

KYLP, Inc. will be happy to consult with LGBTQIA+ youth under age 25 about their concerns with the education system. If resources and volunteer attorneys are available, a KYLP attorney may be assigned to represent children and youth under age 25 without charge.

About KYLP, Inc.

The mission of the Kentucky Youth Law Project, Inc. is to enhance and protect the legal rights and entitlements of lesbian, gay, bisexual, transgender, queer, questioning, intersex, and gender expansive youth through free legal representation, education, training, and public policy development. Our goal is to reduce homelessness and promote equal treatment for LGBTQIA+ youth in social welfare agencies, government services, courts, and schools throughout Kentucky.

Our founder and legal director, Keith D. Elston, serves on the Kentucky Bar Association's Child Protection and Domestic Violence Committee and has served several terms as an officer of the KBA LGBT Law Section. He is a member of the Kentucky and American Bar Associations, the National Association of Counsel for Children, and the National LGBTQ+ Bar Association (NLGBTQBA) and is a vetted member of the NLGBTQBA's LGBT Family Law Institute and the Transgender Law Institute. He has made numerous professional presentations to Kentucky lawyers, judges, social workers, foster families, and educators on LGBTQIA+ Youth issues, and has represented hundreds of LGBTQIA+ clients.

Mr. Elston sees clients and potential clients **by appointment only**. He can be reached by email, at kylp.intake@gmail.com, or on our website, www.kylp.org.

SB 150 & IMPACT ON LGBTQIA+ STUDENTS BROCHURE | CREATED OCTOBER 2023



Kentucky Youth Law Project, Inc.
820 Tremont Avenue
Lexington, KY 40502-2234
Tollfree: (844) 220-0226

Senate Bill 150 and its' Harmful Impact on Kentucky's LGBTQIA+ Students



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The recently adopted Senate Bill 150 (“SB 150”), the Kentucky General Assembly’s heartless attack on transgender youth, seeks to radically remake public education in our Commonwealth. Where public schools have traditionally been places where young people can explore, learn about themselves and the topics that interest them, and begin to find their place as citizens of an increasingly diverse world, SB 150 seeks to impose a pall of orthodoxy, favoring certain rigid religious ideas – ideas which are wholly unsupported by years of careful research and almost the entirety of the medical, mental health, and educational communities – and disregarding the concerns of parents who are struggling to find support for their LGBTQ+ children.

First, the law mandates the creation of a school surveillance infrastructure. Students are no longer free to express themselves in ways challenging gender norms or check out a library book without the risk of educators reporting their activities to their parents.

Second, the law prohibits critical instruction by forbidding students, including those who are part of LGBTQ+ families, from learning about or even seeing examples of role models or families who are not straight and cisgender, or who, like James Baldwin, are remarkable in part because of their gender identity.

Third, the law empowers schools to punish teachers and administrators who support LGBTQ+ students.

Fourth, the law prohibits transgender students from using restrooms and other communal facilities that are consistent with their gender identity, if their gender identity is not the gender they were assigned at birth.

Fifth, the law isolates those LGBTQ+ students who do not have the support of their family members or have not yet “come out” to their family, thus making those students more vulnerable to a risk of homelessness, abuse, neglect, depression, anxiety, self-harming behaviors, and suicidality.

These provisions, especially when taken together, imperil the well-being and lives of LGBTQ+ students. In so doing, they foster a hostile educational environment for LGBTQ+ students in violation of Title IX of the Education Amendments of 1972. Consequently, Kentucky public schools cannot follow these provisions of SB 150 without risking their federal education funding.

The law also raises serious constitutional issues relating to students’ rights to self-expression, access to information, and privacy under both the state and federal constitutions.

“It can hardly be argued that ... students ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
-- *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 506 (1969)

We know this will have devastating consequences for LGBTQ+ students’ mental health. As discussed above, a more stressful, less supportive environment correlates with a rise in LGBTQ school absenteeism, depression, and suicide. Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2023). If there was any doubt, LGBTQ+ students have spoken loud and clear about how measures like SB 150 make them feel. Asked about legislation requiring the outing of LGBTQ+ students, 56% of transgender and nonbinary youth felt angry, 47% felt nervous and/or scared, 45% felt stressed, and more than a third felt sad. Trevor Project, *New Poll Illustrates the Impacts of Social and Political Issues on LGBTQ Youth* (2022).

These consequences make plain that SB 150 fosters the hostile educational environment for LGBTQ+ students that Title IX forbids. It does so daily; for instance, reminding transgender and nonbinary students they are not welcome every day when roll is taken, and their correct name and pronouns are not used. The cumulative impact of these measures is to frustrate schools’ educational mission and LGBTQ+ students’ ability to learn. This means schools cannot comply with Title IX while following the portions of SB 150 gratuitously harming LGBTQ+ students. The choice between Title IX and SB 150 is no choice at all: schools must follow Title IX.

Conclusion

Title IX protects LGBTQ students from hostile educational environments. The harmful provisions of SB 150 discussed above make it harder for educators to teach and for students to learn by casting a pall over the schoolhouse. In doing so, these provisions violate Title IX. Accordingly, schools receiving federal educational funding in Kentucky cannot comply with these pernicious and dangerous portions of SB 150.

“Students must always remain free to inquire, to study, to evaluate, and to gain new maturity and understanding. ...[O]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. ... That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”
-- *Keyishian v. Bd. Of Regents*, 385 U.S. 589, 603 (1967)

Moreover, LGBTQ+ students facing challenges at school often find no respite at home. Only one in three transgender and nonbinary youth say their home affirms their identity. Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2023). This can have harsh consequences: family abuse and abandonment are a leading cause for why LGBTQ+ youth comprise 40% of all homeless youth in the United States. Soon Kyu Chio, Bianca D.M. Wilson, Jama Shelton, Gary Gates, *Serving our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness* (2015).

Fortunately, we know ways to mitigate these harms. Eliminating the four main types of stress on LGBTQ+ youth – including discrimination and physical violence in schools – would decrease suicide attempts among this population by a factor of 12. The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2023). LGBTQ+ youth are 40% less likely to attempt suicide if they have even one accepting adult in their life. The Trevor Project, *Accepting Adults Reduce Suicide Attempts Among LGBTQ Youth* (2019). More broadly, feeling cared for by teachers significantly decreases negative mental health outcomes for LGBTQ+ youth. The Trevor Project, *The Relationship Between Caring Teachers and the Mental Health of LGBTQ Students* (2023).

Unfortunately, SB 150 attacks these pillars of a safe, strong educational environment. The law contains multiple provisions that require schools staff to communicate on a daily basis to LGBTQ+ students that they are inferior to and require more scrutiny than their straight and cisgender peers. The provisions include:

- Requiring schools to “out” gender nonconforming students, regardless of whether the student objects or doing so imperils the student.
- Barring instruction on sexual orientation, gender identity, and gender expression for all students, regardless of age or grade.
- Permitting increased surveillance of textbooks and other instructional materials to target LGBTQ-affirming content.

These provisions further marginalize already vulnerable students. They discriminate against transgender and nonbinary students who change their name or pronouns by outing them to their parents rather than allowing them to come out on their own terms, as is their right. They subject LGBTQ+ students to hostility inside and outside of the schoolhouse. They bar thorough, affirming education on everything from different types of families to stories about girls overcoming challenges. They cut students off from support, whether it be an affirming book, teacher, or administrator. And, perniciously, SB 150 realizes these ends by conscripting teachers and administrators into carrying out its harmful dictates.

Title IX Prohibits Creating Hostile Educational Environments for LGBTQ+ Students

Few laws are better known and have done more to promote equality in our country than Title IX. Its essential guarantee is now well-known in educational communities: “No person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

What is less well understood is the breadth of Title IX’s anti-discrimination mandate. When considering whether and how to comply with state laws like SB 150 that aim to radically remake educational environments, appreciating the scope of Title IX’s protections is imperative.

A. Title IX trumps state laws with contrary mandates. The federal constitution establishes the supremacy of federal laws over conflicting state laws. U.S. Const. Art. VI § 2. (“The Laws of the United States ... shall be the supreme Law of the Land.”)

B. Title IX aims to eliminate discrimination, root and branch. Accordingly, it defines discrimination to include any “disparate provision of programs, aid, benefits, or services or inequitable application of rules or sanctions.” *Crandell v. N.Y. Coll. Of Osteopathic Med.*, 87 F.Supp.2d 304, (S.D.N.Y. Mar. 10, 2000) (citing 45 C.F.R. § 86.31 (2000)).

C. Title IX and its prohibition on discrimination “on the basis of sex” is interpreted in light of case law from the Title VII workplace discrimination context.

D. As part of prohibiting sex discrimination, Title IX bars discrimination against LGBTQ students. The Supreme Court held in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1741 (2020) that Title VII’s prohibition on sex discrimination in the workplace also forbade discrimination on LGBTQ status. Writing for a six-justice majority, Justice Neil Gorsuch reasoned that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* By the same logic, discrimination against LGBTQ students is impermissible pursuant to Title IX. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

E. Contributing to a hostile educational environment for LGBTQ+ students constitutes sex discrimination in violation of Title IX. Courts and the Department of Education consider the following in assessing whether there is a hostile educational environment:

- i. The degree the complained of conduct affects a complainant’s ability to access an educational program or activity. *See, e.g.*, 87 Fed. Reg. 41416. Conduct causing student anxiety or humiliation is pertinent to whether they can fully avail themselves of education programs and activities. *See Grimm, id.* at 616.
- ii. The type, frequency, and duration of the complained of conduct. 87 Fed. Reg. 41416.
- iii. The ages of and relationship between the complaining and complained of party. *Id.* As one might expect, offending conduct from an administrator or teacher towards a student is more likely to deny access to educational programs and activities given the unequal power relationship” between the two.
- iv. The location of the complained of conduct and the control the school has over the student in that location. 87 Fed. Reg. 41416. Offending conduct occurring in a public space, against intuitively, is more likely to humiliate students. 87 Fed. Reg. 41417. And, because this conduct occurs at school, it is more likely to impact student access to educational programs and activities.
- v. These factors and corresponding instances of offending conduct are not considered in isolation. Instead, courts should consider a “totality of the circumstances” approach that rejects the disaggregation of the allegations and requires only that the alleged incidents cumulatively have resulted in the creation of a hostile education environment.

F. Schools violating Title IX not only risk litigation challenging their illegal conduct but also losing their federal educational funding. 42 U.S.C. § 2000d-1. Further, in Kentucky, any educator’s willful violation of a student’s civil rights is an express breach of the Standards of Professional Conduct, and such a finding of illegal and unethical conduct – or failure to report such conduct when an educator observes it – may provide a basis for revoking an individual educator’s teaching license. 16 KAR 1:020.

In sum, Kentucky schools receiving federal educational funding are bound to follow Title IX over any conflicting state law. Title IX broadly protects LGBTQ students from hostile educational environments. Schools fostering such environments risk their federal educational funding, and individual educators who contribute to Title IX violations risk losing their licenses.

SB 150 Exacerbates Pre-Existing Challenges for LGBTQ+ Students, Creating a Hostile Educational Environment in Violation of Title IX.

Even before measures like SB 150, LGBTQ+ students faced challenges at school. Per the 2021 *National School Climate Survey* from the Gay, Lesbian and Straight Education Network (“GLSEN”), LGBTQ+ students in Kentucky and nationwide have overwhelmingly negative experiences at school, even when anti-LGBTQ+ laws like SB 150 are not in place.

A staggering 74.2% of transgender students in the U.S. reported feeling unsafe at school based on their gender. Relatedly, an overwhelming majority (77.9%) of transgender students experienced anti-LGBTQ+ discrimination at school, which correlated with 1) a nearly threefold increase in absences due to feeling unsafe or uncomfortable, 2) decreased feelings of school belonging, lower self-esteem, higher levels of depression, and 3) a more than twofold increase in students reporting that they seriously considered suicide in the past year. *Id.* Of the LGBTQ+ students considering dropping out of school, more than half (51.5%) indicated that they were doing so because of a hostile school climate, including issues with harassment, unsupportive peers or educators, and discriminatory school policies and practices. *Id.*

The situation is even more dire here in Kentucky. GLSEN’s *National School Climate Survey* report on Kentucky shows that most LGBTQ+ students in Kentucky experienced anti-LGBTQ+ harassment in 2021. A large majority of respondents experienced verbal harassment (70%) based on their sexual orientation, 64% based on their gender expression, and 57% based on their gender identity. Many LGBTQ+ students in Kentucky were restricted from LGBTQ+ expression: 36% were disciplined for public displays of affection that did not result in similar action for non-LGBTQ students; 23% were prevented from discussing or writing about LGBTQ+ topics in extracurricular activities and 20% in class assignments or projects. Five percent were disciplined for identifying as LGBTQ+.

Similarly, many LGBTQ+ students in Kentucky experienced discrimination at school related to their gender: 37% were prevented from using their name or pronoun in their school; 37% were prevented from using the bathroom that aligned with their gender; 28% were prevented from using the locker room that aligned with their gender; 28% were prevented from wearing clothing deemed “inappropriate” based on gender; and 22% were prevented from playing on the sports team that was consistent with their gender.

In Kentucky, even prior to the passage of SB 150, transgender and nonbinary students in particular experienced gender-based discrimination.