that Jamie Nabozny did not graduate from high school but did later earn his equivalency diploma); see also Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 327 (1996) (stating that Nabozny’s lawsuit was the first federal trial for failing to protect a gay student and was successful to the extent that it found the school officials liable and resulted in a \$900,000 settlement).

<sup>13</sup> *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir.1996) (remanded to the trial court on the issue of equal protection); See Jane T. Monahan, David J.J. Facciolo, Shakuntla Bhaya, Deborah I. Gottschalk, *Gay And Lesbian Civil Rights: Marriage Is Not Enough*, 15 DEL. L. 10 (Summer 1997) (stating that “a federal jury in Eau Claire, Wisconsin, unanimously found public school principals liable to a gay student for violating his constitutional right to equal protection from harm by repeatedly refusing to come to his aid when he was beaten in middle school and high school for being gay”).

education.<sup>14</sup>

Now, I am going to tell you about Paul. Paul is from Ohio, and as reported in the New York Times Magazine:

There, eight boys dragged him into a bathroom stall at school, bashed his head against a toilet while calling him faggot, threatened to kill him and burned his arm four times with a lighter. (They got demerits.) Later, a truckful of rednecks mowed him down on his bike, leaving him in a body cast for months. Paul got a fiberglass knee and got himself to New York.<sup>15</sup>

In New York City, Paul became one of the young people who received a public education at the Harvey Milk School, a project of Hetrick Martin Institute.<sup>16</sup> Harvey Milk is a school that was established in 1985, and was set up specifically as a last-ditch effort -- often rescuing students from the streets -- to give gay kids a public school education.<sup>17</sup> Harvey Milk's first objective is to reconnect students with traditional schools.<sup>18</sup> However, too often students, teachers, and administrators, continue to ignore and condone rampant homophobia

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<sup>14</sup> *Nabozny*, 92 F.3d at 452 (stating that in 9th grade the Department of Social Services ordered Nabozny to return to Ashland High, because his parents couldn't afford private schooling, and in 11th grade Nabozny was told by a guidance counselor that the "school administrators were unwilling to help him [with the continued harassment] and that he should seek educational opportunities elsewhere.").

<sup>15</sup> See Jesse Green, *This School Is Out*, N.Y. TIMES, Oct. 13, 1991, § 6, at 32.

<sup>16</sup> *Id.* at 33 (stating that "[T]he Hetrick Martin Institute [is] a non-profit organization that provides counseling and other services to homosexual kids.").

<sup>17</sup> See Josh Getlin, *Unique School Helps Youths With No Place To Go*, L.A. TIMES, December 7, 1989, at E1 (stating that Harvey Milk was founded in 1985 and provides public school education for gays, lesbians, and transsexuals who drop out of other schools due to harassment).

<sup>18</sup> See Green, *supra* note 15, at 36 (stating that Harvey Milk's mission is "to reintegrate kids into traditional schools"); see also Getlin, *supra* note 17 (stating that the administrators' goal is to help their students "reenroll in a mainstream school.").

and its spawn -- emotional and physical abuse -- consequently, such reunifications may not be viable options for the students who find refuge at Harvey Milk.<sup>19</sup> Therefore, The Harvey Milk School's next and exceedingly important objective is to provide a safe haven, free from violence, where young people can pursue their educations.<sup>20</sup> It is important to note that Harvey Milk does not have anything close to the resources that a regular school would, and the only reason it has many of the resources it does is that it is supported by a non-profit organization.<sup>21</sup>

There is one more important story that we should keep in mind. This is from a young woman, we will call "Anna," who states:

I have a friend in school who is a year behind me. She's been really 'out' for a long time as a lesbian. She's pretty isolated in school. She gets harassed all the time. We got to be friends this year. A few weeks ago we had a prom. Without me knowing, someone got a picture of her kissing me -- I was there with someone else -- and it got distributed around school. The principal and vice-principal knew she was being harassed and that our picture was being circulated around school. Then last week after school, the guy that I went to the prom with picked me up and said he wanted to show me something. He brought me behind the school to the storage building by the gym. Four

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<sup>19</sup> See *Nabozny v. Podlesny et. al.*, 92 F.3d at 452 (stating that Nabozny was told that "[H]e should seek educational opportunities elsewhere.").

<sup>20</sup> See *Green*, *supra* note 15, at 36 (stating that the Harvey Milk School provides students with a "safe haven. . . [to] pursue their diplomas").

<sup>21</sup> *Id.* at 59 (noting that the Board of Education spends only \$130,000 a year for "teachers, desks, books, typewriters and lunch" and all other expenses such as rent and counselor's salaries are paid by the Hetrick-Martin Institute); See also *Getlin*, *supra* note 17, (stating that most needed funding comes from the non-profit Hetrick-Martin Institute).

other guys had her there. Her lip was cut, her clothes were torn, and it was obvious they were hurting her. The one who supposedly loved women held me. At first I tried to get him to stop them, but I couldn't, and when I saw how violent they were, I was scared. They told her they were going to teach her to stay away from 'their girls.' They made me watch while they raped her and peed on her. She couldn't dress herself after they left. She was bleeding because she was a virgin. There were a lot of bruises. It took me a long time to get her dressed and take her home. My friend is such a wonderful person, and they don't know her. I think they did it because if it was her, no one would care. Afterwards, she told me not to report it to the school. My mom was very upset. She wanted me to report it.<sup>22</sup>

Jamie, Paul, and Anna's experiences are not uncommon. In fact, one state commissioned study documented escalating school based violence against lesbian and gay youth with assailants typically outnumbering victims three to one.<sup>23</sup> Additionally, a Massachusetts study of 4,159 high school students found that lesbian, gay and bisexual students were five times more likely to miss school because of feeling unsafe.<sup>24</sup> As these stories and studies illustrate, lesbian and gay youths' safety can be severely compromised and these concerns

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<sup>22</sup> SAFE SCHOOLS ANTI-VIOLENCE DOCUMENTATION PROJECT THIRD ANNUAL REPORT 8 (1996).

<sup>23</sup> *Id.* at 1. The state of Massachusetts has also documented widespread anti-gay violence in the schools of Massachusetts. THE GOVERNOR'S COMM'N ON GAY AND LESBIAN YOUTH, MAKING SCHOOLS SAFE FOR GAY AND LESBIAN YOUTH 9 (1993).

<sup>24</sup> MASSACHUSETTS DEPARTMENT OF EDUCATION, MASSACHUSETTS HIGH SCHOOL STUDENTS AND SEXUAL ORIENTATION RESULTS OF THE 1995 YOUTH RISK BEHAVIOR SURVEY (1995).

can markedly interfere with their chances of receiving the public education to which they are entitled.<sup>25</sup>

As in most things “American” race, class, and gender play a larger role in whether students are able to “rescue” themselves in an abusive environment. As Anna’s story poignantly illustrates, gay and gender non-conforming students may face a multitude of oppressions (among them gender, race, class, and disability) that further remove them from the school system’s safety and stability.<sup>26</sup> A former director of the Harvey Milk Institute’s social services clarified in response to a charge that HMI “promotes” homosexuality or gay adolescent homosexuality; “These students were not being removed from school culture, they were never a part of it.”<sup>27</sup> Most students at Harvey Milk are African-American or Latino.<sup>28</sup> Most are poor.<sup>29</sup> Requests to attend HMI come from all over the country, from students, parents, guidance counselors, juvenile service providers, and mental health professionals.<sup>30</sup> They recognize that schools and programs like Harvey Milk may be a last chance for gay and gender non-conforming young people before they hit the streets in a bid to escape from the violence

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<sup>25</sup> See Tom Stites, *Gay School: Progress or ‘Sexual Apartheid’?*, CHI. TRIB., June 16, 1985, at C1 (“[H]omosexuals . . . have not been able to cope with abuse received in regular schools.”); Julie E. Washington, *School Safety for Gays Discussed*, PLAIN DEALER, Feb. 26, 1994, at 4E (“That right [to an education] may seem like a given – until students describe the verbal and physical abuse they’ve endured in school. Many end up dropping out, running away from home or attempting suicide.”). Cf. Duchesne Paul Drew, *School for Gay Youths is Planned: Aim is to Offer Tolerant Learning Environment*, DALLAS MORNING NEWS, July 15, 1997, at 11A (“The difference [at the Whitman school, dedicated to educating gays and lesbians] is that you can come to this institution . . . and not have any fears of being beaten, abused, maltreated or verbally assaulted because of their sexual orientation . . .”).

<sup>26</sup> See, e.g., *supra* note 25 and accompanying text.

<sup>27</sup> See Green, *supra* note 15, at 36.

<sup>28</sup> *Id.* at 59.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

that typifies gay youths' experiences.<sup>31</sup> It is estimated that lesbian and gay youth constitute up to twenty five percent of all young people living on the streets in the United States.<sup>32</sup>

As a constitutional matter, schools and programs like HMI can probably survive judicial scrutiny.<sup>33</sup> It is ironic that because lesbians and gay men have largely been defeated in attempts to gain heightened equal protection scrutiny, HMI would probably be examined under rational basis,<sup>34</sup> unlike the East Harlem Girl's School which may, as a gender specific school, be subject to intermediate scrutiny.<sup>35</sup> Additionally, because of rampant homophobia, it is unlikely that a non-

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<sup>31</sup> An alarming number of lesbian and gay youth choose another avenue for escape; suicide. According to a Massachusetts study (funded in part by the U.S. Centers for Disease Control and Prevention), gay youth are four times more likely than non-gay youth to have attempted suicide. MASSACHUSETTS DEPARTMENT OF EDUCATION, MASSACHUSETTS HIGH SCHOOL STUDENTS AND SEXUAL ORIENTATION RESULTS OF THE 1995 YOUTH RISK BEHAVIOR SURVEY (1995).

<sup>32</sup> See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE (1989).

<sup>33</sup> Cf. Fernando J. Gutierrez, *Law & Sexuality: A Review of Lesbian and Gay Legal Issues: Gay And Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEX. 195, 202 (1994) (discussing the court's examination of groups that qualify for suspect classification, stating that "[T]he very fact that gays and lesbians are singled out because of their sexual orientation is a brand upon them and an assertion by the legislatures of . . . inferiority which is a stimulant to sexual orientation prejudice which creates an impediment to securing to individuals of that sexual orientation equal justice.").

<sup>34</sup> See Teresa M. Bruce, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back Into The Courtroom*, 81 CORNELL L. REV. 1135, 1142 (1996) (discussing the application of the rational basis by the Georgia State Supreme Court regarding same-sex intimacy).

<sup>35</sup> See Linda L. Peter, *Symposium: Towards a Radical and Plural Democracy: What Remains of Public Choice and Parental Rights: Does The VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W. L. REV. 249, 277-78 (1997) (suggesting that the Court's application of intermediate scrutiny to VMI may be applied to East Harlem Girl's School).

gay student would try to attend HMI.<sup>36</sup>

As the stories and statistics related above show, the problems facing lesbian and gay students are severe and may prevent them from receiving an education. The burden is on the entire school district to provide an education for all of the children it serves. Because the conditions which afflict gay young people are so severe, they may drop out or be so distracted that they are in effect denied access to public education.<sup>37</sup> Indeed, many state constitutions include public education clauses which may require that affirmative steps such as HMI be taken on a temporary basis until the problems in the other schools are addressed.<sup>38</sup> A separate school may be required depending on the ways in which the State's education clause has been interpreted. Forty-eight states explicitly require public education for children and teenagers.<sup>39</sup> Case law in at least ten states define education as a state-bestowed fundamental right.<sup>40</sup>

In closing, schools and programs like the Harvey Milk School are a stop-gap measure to give gay, lesbian, and non-gender

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<sup>36</sup> But see M. V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 733 (1995) (suggesting that educational decisions are not likely to be determined by sexual orientations).

<sup>37</sup> See Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U.L. REV. 67, 92 (1994) (discussing the Harvey Milk School, "[W]hich was started due to the large number of gay teens dropping out of school because of extreme harassment.").

<sup>38</sup> See Dennis & Harlow, *supra* note 1, at 446 (stating the author's proposal of "a litigation strategy based on state constitutions to enforce gay students' right to an equal integrated education").

<sup>39</sup> Susan H. Bitensky, *Theoretical Foundations For a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 551 n.6 (1992) (stating "[b]y 1918 all forty-eight states then in the Union had enacted compulsory education or school attendance laws.").

<sup>40</sup> See Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J. L. & PUB POL'Y 517, 530 (1991) (stating that six states have declared education a "fundamental right" guaranteed by their respective constitutions).

conforming youth the tools and hope they need for the future.<sup>41</sup> Ideally, schools for lesbian, gay, and gender non-conforming young people would not need to exist because the existing schools and all public institutions would recognize and respect the intrinsic dignity of all human beings regardless of race, gender, national origin, economic status, religion or sexual orientation. The debate and resolution of issues surrounding same-gender schools will not, I hope, endanger the caring, crucial places such as Harvey Milk.

Public education plays a vital role in preparing children for independent and productive adult lives. Unfortunately, too many schools ignore the very real obstacles, including violence, homophobia, and sexism, that prevent young people from attaining the skills, tools, and credentials necessary for finding direction in their own lives and the world.<sup>42</sup> The Harvey Milk School and the East Harlem Girl's School provide alternatives to documented inequities in the public education system. As society attempts to provide an equal education to all children, such alternatives must be considered and supported, especially where they seem to provide the only viable avenue to the public education that is every young person's right.<sup>43</sup>

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<sup>41</sup> See Armstrong, *supra* note 37, at 85 (discussing Project 10, a program developed at a Los Angeles high school, designed to "meet the educational needs" of homosexual youth by allowing them to discuss various issues of concern including "gay issues in the curriculum").

<sup>42</sup> See generally AMERICAN ASSOCIATION OF UNIVERSITY WOMEN: HOW SCHOOLS SHORTCHANGE GIRLS (1992) (criticizing our current education system for failing to address the specific needs of girls and as a result, they are "over-shadowed" by their boy counterparts in certain areas such as math and sciences).

<sup>43</sup> See Laura Gangemi, *After Rowley: The Handicapped Child's Right to an Appropriate Education*, 38 U. MIAMI L. REV. 321, 324 (1984) (observing that "all states, at one time or another" declared public education a fundamental right of children).

