Case Note: Nabozny v. Podlesny

William B Turner
Case Note: *Nabozny v. Podlesny*

William B. Turner, Ph.D., J.D.

©2010, William B. Turner

DRAFT: Please do not quote or cite without permission

It is undoubtedly unusual to write Case Notes on fifteen-year old opinions. However, recent events have made *Nabozny v. Podlesny*\(^1\) regrettably relevant once again.

A rash of teen suicides in September and October 2010, mostly involving various forms of harassment and/or bullying on the basis of sexual orientation and/or gender identity in public schools, make *Nabozny* newly and regrettably relevant despite the passage of fifteen years.\(^2\)

---

\(^1\) 92 F. 3d 446 (CA 7, 1996).

\(^2\) Specific examples over a roughly thirty day period ending on 10/11/2010 include Raymond Chase 3rd Gay Teenage Boy Dies This Week! 5th Death From Suicide In Less Than Three Weeks!!! FREDDYO.COM http://freddyo.com/2010/10/01/raymond-chase-3rd-gay-teenage-boy-dies-this-week-5th-death-from-suicide-in-less-than-three-weeks/ (last visited 10/11/2010); Billy Lucas, Billy Lucas, 15, Hangs Himself After Classmates Called Him a ‘Fag’ One Too Many Times, QUEERTY, http://www.queerty.com/billy-lucas-15-hangs-himself-after-classmates-called-him-a-fag-one-too-many-times-20100914/ (report includes claim that Lucas notified administrators of bullying, but they did nothing) (last visited 10/11/2010); Peggy O’Hare, Parents Say Bullies Drove Their Son To Take His Life; They Claim School District Took No Action, HOUSTON CHRONICLE, 09/29/2010 http://www.chron.com/disp/story.mpl/metropolitan/7220896.html (last visited 10/11/2010); Dean Hamer and Joe Wilson, Silence Equals Suicide, HUFFINGTON POST, 10/11/2010, http://www.huffingtonpost.com/dean-hamer-and-joe-wilson/post_1037_b_756772.html (last visited 10/11/2010) (reporting, *inter alia*, suicide hanging of Seth Walsh in Tehachapi, CA despite efforts of mother, who reports that school officials failed to act); Emily Freedman, Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to his Death; Rutgers University Freshman Jumped from the George Washington Bridge, 09/29/2010 ABC NEWS http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716 (last visited 10/11/2010) (the Clementi episode is an outlier in that he was older, at 18, than most of these cases, and in that school officials, in this case Rutgers University, bear essentially zero responsibility because it seems that Clementi acted even more rashly than most; news reports indicate that he acted very quickly after his roommate secretly captured video of Clementi having sex with another man in their dorm room, then posted the video on line, leaving Rutgers officials no time to intervene, which college administrators are typically more equipped to do); for older examples, see Charles Blow, Two Little Boys, NEW YORK TIMES, 04/29/2009 http://blow.blogs.nytimes.com/2009/04/24/two-little-boys/ (op-ed piece discussing two examples of two boys, Carl Joseph Walker-Hoover and Jaheem Harrera, both 11, who killed themselves in April 2009 after enduring homophobic taunting at school); Stuart Biegel provides some perspective on this issue, reporting what many LGBT adults who pay attention
One reason to remind all concerned about this decision is that, for parents and activists who witness such examples of unaddressed harassment and bullying in public schools, *Nabozny* is a potentially powerful weapon with which to extract real help from recalcitrant school administrators. Unless they are just impressively stupid (a regrettably tempting conclusion from the facts of this and other cases), then giving them a copy of the opinion should help them to understand that they are potentially liable in federal court for their malfeasance. Thus, publicizing the facts and the legal conclusions of *Nabozny*, and charitably assuming both intelligence and good faith, should also help school administrators and teachers evaluate the sufficiency of their policies and procedures for preventing bully and harassment of students, which is, of course, a vastly preferable

---

worried was the case: the recent rash of reports about LGBT teen suicide do not indicate a new phenomenon, but are just increased publicity, presumably made easier by social media outlets such as Facebook, for an ongoing problem, as the *Nabozny* case illustrates, Bullying, Teen Suicides Out Of The Shadows THE HUFFINGTON POST, 10/11/2010 http://www.huffingtonpost.com/stuart-biegel/bullying-teen-suicides-ou_b_758081.html (last visited 10/11/2010). For a summary of sorts, see Updated: September’s Anti-Gay Bullying Suicides –There Were a Lot More than 5, The New Civil Rights Movement http://thenewcivilrightsmovement.com/septembers-anti-gay-bullying-suicides-there-were-a-lot-more-than-5/discrimination/2010/10/01/13297 (last visited, 10/13/2010). Most recent is the case of Zach Harrington in Oklahoma, who killed himself after attending a town meeting at which the city council ultimately approved a resolution to recognize LGBT History Month, but apparently not until substantial debate, including vocal denunciations of LGBT persons. See Suicide: Oklahoma’s Zach Harrington, 19, Kills Himself after Hateful Town Meeting, QUEERTY, http://www.queerty.com/suicide-oklahomas-zach-harrington-19-kills-himself-after-hateful-town-meeting-20101010/ (last visited 10/11/2010). This last instance is not terribly relevant to the current Note in that the event that allegedly drove Harrington to suicide was a public debate at a town meeting, which obviously involves no actionable conduct, indeed, is the most robustly protected form of speech, political speech, under the First Amendment to the Constitution. That all of these examples are males should not lead us to conclude that females do not suffer from the general phenomenon. The difference is more likely a function of the fact that males are more likely to attempt suicide, and to use more successful methods (see http://ajp.psychiatryonline.org/cgi/content/full/160/6/1093) (last visited 10/11/2010) (for anecdotal confirmation, see female’s story in video at http://makeitbetterproject.org/) (last visited 10/11/2010).

3 *Nabozny* is by no means the only case that has resulted in a large payment to a student who complained of harassment that school administrators failed to address. For other cases, see ACLU, The Cost of Harassment: A Fact Sheet for Lesbian, Gay, Bisexual, and Transgender High School Students http://www.aclu.org/lgbt-rights_hiv-aids/cost-harassment-fact-sheet-lesbian-gay-bisexual-and-transgender-high-school-stu (last visited, 10/11/2010).
outcome to the filing of federal law suits, and should be a matter of enormous concern to all teachers and administrators regardless.\(^4\)

The opinion begins with a relatively technical discussion of the scope of the record the court properly had before it, noting that local court rules on summary judgment require both parties to submit briefs of proposed findings of fact with citations to the fact in the record to that point, and that the plaintiffs had failed to do so, leaving the appeals court with only the defendants’ proposed findings of fact. The court went on to note, however, that the trial judge, in his order granting summary judgment to the defendants, had failed to specify precisely the grounds for dismissing the plaintiff’s claim to violation of his equal protection rights on the basis of his gender, but that the trial order’s discussion plainly ventured beyond the defendants’ proposed findings of fact, leaving the entire record open to review by the appeals court. In keeping with established rules and practice in American courts, the appeals court accepted the facts and drew all reasonable inferences in favor of the non-moving party, the plaintiff in this instance.\(^5\)

The facts of \textit{Nabozny} are horrific, but regrettably not that uncommon. In order to avoid accusations of exaggeration, this Note will quote liberally from the opinion. The second paragraph of the facts section reads:

When Nabozny graduated to the Ashland Middle School in 1988, his life changed. Around the time that Nabozny entered the seventh grade, Nabozny realized that he is gay. Many of Nabozny's fellow classmates soon realized it too.

\(^4\) Note well that this is not only a problem for LGBT students, as an article in the Huffington Post makes clear: Meghan Barr, \textit{4 Bullied Teen Deaths At Ohio School}, \textit{Huffington Post}, 10/08/10 \textit{http://www.huffingtonpost.com/2010/10/08/4-bullied-teen-deaths-at-_n_755461.html} (last visited 10/11/2010) (report on four teen suicides at single school in Ohio, only one of whom was gay).

\(^5\) \textit{Nabozny}, 93 F. 3d at 450.
Nabozny decided not to "closet" his sexuality, and considerable harassment from his fellow students ensued. Nabozny's classmates regularly referred to him as "faggot," and subjected him to various forms of physical abuse, including striking and spitting on him. Nabozny spoke to the school's guidance counselor, Ms. Peterson, about the abuse, informing Peterson that he is gay. Peterson took action, ordering the offending students to stop the harassment and placing two of them in detention. However, the students' abusive behavior toward Nabozny stopped only briefly. Meanwhile, Peterson was replaced as guidance counselor by Mr. Nowakowski. Nabozny similarly informed Nowakowski that he is gay, and asked for protection from the student harassment. Nowakowski, in turn, referred the matter to school Principal Mary Podlesny; *Podlesny was responsible for school discipline.*

Nabozny then met again with Nowkowski and Podlesny, who promised to protect him from harassment, but took no effective action. Sometime in the spring of 1989:

> The harassment…only intensified. A short time later, in a science classroom, Welty [another student] grabbed Nabozny and pushed him to the floor. Welty and Grande [a third student] held Nabozny down and performed a mock rape on Nabozny, exclaiming that Nabozny should enjoy it. The boys carried out the mock rape as twenty other students looked on and laughed. Nabozny escaped and fled to Podlesny's office. Podlesny's alleged response is somewhat astonishing; *she said that "boys will be boys" and told Nabozny that if he was "going to be so*

---

6 *Id.*, at 451. (Emphasis added).
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 the school without obtaining the proper permission. No action was taken against the students involved. Nabozny was forced to return to his regular schedule. Understandably, Nabozny was "petrified" to attend school; he was subjected to abuse throughout the duration of the school year.7

This passage invites several comments.

First, this account by a federal circuit court judge is remarkable in its own terms. He states that “Nabozny chose not to ‘closet’ his sexuality,” but this in the context of a larger passage that contains the implicit recognition that, to some extent, doing so in Nabozny’s case, as it often is for adolescents, was simply impossible. The simple fact is that these cases often turn on facts of gender presentation – tone of voice, mannerisms, preferences for extracurricular activities, etc. – that are either not fully under the student’s control, or should not be the basis for differential treatment at all in the first place. This is also an important observation in the context of debates over whether to insist on including gender identity as a protected category in the Employment Nondiscrimination Act, the proposed federal legislation to prohibit discrimination based on sexual-orientation, and perhaps gender identity, in employment.8

7 Id. (Emphasis added).
8 See Finally – Trans-Inclusive ENDA Debated in Senate, GENDER TALK, 09/09/2007 http://www.gendertalk.com/?q=node/230 (last visited 10/11/2010). For anyone who is not steeped in LGBT political/policy debates, this issue may seem excessively abstruse. A brief primer: ENDA as originally written was already a fall-back bill that emerged from the debacle of the debate early in the Clinton Administration over allowing LGBT persons to serve openly in the military that produced the Don’t Ask, Don’t Tell policy. See Chai Feldblum, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY,
Furthermore, federal judges see the worst cases in the American court system—rape, murder, drug trafficking, espionage, etc.—as every party to a federal court case has the right to appeal the decisions of the federal district court to the federal circuit court. To “astonish” a federal circuit court judge is not an easy task, but one is inclined to appreciate such an expression from this judge, especially given that he is correct: the alleged response from the school administrator is, or should be, “astonishing.”

Except that, with all due respect to the federal judge, this response actually is not particularly astonishing at all to LGBT persons who become accustomed to having authority figures who should protect us blaming us for the discrimination and harassment we suffer. Too many of us have learned to expect it. Remember that our movement began in 1969 as a riot in response to an otherwise routine police raid on a gay bar in New York City.9

AND CIVIL RIGHTS (John D’Emilio, William B. Turner, and Urvashi Vaid, eds., 2000). It prohibited employment discrimination only, and only on the basis of “sexual orientation.” It so happens that the years immediately after ENDA’s writing and introduction in Congress saw the emergence of an increasingly militant movement by and for transgender persons, or those who feel a radical disparity between their internal gender identity and their sexed anatomy, at least some significant percentage of whom have undergone, or intend to undergo, sex reassignment surgery to conform their anatomy to their internal gender identity—the T in LGBT. For some lesbian, gay, and bisexual persons, LGB issues were already controversial enough, making them resist the idea of taking up cudgels for a minority whom most people consider even more freakish than they do LGB persons, setting up a certain amount of antagonism between transgender activists and some LGB activists. This remained a mostly abstract issue until the question of including gender identity, and therefore transgender persons, in ENDA emerged. As enactment of ENDA came, during the late 1990s and again after 2006, to seem like a real political possibility, not a few LGB persons, notably including the leaders of the Human Rights Campaign, which claims to be the world’s largest LGBT civil rights organization, advocated passing ENDA with only coverage of sexual orientation with the commitment to revisit the statute after its safe enactment and add gender identity. Trans activists expressed substantial doubt and openly protested against HRC (see Transgender Activists Protest HRC Dinner, Windy City Times, 10/10/2007 http://www.queerty.com/hrc-finally-ready-to-back-trans-inclusive-enda-20090326/ (last visited 10/11/2010), ultimately prompting HRC to relent and support a “trans-inclusive” version of ENDA. See supra. Among their arguments is that much discrimination on the basis of “sexual orientation” actually manifests as discrimination on the basis of gender presentation, with fellow students and co-workers simply assuming that effeminate men and masculine women are lesbian/gay with zero evidence either way of actual sexual orientation or practice, making ENDA without protection for gender identity incompetent even to its stated purpose. It would seem, given the opinion’s presentation of the facts, that Nabozny was such an effeminate boy, whose peers simply assumed that he must, therefore, be gay.

Insofar as we, as LGBT adults, now receive respectful, adequate treatment from professionals such as teachers, school administrators, and law enforcement officers, we have typically had to fight for it; we should make clear, especially in response to the recent rash of teen suicides, that we are still willing to fight these battles.

Secondly, as further evidence for this claim, note that, after Nabozny responded to a mock rape at school by going home, any punitive action that resulted fell on Nabozny for leaving, not on the perpetrators of the mock rape. See above about blaming the victim.

Thirdly, every LGBT person, whether she or he ever suffered such harassment or not, should find profoundly insulting the proposition that our failures to conceal our gender identity and/or sexual orientation somehow validates discrimination against and harassment of us. Of what other population in the modern United States can one even conceive of hearing such a predicate? “Oh, you should expect harassment and bullying if you’re going to be so openly black,” or, “so openly female,” or, “so openly Jewish.”

Fourthly, allegations of discrimination and harassment aside, since when is allowing mock rapes to occur in any classroom in any sense conducive to education? Where was the teacher during this episode? From the description, it sounds as if effectively the entire class was looking on. Did anyone learn any science that day in the science classroom? It is difficult to imagine how.

So it is that, even parents whose children were not directly involved in this event as either perpetrators or victims should be on the phone with school administrators demanding an explanation for why their children were subjected to such classroom experiences.

---

10 And, regrettably, even now we cannot take such treatment for granted, as the raid in September 2009 on The Eagle, a famous gay bar in Atlanta, Georgia, illustrates. http://atlantaeagleraid.com/ (last visited 10/11/2010).
disorder. One key point that tends to get lost too easily in these debates is that harassment and bullying are never part of the mission of any educational institution, such that responsible administrators have a duty to respond to such conduct regardless of the motive for it, and parents have the right to expect that their children’s schools will be free of such activity, regardless of their own children’s participation in it, or lack thereof.\textsuperscript{11}

But specifically with respect to Nabozny, the other unsurprising effect such harassment often has on LGBT youth is that their academic performance tends to suffer, often dramatically.\textsuperscript{12}

The opinion continues:

Podlesny told both Nabozny and his parents that Nabozny should expect such incidents because he is "openly" gay. Several similar meetings between Nabozny's parents and Podlesny followed subsequent incidents involving Nabozny. Each time perpetrators were identified to Podlesny. Each time Podlesny pledged to take action. And, each time nothing was done. Toward the end of the school year, the harassment against Nabozny intensified to the point that a district attorney purportedly advised Nabozny to take time off from school. Nabozny took one and a half weeks off from school. When he returned, the harassment resumed, driving Nabozny to attempt suicide. After a stint in a hospital, Nabozny finished his eighth grade year in a Catholic school.\textsuperscript{13}

\textsuperscript{11} Also, insofar as much bullying and harassment of supposedly LGBT youth occurs solely on the basis of the student’s gender presentation, see supra, note 7, and it is empirically false that all effeminate men are gay and all masculine women are lesbians, it also sometimes happens that non-LGBT students can fall prey to anti-LGBT bullying and harassment, making this not just an LGBT issue.

\textsuperscript{12} http://www.k12.wa.us/cisl/K-12/YouthSuicidePrevention.aspx (last visited 10/11/2010) (noting that sudden decrease in academic performance can be an indicator of possible impending suicide attempt in school-aged youth).

\textsuperscript{13} Nabozny, 93 F. 3d at 451-2.
At the risk of belaboring the point, the district attorney’s response to allegations of clearly criminal actions against Nabozny -- the suggestion that Nabozny “take time off from school” – not that the district attorney had any intention of prosecuting the perpetrators, or otherwise taking steps to protect Nabozny from criminal activity, should give all practicing attorneys pause. This looks suspiciously like a failure by this attorney to adhere to the ethical principles of the profession, which is always more likely to happen in the presence of naked prejudice. In effect, if the district attorney is willing to look the other way when a citizen presents a compelling complaint of battery by other citizens, one has to wonder if the rule of law is even possible. Arguably, for Nabozny, it was not.

Note also that, in this period, Nabozny apparently attempted suicide, and who can blame him? He lived in a world in which no one – including “law enforcement” officials -- could or would protect him from apparently incessant harassment at school. How many adolescents, in the presence of such gross malfeasance by so many so-called adults, would have the psychological fortitude to persist?

There is yet more:

Early in the year, while Nabozny was using a urinal in the restroom, Nabozny was assaulted. Student Stephen Huntley struck Nabozny in the back of the knee, forcing him to fall into the urinal. Roy Grande then urinated on Nabozny. Nabozny immediately reported the incident to the principal's office. Nabozny recounted the incident to the office secretary, who in turn relayed the story to Principal William Davis. Davis ordered Nabozny to go home and change clothes. Nabozny's parents scheduled a meeting with Davis and Assistant Principal
Thomas Blauert. At the meeting, the parties discussed numerous instances of harassment against Nabozny, including the restroom incident.

Rather than taking action against the perpetrators, Davis and Blauert referred Nabozny to Mr. Reeder, a school guidance counselor. Reeder was supposed to change Nabozny's schedule so as to minimize Nabozny's exposure to the offending students. Eventually the school placed Nabozny in a special education class; Stephen Huntley and Roy Grande were special education students. Nabozny's parents continued to insist that the school take action, repeatedly meeting with Davis and Blauert among others. Nabozny's parents' efforts were futile; no action was taken. In the middle of his ninth grade year, Nabozny again attempted suicide. Following another hospital stay and a period living with relatives, Nabozny ran away to Minneapolis. His parents convinced him to return to Ashland by promising that Nabozny would not have to attend Ashland High. Because Nabozny's parents were unable to afford private schooling, however, the Department of Social Services ordered Nabozny to return to Ashland High.15

14 It is not clear from the opinion exactly what “special education” meant in this particular school, but in the American educational system, one typically associates the term with students who have various learning and/or intellectual deficiencies. See http://specialed.about.com/od/iep/qt/IEPoverview.htm (last visited 10/12/2010). Thus, in Nabozny’s case, we have a school placing student in “special education” not, apparently, on the basis of any such deficiencies, but more because of the school’s own deficiencies in maintaining basic discipline. The problems with this approach, apart from the fact of placing Nabozny into the same class as his tormentors, are obvious and multiple, starting with the implicit equation of gay identity in a student with learning and/or intellectual deficiencies, with possible adverse consequences for Nabozny upon receiving a designation as a “special education” student that is academically inappropriate, and continuing with the maldistribution of probably precious resources for those students who actually need the increased attention that the “special education” class is likely intended to provide them with. As with the general issue of school discipline and order, these are facts that should give any parent, whether of a child who suffers bullying/harassment or not, concerns about the managerial competence of the school administrators in question.

15 Id. at 452.
Again, to anyone who is at all familiar with the social pathology that too often befalls LGBT teens, this story sounds entirely too familiar: a second attempt at suicide, the decision to run away, the ongoing malfeasance of school administrators who, one would think, should feel some obligation to help a now-severely troubled student in their school, whose ineptitude rises to the level of actual malice.

The sad story contained in the opinion’s statement of facts finally concludes:

Students on the bus regularly used epithets, such as "fag" and "queer," to refer to Nabozny. Some students even pelted Nabozny with dangerous objects such as steel nuts and bolts. When Nabozny's parents complained to the school, school officials changed Nabozny's assigned seat and moved him to the front of the bus. The harassment continued. Ms. Hanson, a school guidance counselor, lobbied the school's administration to take more aggressive action to no avail. The worst was yet to come, however. One morning when Nabozny arrived early to school, he went to the library to study. The library was not yet open, so Nabozny sat down in the hallway. Minutes later he was met by a group of eight boys led by Stephen Huntley. Huntley began kicking Nabozny in the stomach, and continued to do so for five to ten minutes while the other students looked on laughing. Nabozny reported the incident to Hanson, who referred him to the school's "police liaison" Dan Crawford. Nabozny told Crawford that he wanted to press charges, but Crawford dissuaded him. Crawford promised to speak to the offending boys instead. Meanwhile, at Crawford's behest, Nabozny reported the incident to Blauert. Blauert, the school official supposedly in charge of disciplining, laughed and told Nabozny that Nabozny deserved such treatment because he is gay.
Weeks later Nabozny collapsed from internal bleeding that resulted from Huntley's beating. Nabozny's parents and counselor Hanson repeatedly urged Davis and Blauert to take action to protect Nabozny. Each time aggressive action was promised. And, each time nothing was done.\textsuperscript{16}

Ultimately, school officials in Ashland, Wisconsin, where all of these events occurred, simply admitted that their gross malfeasance would not change, and that Nabozny should attend school elsewhere. Note that the critique above of the district attorney applies with equal force to the school “police liaison” described in this passage, whose conduct exemplifies official malfeasance. Again, Nabozny at this point had good reason to doubt the rule of law in the United States, or at least in his corner of it. He moved to Minneapolis, where he received treatment for post-traumatic stress disorder and the sagacious advice to file suit against the school administrators back in Ashland.\textsuperscript{17}

To state what one hopes would be obvious, although apparently it was not in this case, laughing dismissal should never be an appropriate response to complaints from students of harassment and bullying by fellow students, for numerous reasons. First, to reiterate, one does not need extensive training as a teacher to grasp that bullying and harassment necessarily distract both the victims and the perpetrators from the education that should be the primary focus of the institution. At least, one rather doubts that any jurisdiction wants to pay to support an Institute of Bullying.

Then, of course, for teachers and administrators to consistently refuse to intervene in such activity necessarily serves for the perpetrators as an implicit endorsement of their conduct. If they suffer no discipline for kicking a fellow student repeatedly in the

\textsuperscript{16} \textit{Id.} (Emphasis added).

\textsuperscript{17} \textit{Id.}
stomach, then it must be okay to do so. And for those who are content to rest comfortable with the thought that neither they nor anyone they care about is lesbian or gay, do not think that bullies are always so selective about their targets. Extrapolating not unreasonably from the inference that Nabozny’s real sin was just an overly effeminate affect, it is not too much to suggest that the real target here is femininity, which might well metastasize into larger violence against girls and women generally, not to mention other effeminate men.

The Law of the Case

The remainder of this Note will discuss the legal arguments in the opinion, which of course are critical to invoking it in other jurisdictions. Again, this is an opinion from the Seventh Circuit Court of Appeals, so it is merely persuasive precedent outside that circuit. Both district and circuit courts in other parts of the country, however, have come to similar conclusions, presumably because the legal reasoning of Nabozny has that ring of obviousness to it that all good judicial opinions have. Again, in the face of gross malfeasance by public school administrators, a district attorney, and a school police liaison, one is inclined to doubt that the rule of law is at all possible if even the federal courts refuse to intervene.

Not surprisingly, Nabozny’s counsel filed their suit under 42 U.S.C. sec. 1983, alleging violation of Nabozny’s rights to equal protection, on the basis of his sexual orientation and his gender, and due process of law, for having increased his exposure to harm from fellow students.\(^\text{18}\) The case reached the circuit court on appeal from the district court’s grant of summary judgment to the defendants. The circuit court affirmed

\(^\text{18}\) Id. at 449.
in part, with respect to the due process claim, but reversed in part, with regard to the
equal protection claim, and remanded for trial,\textsuperscript{19} at which a jury found the defendants
liable, prompting a successful settlement offer of nearly one million dollars to Nabozny
before the jury returned to set the damages.\textsuperscript{20}

Before addressing the substantive issues, the circuit court first had to define the
scope of the record before it.\textsuperscript{21} Under local rules, both parties upon submission of a
motion for summary judgment must file proposed findings of fact with record support.
Nabozny failed to do so, allowing the district judge to rely entirely on defendant’s
proposed facts in deciding on their summary judgment motion. The circuit court found,
however, that the district court’s order ventured well beyond the defendants’ stipulation
to support its conclusions, thus allowing the circuit court to examine the entire record in
reviewing the district order and, as is customary under summary judgment motions, to
construe the facts most favorably to the non-moving party, in this case, Nabozny.\textsuperscript{22}

The circuit court began its discussion of the legal issues with a quotation from the
Wisconsin statute, 118.13 (1), that prohibits discrimination against students, which
includes sexual orientation as a protected category.\textsuperscript{23} Obviously, as a legal question, it is
important to note that \textit{Nabozny} originated in a jurisdiction that enacted the nation’s first
statute prohibiting sexual-orientation discrimination, then followed up with a statute
prohibiting discrimination against students that includes sexual orientation as a protected

\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \url{http://www.aclu.org/lgbt-rights_hiv-aids/cost-harassment-fact-sheet-lesbian-gay-bisexual-and-
transgender-high-school-stu} (last visited 10/11/2010).
\textsuperscript{21} \textit{Nabozny}, 93 F. 3d at 449.
\textsuperscript{22} \textit{Id.} at 450-51.
\textsuperscript{23} \textit{Id.} at 453.
category. The Circuit Court reported that, according to the District Court, Nabozny “had proffered no evidence to support his equal protection claims. In the alternative, the court granted to the defendants qualified immunity.” The Circuit Court went on to assert that “we respectfully disagree with the district court’s conclusions.”

The Court inferred that the district court had found either 1) no evidence that Nabozny suffered different treatment than other students, or 2) no evidence that any different treatment resulted from Nabozny’s gender.

Immediately after the quotation from the statute prohibiting discrimination against students, the opinion notes that the school district, in keeping with that statute, had a policy of prohibiting discrimination, including sexual harassment and battery by students on other students.

The opinion then provides a brief discussion of equal protection jurisprudence, emphasizing that “The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action,” and that “a showing that the defendants were negligent will not suffice. Nabozny must show that the defendants acted either intentionally or with deliberate indifference.” It closes that section with the observation that two different standards of review applied in this case: “heightened scrutiny” in the case of gender discrimination, or rational basis review in the case of sexual orientation.

25 Nabozny, 93 F. 3d at 454.
26 Id. at 454.
27 Id. at 453.
28 Id. at 453-54.
At this point, the defense’s own stipulations worked against them. They apparently asserted for the record that they aggressively enforced their policy of prohibiting harassment and bullying by students on students. Noting that Nabozny presented no specific examples of such enforcement for the court to compare to, still the court noted that “that when he was subjected to a mock rape Podlesny responded by saying ‘boys will be boys,’ apparently dismissing the incident because both the perpetrators and the victim were males. We find it impossible to believe that a female lodging a similar complaint would have received the same response.”\textsuperscript{29} Attorneys considering filing such cases will notice the double-bind that the school district is in here: presumably they will be loath to state in federal court that they do not punish sexual harassment at all, but, by insisting that they do punish it at all, they set themselves up, as in \textit{Nabozny}, to charges of violating some students’ rights to equal protection insofar as those students present any credible evidence at all that they suffered harassment that the district failed to address.

As an important aside, note that this opinion antedates the Supreme Court’s decision in \textit{Oncale v. Sundowner Offshore Services, Inc.}\textsuperscript{30}, in which the Court held that same-sex sexual harassment is actionable under Title VII of the 1964 Civil Right Act\textsuperscript{31} as is different-sex sexual harassment. It certainly stands to reason that the legal principles the court articulates for Title VII of the 1964 Civil Rights Act would apply with equal force to Title IX of the 1972 Education Amendments.\textsuperscript{32} Thus, one who finds the need to file such a suit in the present will likely wish to include prominent reference to \textit{Oncale}.

\textsuperscript{29} \textit{Id.} at 454-55.
\textsuperscript{30} 523 U.S. 75 (1998)
\textsuperscript{31} 42 U.S.C. 2000e et seq.
\textsuperscript{32} 20 U.S.C. sec. 1681-88.
The Nabozny court quite reasonably found evidence of discriminatory intent in Nabozny’s allegations as compared to the defendants’ own claims about their pattern and practice of vigorously prohibiting sexual harassment in general. The court wrote that “the defendants also argue that there is no evidence that they either intentionally discriminated against Nabozny, or were deliberately indifferent to his complaints. The defendants concede that they had a policy and practice of punishing perpetrators of battery and harassment. It is well settled law that departures from established practices may evince discriminatory intent. Moreover, Nabozny introduced evidence to suggest that the defendants literally laughed at Nabozny's pleas for help. The defendants’ argument, considered against Nabozny's evidence, is simply indefensible.”

The opinion then went on to discuss the lower court’s grant of qualified immunity, dispensing easily with the claim to immunity for the district, and exploring in more detail the claim for immunity on behalf of the administrators as individuals. Citing both U.S. Supreme Court and Seventh Circuit precedent, the opinion asserts that “the critical questions in this case are whether the law ‘clearly establishes’ the basis for Nabozny's claim, and whether the law was so established in 1988 when Nabozny entered middle school.” It then reviews the major cases from the Supreme Court that antedate 1988 invalidating state action that relied on sex as a determining factor in the distribution of rights and benefits, concluding “The question is not whether they are required to treat every harassment complaint the same way; as we have noted, they are not. The question is whether they are required to give male and female students equivalent levels of protection; they are, absent an important governmental objective, and the law clearly said so prior to Nabozny's years in middle school.”

33 Nabozny, 93 F. 3d at 455. (Citation omitted; emphasis added).
Here it is worth noting a point that seems to get too often and too easily overlooked in these debates: there is NO “governmental objective,” important or otherwise, in allowing any student to suffer what Nabozny alleges he suffered in any school. In what sense can permitting harassment and bullying ever be a “governmental objective”? As noted above, the wholesale malfeasance of multiple officials begins to threaten the total cessation of the rule of law, at least for Nabozny, which obviously cannot be a governmental objective.

**Equal Protection on the Basis of Sexual Orientation**

Having validated Nabozny’s claim to discrimination on the basis of sex, the opinion then discusses Nabozny’s claim to discrimination on the basis of sexual orientation. In effect, the analysis of the sex discrimination claim disposes of the sexual-orientation discrimination claim, because in both cases, the gravamen is essentially the same: discrimination based on membership in, or ascription to, a definable class.

The opinion address this point thus: “There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society. Given the legislation across the country both positing and prohibiting homosexual rights, that proposition was as self-evident in 1988 as it is today. In addition, the Wisconsin statute expressly prohibits discrimination on the basis of sexual orientation. Obviously that language was included because the Wisconsin legislature both recognized that homosexuals are discriminated against, and sought to prohibit such discrimination in Wisconsin schools.”

---

34 *Id.* at 457.
Plainly, this is the one point at which the Wisconsin legislature’s unusual willingness to prohibit sexual-orientation discrimination becomes important, and may pose some difficulty for those whose cases originate in jurisdictions that lack such favorable legislation. But the statute is ultimately not dispositive for the court’s underlying constitutional analysis.

Again citing its own precedent, the court finds that rational basis is the appropriate standard of review. The opinion states: “Under rational basis review there is no constitutional violation if ‘there is any reasonably conceivable state of facts’ that would provide a rational basis for the government's conduct. We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one. Like Nabozny's gender claim, the defendants argue that they did not discriminate against Nabozny.”

The opinion ends its discussion of the sexual orientation claim with reference to Bowers v. Hardwick, the infamous 1986 Supreme Court decision upholding Georgia’s sodomy statute, which, as Antonin Scalia reminded us, offered justification in numerous cases for all manner of discriminations against lesbians and gay men. The Nabozny court notes, however, that Bowers was a due process, not an equal protection, case, and involved criminalization of sodomy, which Nabozny in no way implicated. Given that, rather than attempt to articulate a rational basis for their discrimination, the defendants insisted that they in fact did not discriminate against Nabozny, the rational basis analysis in Bowers is irrelevant. Bowers is even less relevant now by dint of having since been overruled.

35 Id. at 458. Not surprisingly, lesbian/gay litigants continue to seek status as a suspect, or at least a quasi-suspect, class, and sometimes receive such designation from
The opinion ends with a brief dismissal of Nabozny’s due process claim, on the theory that Nabozny had only demonstrated a failure to act by the defendants, who, under Seventh Circuit precedent, had no duty to act. Thus, their failure to act to protect Nabozny was not, on that theory, actionable.