

September 3, 2024

Dear Principal or Superintendent,

You're being given this letter because your school or a school in your district may be disciplining lesbian, gay, bisexual, transgender, queer, and questioning ("LGBTQ") students for displays of affection more often or more severely than it disciplines heterosexual students for similar behavior. Such unequal treatment violates your students' rights under the Constitution and Title IX.



Disciplining LGBTQ students unequally for displays of affection violates the Fourteenth Amendment of the U.S. Constitution. Treating students unequally based on their sexual orientation triggers "heightened scrutiny" under the Fourteenth Amendment and is presumptively unconstitutional. *See Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012). Similarly, the intimate relationships of LGBTQ individuals must be treated with equal dignity as the intimate relationships of heterosexuals. *See Obergefell v. Hodges*, 576 U.S. 644 (2015).

Unequal discipline of LGBTQ students also violates Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681. Title IX's implementing regulations prohibit schools from "subject[ing] any person to separate or different rules of behavior, sanctions, or other treatment" on the basis of sex. 34 C.F.R. § 106.31(b)(4). Title IX's protections from discrimination based on a student's "sex" include protections from discrimination based on sexual orientation, gender identity, and other types of gender non-conformity. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) (holding that discrimination against a transgender student in bathroom use constituted a violation of Title IX); *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015) ("the distinction between sexual orientation discrimination and sexual discrimination is illusory."). *See also Bostock v. Clayton Cty, Ga.*, 590 U.S. 644, 660 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex").

As a school administrator, you have a legal obligation to ensure that LGBTQ students and heterosexual students are treated equally when engaging in the same conduct. Please contact the ACLU if

you have any questions about this letter or wish to discuss it further.
We can be reached at helpgbtq@aclu.org.

Sincerely,



James D. Esseks
Director
ACLU LGBTQ & HIV Project



Students and parents: Feel free to use this letter as an advocacy tool in your school.