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# Bullicide in American Schools: Forging a Comprehensive Legislative Solution<sup>†</sup>

JASON A. WALLACE\*

## INTRODUCTION

Eric Mohat, “brilliant and quirky,” had a tall and lanky frame that earned him the title “Twiggy” around school, but he did not mind the nickname.<sup>1</sup> Despite Mohat’s affable demeanor, however, the seventeen-year-old Ohio student was persistently pelted with anti-gay slurs by his fellow classmates, often in front of teachers and school officials who did nothing to intervene.<sup>2</sup> Mohat was targeted because he “may have looked effeminate, was in theater and would wear bright clothes.”<sup>3</sup> On March 29, 2007, a bully said to Mohat, in front of other students, “Why don’t you go home and shoot yourself? No one would miss you.”<sup>4</sup> After returning home later that day, Mohat “took a legally registered gun from his father’s bureau drawer, locked himself in his room and shot himself in the head.”<sup>5</sup> Mohat’s parents have filed a lawsuit against the school in federal court—instead of seeking compensation they are asking the school to recognize Eric’s death as a “bullicide” and implement an anti-bullying program in the classroom.<sup>6</sup> There is something of a bullicide epidemic brewing in Mohat’s hometown of Mentor, Ohio: five students in this small Cleveland suburb have killed themselves in the past two years.<sup>7</sup>

In the landmark decision *Brown v. Board of Education*,<sup>8</sup> the Supreme Court recognized education as “perhaps the most important function of state and local governments.”<sup>9</sup> Half a century after *Brown*, with the establishment of the Department of Education as a cabinet-level agency and the emergence of a public school system that relies on federal funding, the federal government has also

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1. Lucinda Franks, *Life and Death at Suicide High*, DAILY BEAST (Mar. 31, 2010), <http://www.thedailybeast.com/blogs-and-stories/2010-03-31/life-and-death-at-suicide-high/full/>. Mohat’s mother described him as “an unusually secure boy” who “just let things roll off him . . . and . . . turned it into a joke.” *Id.*

2. Susan Donaldson James, *Teen Commits Suicide Due to Bullying: Parents Sue School for Son’s Death*, ABC NEWS (Apr. 2, 2009), <http://abcnews.go.com/print?id=7228335>.

3. *Id.* Mohat’s mother said that Eric did not identify as gay but begrudgingly referred to himself as “heterosexual but terminally single.” Peter Krouse, *Mentor Schools Sued in Suicide; Parents Contend Officials Allowed Bullying, Name Calling*, PLAIN DEALER (Cleveland), Apr. 3, 2009, at B1.

4. Krouse, *supra* note 3.

5. James, *supra* note 2.

6. *Id.*

7. Franks, *supra* note 1.

8. 347 U.S. 483 (1954).

9. *Id.* at 493.

embraced a substantial role in education.<sup>10</sup> In order to fulfill this “important function” and foster a culture of learning, it is imperative that schools provide a safe environment for their students. Studies have demonstrated a link between school safety and academic success,<sup>11</sup> and many parents have identified safety as their top school issue of concern.<sup>12</sup> However, millions of students are victims of bullying each year, depriving them of a safe school environment and leading them to perform poorly, skip classes, or drop out entirely.<sup>13</sup>

Although bullying adversely affects all of its victims, students who identify as lesbian, gay, bisexual, or transgender (LGBT)<sup>14</sup> and students who are perceived by their peers to be LGBT are disproportionately targeted by bullies.<sup>15</sup> This Note analyzes the epidemic of anti-gay bullying in schools, surveys the inadequate remedies that currently exist, and proposes a national standard to combat anti-gay bullying. Part I explores the prevalence of anti-gay bullying in schools and the exceptionally detrimental effect it has on LGBT students. Part II examines the successes and failures encountered when using Title IX to address anti-gay harassment in schools. Part III surveys state anti-bullying statutes and considers the difficulty of enacting an LGBT-inclusive law. Rejecting the attempts detailed in Parts II and III as inadequate measures for reducing anti-gay harassment, Part IV considers the possibility of a national anti-bullying law and its potential for success. Using recently proposed legislation—the Safe Schools Improvement Act of 2009 and the Student Non-Discrimination Act of 2010—as a springboard, this Note

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10. The United States Department of Education administered a fiscal year 2010 budget of nearly \$64 billion, and its programs serve more than seventy million elementary, secondary, and postsecondary students. *Budget Office*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/overview/budget/index.html> (last updated Oct. 14, 2010).

11. NAT’L SAFE SCH. P’SHP, BRIDGING THE GAP IN FEDERAL LAW: PROMOTING SAFE SCHOOLS AND IMPROVED STUDENT ACHIEVEMENT BY PREVENTING BULLYING AND HARASSMENT IN OUR SCHOOLS I (2007), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/000/912-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/912-1.pdf).

12. *Id.* at 4.

13. *See id.* at 3–4.

14. This Note also uses the generic term “gay” to encompass self-identified LGBT students and students targeted because they are perceived by their harasser to be LGBT, whether or not they so identify. Bullies rarely distinguish between the two, subjecting both to the same anti-gay harassment. *See infra* notes 70–73 and accompanying text. The term “homosexual” is disfavored, as it connotes a clinical designation and is used by anti-gay activists to suggest that LGBT individuals are psychologically or biologically deviant. GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, GLAAD MEDIA REFERENCE GUIDE 12 (8th ed. 2010), <http://www.glaad.org/document.doc?id=99>. The terminology employed has practical as well as philosophical implications. When a 2010 poll on the United States military’s “Don’t Ask, Don’t Tell” policy asked if “gay men and lesbians” should be allowed to serve in the military, 70% of respondents answered yes. Kevin Hechtkopf, *Support for Gays in the Military Depends on the Question*, CBS NEWS (Feb. 11, 2010, 2:00 PM), [http://www.cbsnews.com/8301-503544\\_162-6198284-503544.html](http://www.cbsnews.com/8301-503544_162-6198284-503544.html). However, when the poll was altered to ask if “homosexuals” should be allowed to serve in the military, only 59% of those surveyed answered favorably. *Id.* In keeping with common parlance, this Note uses the shorthand term “straight” to refer to non-LGBT students.

15. *See infra* Part I.

argues that the time has come to pass an LGBT-inclusive federal anti-bullying law and envisions a statute that would be constitutionally permissible and politically feasible.

#### I. THE PREVALENCE OF BULLYING BASED ON SEXUAL ORIENTATION

Although any child could potentially fall prey to the bullying epidemic, studies and surveys have repeatedly shown that bullies disproportionately target gay students as the recipients of their abuse. According to recent studies, nearly nine out of ten gay students are verbally harassed in school based on their sexual orientation.<sup>16</sup> Compared to their LGBT peers, “only” sixty-two percent of straight students report being bullied at school.<sup>17</sup> Even when bullying does not directly affect them, over ninety percent of students hear homophobic phrases in classrooms and hallways, and a majority of gay students are distressed by these comments, even when they are not the intended targets.<sup>18</sup>

Twenty-two percent of LGBT students report feeling unsafe in school, while only seven percent of non-LGBT students feel unsafe in school generally.<sup>19</sup> Fear for their safety leads nearly one-third of LGBT students to skip at least one day of school per year, compared with less than five percent of high school students overall.<sup>20</sup> Excessive bullying also has consequences for academic performance: LGBT students who experience frequent harassment have a grade point average that falls almost half a grade lower than LGBT students who are not severely bullied.<sup>21</sup> Despite the disproportionate amount of harassment faced by gay students, over seventy percent do not notify a school administrator about the abuse, believing that no action will be taken or that the situation could worsen.<sup>22</sup> Quite often their concerns are grounded in reality, as almost one-third of students who reported abuse said that school staff ignored the complaint or did nothing in response.<sup>23</sup>

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16. JOSEPH G. KOSCIW, ELIZABETH M. DIAZ & EMILY A. GREYAK, THE 2007 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 30 (2008), *available at* [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1290-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf).

17. HARRIS INTERACTIVE & GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA, A SURVEY OF STUDENTS AND TEACHERS 7 (2005) [hereinafter HARRIS INTERACTIVE & GLSEN], *available at* [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/499-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf).

18. KOSCIW ET AL., *supra* note 16, at 16 (finding 83.1% of LGBT students “reported that hearing ‘gay’ or ‘queer’ used in a negative manner at school [and] this caused them to feel bothered or distressed”).

19. HARRIS INTERACTIVE & GLSEN, *supra* note 17, at 7. Another study recorded a much higher percentage, finding that 60.8% of students felt unsafe in school because of their sexual orientation. KOSCIW ET AL., *supra* note 16, at 25.

20. KOSCIW ET AL., *supra* note 16, at xiii.

21. *Id.* at 86 (2.4 versus 2.8).

22. HARRIS INTERACTIVE & GLSEN, *supra* note 17, at 80. Of students who did not report their bullying, 32.8% had “doubts that effective intervention would occur,” while 28.3% reported “fears related to making the situation worse.” KOSCIW ET AL., *supra* note 16, at 44.

23. KOSCIW ET AL., *supra* note 16, at 51.

Perhaps contributing to students' failure to report these incidents is the fact that two-thirds of students hear teachers and school staff make homophobic comments,<sup>24</sup> lending a gloss of tacit approval to the environment of anti-gay harassment.<sup>25</sup>

*A. More Than Sticks and Stones: The Violent Consequences of Bullying*

Gay students report higher levels of physical harassment (16%) and physical assault (8%) based on their sexual orientation than do their straight peers.<sup>26</sup> One of the earliest documented anti-gay bullying cases is also one of the most violent. When openly gay student Jamie Nabozny entered middle school in 1988, he quickly became the target of abuse based on his sexual orientation.<sup>27</sup> Nabozny's classmates regularly insulted him with anti-gay epithets, spit on him, and struck

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24. *Id.* at 16. While this Note focuses on peer-on-peer anti-gay bullying, studies reveal the stark reality that many gay students are also harassed by their teachers or other school officials. *Id.* Clint McCance, vice president of a school board in Arkansas, received harsh condemnation when he published a statement—via his Facebook account—mocking the recent suicides of five gay teenagers and encouraging other gay kids to kill themselves. Leonard Pitts, Op-Ed., *Anti-Gay Movement's New Face of Hate*, BALT. SUN, Oct. 31, 2010, at A23. After sparking a national uproar (and drawing the ire of television personalities Ellen DeGeneres and Anderson Cooper), McCance announced his resignation. *Anderson Cooper 360* (CNN television broadcast Oct. 31, 2010). A Minnesota student received a \$25,000 settlement after teachers said he was gay, “enjoy[ed] wearing wom[e]n’s clothing,” and “had a ‘thing for older men.’” *MN School District Settles for \$25,000 After Teachers Subjected Student to Anti-Gay Harassment*, GLSEN (Aug. 13, 2009), <http://www.glsen.org/cgi-bin/iowa/all/news/record/2459.html>. In Georgia, a teacher was placed on leave and charged with making “terrorist threats” after allegedly asking a student if he was gay and attempting to put a “hit” out on the student to have him killed. Megan Matteucci, *Clayton Teacher Charged with Putting “Hit” on Student*, ATLANTA J.—CONST. (Nov. 16, 2009, 10:51 PM), <http://www.ajc.com/news/clayton/clayton-teacher-charged-with-200153.html>. Although a grand jury did not find enough evidence to indict the teacher, the students involved in the incident maintain that the encounter occurred. Emanuella Grinberg, *Fired Teacher Fights to Clear Name After “Hit” Allegation*, CNN (Sept. 20, 2010, 12:52 PM), <http://www.cnn.com/2010/CRIME/09/20/andolph.forde.reputation/index.html>. Researchers at Yale University found that LGBT students also face discrimination from school administrators and the criminal justice system. Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 54 (2011). Compared to their straight peers who commit similar acts, gay and lesbian youth are more likely to be expelled, arrested, and convicted for their misdeeds. *Id.* at 49; see also Tara Parker-Pope, *Schools and Legal System Mistreat Gays, Study Says*, N.Y. TIMES, Dec. 7, 2010, at A24.

25. One commenter has concluded that “prevailing negative attitudes towards homosexuality on the part of school officials . . . act as a barrier to helping a gay student targeted for harassment by fellow students.” Jeffrey I. Bedell, Note, *Personal Liability of School Officials Under §1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 836. Inaction on the part of homophobic school staff “reinforc[es] the idea that it is acceptable to harass gay students.” *Id.* at 836 n.56.

26. HARRIS INTERACTIVE & GLSEN, *supra* note 17, at 67.

27. *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996).

him.<sup>28</sup> Two bullies once pinned Nabozny down on the floor and performed a “mock rape” on him in front of a classroom of students.<sup>29</sup> One of those bullies later pushed Nabozny into a toilet and urinated on him.<sup>30</sup> The escalating physical abuse culminated in an assault by a group of eight boys who surrounded Nabozny while one of the boys kicked him in the stomach for ten minutes; Nabozny later collapsed due to internal bleeding.<sup>31</sup> Nabozny reported these attacks to school officials, but they repeatedly dismissed his complaints, telling him that “boys will be boys” and warning that “Nabozny should expect such incidents because he [was] ‘openly’ gay.”<sup>32</sup> Nabozny’s attackers were never punished—instead, Nabozny was reprimanded for leaving school without permission when he once ran home to escape his attackers after the school refused to intervene.<sup>33</sup> The bullying Nabozny experienced during his middle and high school career caused him to drop out of school, run away from home, and attempt suicide.<sup>34</sup>

Twenty years after the attacks on Nabozny, gay students are still experiencing violence at the hands of bullies. On November 12, 2009, sixteen-year-old Jayron Martin overheard that classmates at his Houston-area school were planning to attack him.<sup>35</sup> Martin notified two school principals about the impending attacks, but they did not respond promptly to his concerns.<sup>36</sup> Because the administrators would not call his mother to pick him up from school, Martin had to ride the bus home—along with his anticipated attackers.<sup>37</sup> Before disembarking, Martin warned his bus driver that he feared for his safety, but the bus driver did nothing.<sup>38</sup> Martin ran to the home of a neighbor to seek shelter but was pursued by nine classmates, one wielding a metal pipe.<sup>39</sup> As Martin’s attackers hit him, they told him that he was “not going to be gay anymore.”<sup>40</sup> The beating continued for seven minutes until Martin’s neighbor drove the bullies off by brandishing a shotgun.<sup>41</sup> Martin suffered cuts, bruises, and a concussion and was afraid to return to school.<sup>42</sup>

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28. *Id.*

29. *Id.*

30. *Id.* at 452.

31. *Id.*

32. *Id.* at 451.

33. *Id.*

34. *Id.* at 452. After the Seventh Circuit’s ruling, the school settled the case for nearly one million dollars. NAT’L CTR. FOR LESBIAN RIGHTS & GAY, LESBIAN, AND STRAIGHT EDUC. NETWORK, FIFTEEN EXPENSIVE REASONS WHY SAFE SCHOOLS LEGISLATION IS IN YOUR STATE’S BEST INTEREST (2005), available at <http://www.nclrights.org/site/DocServer/15reasons.pdf?docID=1621> [hereinafter FIFTEEN REASONS].

35. Courtney Zubowski, *Student Attacked with Metal Pipe Said School Administrators Did Nothing to Help*, KHOU (Nov. 19, 2009, 12:04 AM), <http://www.khou.com/home/Student-allegedly-chased-beat-with-metal-pipe-says-school-administrators-did-nothing-to-help-70430507.html>.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Perhaps the most widely reported account of anti-gay school violence was the murder of fifteen-year-old Lawrence King, an eighth-grade student in Oxnard, California.<sup>43</sup> King, who was openly gay, occasionally wore dresses, makeup, and high-heels to school and was often ridiculed by his classmates.<sup>44</sup> A few days before his murder, King asked Brandon McInerney, one of his chief tormentors, to be his valentine for the upcoming holiday.<sup>45</sup> At the beginning of the school day on February 12, 2008, McInerney took a seat behind King, drew a handgun from his backpack, and shot King twice in the head.<sup>46</sup> On February 14, King was declared brain dead and was removed from life support.<sup>47</sup> Fourteen-year-old McInerney was charged with premeditated murder with a hate crime enhancement and will be tried as an adult.<sup>48</sup>

*B. Bullycide: A Growing Trend in Peer-on-Peer Harassment*

In addition to declining academic performance, the high rate of bullying faced by gay students has a detrimental effect on their health and welfare. Studies show that LGBT youth are three to four times more likely to attempt suicide than their straight peers.<sup>49</sup> It bears noting that the increased suicide rate is not due to psychological problems or self-destructive behaviors inherent in LGBT youth; rather, the difficulties “are the result of a school-based culture that expresses disapproval and oftentimes extreme hostility toward apparently nonmajoritarian sexual orientations.”<sup>50</sup> A 2010 study by the Harvard School of Public Health found

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43. Ramin Setoodeh with Andrew Murr & Jennifer Ordoñez, *Young, Gay and Murdered*, NEWSWEEK, July 28, 2008, at 41, available at <http://www.newsweek.com/id/147790> (describing King’s death as “the most prominent gay-bias crime since the murder of Matthew Shepard 10 years ago”).

44. *Id.*

45. *Id.*

46. *Id.*

47. Catherine Saillant & Gregory W. Griggs, *Student Is Declared Brain Dead*, L.A. TIMES, Feb. 14, 2008, at B1.

48. Catherine Saillant & Amanda Covarrubias, *Killing Called a Hate Crime*, L.A. TIMES, Feb. 15, 2008, at A1. McInerney faces up to fifty-three years in prison if convicted. *Id.* McInerney’s attorney holds the school responsible for the shooting, claiming that by allowing King to “explore[] his sexuality” and “come to school wearing feminine makeup and accessories,” the school contributed to the rising tensions between the two boys. Catherine Saillant, *School Blamed in Killing of Gay Student*, L.A. TIMES, May 8, 2008, at B1. McInerney has pleaded not guilty. Raul Hernandez, *McInerney Pleads Not Guilty to All Charges*, VENTURA CNTY. STAR (Aug. 27, 2009, 10:16 AM), <http://www.vcstar.com/news/2009/aug/27/mcinerney-pleads-not-guilty-to-all-charges/>. Jury selection is scheduled to begin in March 2011. *CA Judge Rejects Move to Bar DA in Gay Hate Case*, VENTURA CNTY. STAR (Dec. 7, 2010, 12:18 PM), <http://www.vcstar.com/news/2010/dec/07/ca-judge-rejects-move-to-bar-da-in-gay-hate-case>.

49. MASS. DEP’T. OF EDUC., 2005 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY RESULTS 50 (2006), available at <http://www.doe.mass.edu/cnp/hprograms/yrbs/05/ch6.pdf>.

50. Amy Lovell, Comment, “*Other Students Always Used to Say, ‘Look at All the Dykes!’: Protecting Students from Peer Sexual Orientation Harassment*,” 86 CAL. L. REV. 617, 624 (1998); see also Sharon L. Nichols, *Gay, Lesbian, and Bisexual Youth:*

that gays and lesbians—when compared to their straight counterparts—were twice as likely to be victims of interpersonal violence, especially in their childhood, and twice as likely to develop post-traumatic stress disorder (PTSD) later in life.<sup>51</sup> If untreated, PTSD can lead to drug and alcohol abuse, depression, and difficulties maintaining relationships and employment.<sup>52</sup> Researchers linked the increased rates of PTSD to the social isolation, discrimination, and bullying experienced by LGBT youth as a result of their gender nonconformity.<sup>53</sup>

In recent years, these statistics have been given a visible face, as accounts of anti-gay school bullying have been reported in the national media. Multiple accounts of suicide by students targeted with anti-gay slurs have brought cultural and political awareness to the concept of “bullycide” in American schools. Bullycide, a term coined by anti-bullying activists, refers to a suicide provoked by the depression and distress that results from bullying and harassment.<sup>54</sup> Statistical and anecdotal evidence reveals that many victims of bullycide suffer vicious verbal abuse but often are not physically assaulted by their tormentor.<sup>55</sup> By words alone, perpetrators of bullycide kill their victims without ever laying a hand on them.<sup>56</sup> Because LGBT youth experience higher rates of bullying than their straight peers and have fewer resources to rely on in times of crisis, this segment of the population is especially at risk of succumbing to bullycide.

Carl Walker-Hoover had been tormented since he entered middle school in September 2008.<sup>57</sup> The eleven-year-old Massachusetts student, a Boy Scout and

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*Understanding Diversity and Promoting Tolerance in Schools*, 99 ELEMENTARY SCH. J. 505 (1999).

51. Andrea L. Roberts, S. Bryn Austin, Heather L. Corliss, Ashley K. Vander Morris & Karestan C. Koenen, *Pervasive Trauma Exposure Among US Sexual Orientation Minority Adults and Risk of Posttraumatic Stress Disorder*, 100 AM. J. PUB. HEALTH 2433 (2010). While the lifetime risk for PTSD is 4% for men and 10% for women, the risk for gay men and lesbians is doubled to 9% and 20%, respectively. *Id.*

52. *Id.*

53. Marie Szanislo, *Study: Bullies Home in on Gays*, BOS. HERALD, Apr. 25, 2010, at 4.

54. NEIL MARR & TIM FIELD, *BULLYCIDES: DEATH AT PLAYTIME*, at xi (2001); see also BARBARA COLOROSO, *THE BULLY, THE BULLIED, AND THE BYSTANDER* 54 (2003) (defining the term as “when bullied children choose to kill themselves rather than face one more day of being bullied”); Wendy Hundley, *Standing Up to Bullying*, DALL. MORNING NEWS, Aug. 11, 2010, at A1; Janet Kornblum, *Cyberbullying Grows Bigger and Meaner*, USA TODAY, July 15, 2008, at 1D; Michael Ollove, *Bullying and Teen Suicide: How Do We Adjust School Climate?*, CHRISTIAN SCIENCE MONITOR (Apr. 28, 2010), <http://www.csmonitor.com/USA/Society/2010/0428/Bullying-and-teen-suicide-How-do-we-adjust-school-climate>.

55. See HARRIS INTERACTIVE & GLSEN, *supra* note 17, at 67 (finding that 65% of LGBT students have been verbally harassed because of their sexual orientation, but only 8% have been physically assaulted).

56. However, the lack of physical contact with the victim does not necessarily mean a lack of consequences for the bully. Fifteen-year-old Massachusetts student Phoebe Prince, a recent Irish immigrant, endured daily harassment at the hands of her classmates. Erik Eckholm & Katie Zezima, *9 Teenagers Are Charged After Suicide of Classmate*, N.Y. TIMES, Mar. 30, 2010, at A14. After Prince hanged herself in January 2010, prosecutors filed felony charges against six students for their role in Prince’s bullycide death. *Id.*

57. Mike Plaisance, *Mom: Boy’s Suicide Due to Bullying*, REPUBLICAN (Springfield, Mass.), Apr. 9, 2009, at A1.



football player,<sup>58</sup> was ridiculed daily by classmates who called him “gay,” said he “acted like a girl,” and made fun of the clothes he wore.<sup>59</sup> Walker-Hoover’s mother phoned the school on a weekly basis to report the harassment, but the school took no action to protect her son.<sup>60</sup> On April 6, 2009, Walker-Hoover accidentally bumped into a classmate, who threatened him; the school intervened by forcing the two to eat lunch together, in the spirit of “mediation.”<sup>61</sup> That night, after another day of taunting at school, Walker-Hoover hanged himself with an extension cord in the stairway of his home.<sup>62</sup> Since her son’s death, Sirdeaner Walker has become a staunch anti-bullying activist, testifying before Congress,<sup>63</sup> lobbying for anti-bullying legislation in Massachusetts,<sup>64</sup> and running for a seat on the Springfield School Committee.<sup>65</sup>

Only ten days after Walker-Hoover’s death, bullycide claimed another victim. Jaheem Herrera, an Atlanta fifth-grader, was repeatedly called “gay” and “a snitch” by his classmates.<sup>66</sup> Although his mother visited the elementary school a number of times to complain about the harassment, the bullying was not curtailed.<sup>67</sup> After arriving home from school on April 16, 2009, Herrera marched up to his bedroom, locked the door, and hanged himself with a belt in his closet.<sup>68</sup> Herrera’s family is suing DeKalb County and the elementary school principal.<sup>69</sup>

Such a death would be a tragic end for any child, yet these recent suicides are also noteworthy because of the identities of the victims. Although they were primarily harassed using anti-gay terminology, none of these bullycide victims had outwardly self-identified as LGBT.<sup>70</sup> Their deaths underscore the ubiquity of anti-gay harassment in contemporary American schools. The use of anti-gay slurs such as “fag,” “faggot,” “dyke,” “homo,” “queer,” and “that’s so gay”/“you’re so gay” have become commonplace in school hallways and serve as tools of the trade for bullies.<sup>71</sup> While harassment based on characteristics such as race or religion is often

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58. *Id.*

59. *Id.*; Milton J. Valencia, *Constantly Bullied, He Ends His Life at Age 11; Mother Vows to Expose Dangers of Harassment*, BOS. GLOBE, Apr. 20, 2009, at 1.

60. Plaisance, *supra* note 57.

61. *Id.*

62. Valencia, *supra* note 59.

63. *House Questions Spread of Stimulus*, BOS. GLOBE, July 9, 2009, at 6.

64. Marie Szaniszlo, *Victim’s Mom Lends Voice to Anti-Bully Bill*, BOS. HERALD, Nov. 18, 2009, at 8.

65. Elizabeth Roman, *Tragedy Inspired Campaign*, REPUBLICAN (Springfield, Mass.), Nov. 4, 2009, at A6. Walker was unsuccessful in her bid for office. *Id.*

66. Gracie Bonds Staples, *Bullies at School Took Boy’s Life, Family Says*, ATLANTA J.–CONST., Apr. 22, 2009, at A1.

67. *Id.*

68. Mark Davis, *Taunted Boy Just Told Pals, ‘Bye,’* ATLANTA J.–CONST., Apr. 26, 2009, at A1.

69. *Suicide Prompts School Lawsuit*, ATLANTA J.–CONST. (May 10, 2009), <http://www.ajc.com/metro/content/printedition/2009/05/10/deklawsuit0510.html> (“[T]he family is seeking an unspecified amount to help fund the Jaheem Herrera Foundation, formed to stop bullying in schools.”).

70. See *supra* notes 1–6, 57–69 and accompanying text.

71. KOSCIW ET AL., *supra* note 16, at 16.

viewed as “out of bounds” and not as prevalent in schools, bullying because of the victim’s perceived sexual orientation or gender identity are still viewed as “acceptable” grounds for abuse by bullies.<sup>72</sup> Because of the stigma many young students attach to accusations of homosexuality,<sup>73</sup> bullies have found harassment using anti-gay epithets to be particularly effective, regardless of the actual sexual orientation of their victims.

The Mohat, Walker-Hoover, and Herrera deaths all share another commonality: in all three situations, the parents of the bullied student had notified the school, but school administrators failed to take action. Because most harassment occurs in the school environment, teachers and faculty are in the best position to address the problem.<sup>74</sup> When school bullying leads to violence, suicide, or even murder, who can be held responsible? Currently, no national legislation comprehensively addresses harassment or prohibits bullying in schools.<sup>75</sup> Courts have addressed the phenomenon of anti-gay bullying using a variety of approaches, such as Title IX liability and state-based anti-bullying laws, but these approaches deliver inconsistent results.<sup>76</sup> As a consequence of this unsettled doctrine, plaintiffs have few standards to rely upon and lower courts lack uniform precedent to follow.

## II. TITLE IX: A FEDERAL WEAPON IN THE BATTLE AGAINST ANTI-GAY SCHOOL BULLYING?

### A. *The Origins of Title IX Liability*

Congress passed Title IX of the Education Amendments of 1972 (“Title IX”) with the goal of providing women equal access to higher education.<sup>77</sup> The relevant

72. See KOSCIW ET AL., *supra* note 16, at 18; Candis Cayne, *I Advocate . . .*, *ADVOC.*, Mar. 2009, at 80 (“The GLBT community is the last great minority. We can still be harassed openly . . .”); cf. Editorial, *Hate Crimes*, *WASH. POST*, Nov. 5, 2008, at A22 (noting that FBI statistics indicate a decrease in hate crimes based on race (-3.2%) and religion (-4.2%), but an increase in hate crimes based on sexual orientation (+5.5%).)

73. AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 10* (2001) (finding that 73% of students would be “very upset” if someone called them “gay” or “lesbian”). In 2001, 36% of students reported being called “gay” or “lesbian” in school. *Id.* at 21.

74. *But see, e.g.*, Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 *SETON HALL LEGIS. J.* 651 (2009) (discussing the emerging trend of “cyberbullying”—peer-to-peer harassment and abuse perpetrated over the Internet through e-mail, instant messaging programs, and social-networking websites). This Note addresses traditional face-to-face bullying that occurs in the school context. Cyberbullying, where the perpetrator cannot physically harm his victim, does create a potential for bullycide. However, because most cyberbullying occurs on the Internet and outside of the ambit of school control, the role that schools should play in combating cyberbullying (and possible liability for failure to act) is still unclear.

75. NAT’L SAFE SCH. P’SHIP, *supra* note 11, at 2, 5 (decrying “an obvious gap in federal law” and calling for congressional action).

76. See *infra* Parts II and III.

77. Kelly Titus, Note, *Students, Beware: Gebser v. Lago Vista Independent School District*, 60 *LA. L. REV.* 321, 327 (1999).

portion of Title IX provides that “[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”<sup>78</sup> Title IX’s legislative history left unsettled whether Congress intended Title IX to prohibit sexual harassment in schools akin to Title VII’s workplace protections.<sup>79</sup> The Supreme Court later dispelled this uncertainty when it held in *Franklin v. Gwinnett County Public Schools*<sup>80</sup> that a student could recover monetary damages for sexual harassment perpetrated by her teacher.<sup>81</sup>

The Supreme Court further augmented its Title IX jurisprudence in *Davis v. Monroe County Board of Education*,<sup>82</sup> when it extended school liability to peer sexual harassment.<sup>83</sup> In *Davis*, the Court concluded that a school receiving federal funding “may be liable for ‘subjecting’ [its] students to discrimination where the recipient is *deliberately indifferent to known acts* of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.”<sup>84</sup> While allowing a cause of action under Title IX, the Court clarified that not every form of mischief was actionable. Although “students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it,” the Court declared that “[d]amages are not available for simple acts of teasing.”<sup>85</sup> Instead, Justice O’Connor set a high bar for a Title IX action, requiring plaintiffs to show that the peer harassment was “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>86</sup>

The requirements for Title IX liability present a few difficulties. First, the *Davis* Court did not elucidate what constitutes “severe, pervasive, and objectively offensive” conduct. As a result, the lower courts have been forced to distill their own (often inconsistent) definitions, leading one commenter to declare that “[w]hat may qualify as a hostile environment at one school may not be actionable at

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78. 20 U.S.C. § 1681(a) (2006) (emphasis added).

79. Titus, *supra* note 77, at 327 (noting that Title IX committee hearings included “no discussion about discrimination in the form of sexual harassment”). Title VII of the Civil Rights Acts of 1964 (“Title VII”) made it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex.” Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).

80. 503 U.S. 60 (1992).

81. *Id.* at 76. Borrowing language from a previous Title VII “hostile environment” sexual harassment case, the Court reaffirmed that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” *Id.* at 75 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

82. 526 U.S. 629 (1999). LaShonda Davis, a Georgia fifth-grader, was sexually harassed by a classmate who repeatedly fondled her breasts and genitals and propositioned her for sex. *Id.* at 633. Even after her harasser was charged with sexual battery and pleaded guilty, administrators did not intervene and the harassment continued, prompting Davis’s mother to sue the school. *Id.* at 634–35.

83. *Id.* at 633.

84. *Id.* at 646–47 (emphasis added).

85. *Id.* at 651–52.

86. *Id.* at 650.

another. Unfortunately, it is impossible for a bright line test to be developed in this area of law.”<sup>87</sup>

Second, the *Davis* decision established a forgiving standard that requires little action on the part of the school to avoid liability. When a school receives actual notice of ongoing peer-on-peer harassment, Title IX does not impose a duty on the school to successfully intervene and remedy the bullying.<sup>88</sup> Instead, the school “must merely respond to known peer harassment in a manner that is not clearly unreasonable.”<sup>89</sup> As with the “severe, pervasive, and objectively offensive” conduct standard, the Supreme Court has left the meaning of “clearly unreasonable” to lower courts. Surveying post-*Davis* cases, legal commentators have found that “[e]ven when the harassment is severe, the circuits have been hesitant to impose liability.”<sup>90</sup> In addition to these general difficulties presented by Title IX jurisprudence, a successful verdict for the plaintiff is even less likely when the discrimination at issue is anti-gay harassment.<sup>91</sup>

### B. Adapting Title IX Liability to Anti-Gay Bullying

#### 1. “On the Basis of Sex”

Courts that have attempted to address anti-gay school bullying under the framework of Title IX sex discrimination have arrived at varying conclusions. Title IX was passed eight years after Title VII had gone into effect, and the two statutes have much in common.<sup>92</sup> As a result of the laws’ similarities, courts often rely on Title VII employment sexual harassment jurisprudence when analyzing Title IX education sexual harassment cases; in fact, “most have explicitly adopted Title VII precedent.”<sup>93</sup> Because circuit courts have almost unanimously held that Title VII does not cover sexual orientation discrimination,<sup>94</sup> courts applying Title IX have

87. Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 59 (2005).

88. *Davis*, 526 U.S. at 648.

89. *Id.* at 649. Perhaps to quell the dissent’s fears that school liability would run unchecked, Justice O’Connor acknowledged that the “not clearly unreasonable” standard could be resolved with judicial economy and expediency. *Id.* Considering a defendant school’s motion for summary judgment or directed verdict, she sees “no reason why courts . . . could not identify a [school’s] response [to harassment] as not ‘clearly unreasonable’ as a matter of law.” *Id.*

90. Kosse & Wright, *supra* note 87, at 61.

91. *See infra* Part II.B.

92. Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 219 (2005).

93. *Id.* at 220; *see also* *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992).

94. Weiner, *supra* note 92, at 209. *But see* *Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc) (“We would hold that an employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser have engaged in severe or pervasive unwelcome physical conduct

been reluctant to find protection based on sexual orientation alone. Instead, in order to protect gay or perceived gay victims under Title IX, courts must necessarily perform legal “contortions” to shape sexual orientation-based claims into permissible causes of action.<sup>95</sup>

Guidance from the Department of Education explicitly directs that “Title IX does not prohibit discrimination on the basis of sexual orientation.”<sup>96</sup> Despite the lack of overt statutory protection, the Guidance clarifies that “if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian.”<sup>97</sup> The Guidance distinguishes between sexualized and nonsexualized harassment:

[I]f students heckle another student with comments based on the student's sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a

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of a sexual nature.”).

95. Weiner, *supra* note 92, at 191; *see also* *Montgomery v. Ind. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (rejecting a claim for sexual orientation discrimination but allowing the case to proceed by reasoning that a gay student who did not conform to masculine stereotypes could state a claim for discrimination “on the basis of sex”); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (“[T]he Court finds no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser's perception that he is a homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality . . .”).

96. Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997). But in a recent lawsuit brought by “Jacob,” a New York student who was bullied for being gay, the Department of Justice’s Civil Rights Division asked to intervene, arguing that the student is protected by Title IX. Ari Shapiro, *Justice Department Intervenes in Gay Rights Suit*, NPR (Jan. 15, 2010), <http://www.npr.org/templates/story/story.php?storyId=122620723>. Although the Justice Department did not explicitly claim that Title IX protection extends to sexual orientation, it did argue that Title IX covers discrimination based on gender stereotypes—as in cases like Jacob’s, when a boy is beaten up for being effeminate. *Id.* After the Justice Department joined the case, the Mohawk Central School District settled Jacob’s suit, agreeing to institute reforms that would protect LGBT and gender non-conforming students from harassment. *NYCLU, DOJ and Herkimer Co. School District Settle Lawsuit with School Agreeing to Protect Gay Students from Harassment*, N.Y. CIV. LIBERTIES UNION (Mar. 29, 2010), <http://www.nyclu.org/news/nyclu-doj-and-herkimer-co-school-district-settle-lawsuit-with-school-agreeing-protect-gay-stude>. The school will also pay Jacob’s family \$50,000 and cover the cost of his counseling services. Rick Hampson, *A “Watershed” Case in School Bullying?*, USA TODAY, Apr. 5, 2010, at A1, available at [http://www.usatoday.com/NEWS/NATION/2010-04-04-BULLYING\\_N.HTM?CSP=HF](http://www.usatoday.com/NEWS/NATION/2010-04-04-BULLYING_N.HTM?CSP=HF).

97. Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,036 (Mar. 13, 1997).

group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX.<sup>98</sup>

Thus, gay and lesbian students are not protected under Title IX on the basis of their sexual orientation. LGBT students receive protection only from insults that are predicated on sexual *intercourse*, not sexual *identity*. Such a construction has led to the emergence of what critics call the “sexual orientation loophole.”<sup>99</sup> Knowing that Title IX does not protect sexual orientation, a defendant-school might successfully avoid liability by portraying the actions of a bully as motivated by anti-gay animus rather than as pure sexual harassment.<sup>100</sup>

Although Title IX permits suits based on same-sex sexual harassment, this cause of action is not analogous to harassment based on sexual orientation. While the Supreme Court has never explicitly stated that sexual orientation discrimination is *not* protected, it did establish a sufficiently narrow definition of “sex” in *Oncale v. Sundowner Offshore Services, Inc.*<sup>101</sup> In *Oncale*, the Court placed a heavy burden on plaintiffs, requiring them to “prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimin[ation] . . . because of . . . sex.’”<sup>102</sup> The *Oncale* decision further legitimizes the “sexual orientation loophole.” Under the *Oncale* standard, if a male student bullied a gay male student by threatening to rape him, the victim could not prevail unless he could produce evidence that his harasser was also gay and was conveying an intention to force sexual intercourse upon him.<sup>103</sup> However, if the attacker was a straight male, with no intent to actually proposition or engage in sex with the victim, courts could find the harassment to be a threat motivated by anti-gay hostility; because the harassment was on the basis of sexual orientation (as opposed to “sex”), Title IX liability would not attach.<sup>104</sup> Similarly, common anti-

98. *Id.* at 12,039.

99. Weiner, *supra* note 92, at 208 (“[I]f plaintiffs argue harassment on the basis of sexual orientation, the inquiry often ends there.”).

100. *Cf. id.* at 214–15 (citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000)) (noting that the Seventh Circuit in *Spearman* “scour[ed] the facts for any intimation of anti-gay motives”).

101. 523 U.S. 75 (1998). Although *Oncale* was a Title VII employment sexual harassment case, courts have incorporated much of its reasoning into Title IX jurisprudence. *See, e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 64 (1999).

102. *Oncale*, 523 U.S. at 81 (alteration in original) (emphasis in original).

103. *See Brake, supra* note 101, at 64.

104. Such an interpretation initially appears to be at odds with the Department of Education Guidance and warrants clarification. *See supra* notes 96–98 and accompanying text. If a bully uses sexually charged language or threats to show disapproval of another student’s homosexuality, the “because of sex” requirement is not fulfilled. However, if a straight bully taunts a gay student with sexually suggestive gestures simulating intercourse, such as a performing a “mock rape,” a court could find the behavior to be of a “sexual nature” (even though the bully did not sexually desire his victim). Some courts have abolished this tenuous distinction by refusing to extend the logic of *Oncale* to Title IX

gay slurs, such as “faggot,” “homo,” or “dyke,” which only incidentally implicate sex and gender, would not fit the “because of sex” requirement.<sup>105</sup>

Because courts overwhelmingly take a disaggregating approach to Title IX and refuse to consider the interconnectedness of sex, gender, and sexual orientation,<sup>106</sup> Title IX jurisprudence is now firmly cemented around excluding protection for gay and lesbian students on the basis of their sexual orientation. When a gay student sues under Title IX for sexual orientation discrimination, the only hope for victory rests in a legal fiction created by a receptive court.<sup>107</sup>

Each time a gay student is harassed because of his sexual orientation, the bully communicates a message that a central element of the gay student’s identity is deficient, shameful, and worthy of ridicule. Current Title IX doctrine does not provide a bullied gay student with a forum to redress the grief he feels and refute the premise that his sexual orientation somehow devalues his existence. Because his claim is not actionable under Title IX, a gay victim of student-on-student harassment lacks the chance for catharsis and affirmation in a court of law. Only by obscuring the facts of his ordeal to remove the dimension of sexual orientation from a claim can a gay student prevail.

This limitation of Title IX places LGBT students in a bind: do they seek *recognition* or do they seek *results*? By including sexual orientation discrimination as a cause of action in their suit, gay students may inadvertently invoke the “sexual orientation loophole” and foreclose any chance for relief. To best ensure victory under Title IX, a gay student’s safest option is to retreat back into the “closet”<sup>108</sup> and sue the school on other grounds.<sup>109</sup> Although some courts question the role

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actions. *See, e.g.,* Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (allowing a claim for anti-gay bullying to proceed, even though the student’s complaint did not categorize the harassment as “‘sexual’ in nature”).

105. *But see* Bedell, *supra* note 25, at 846 (arguing that because “fag” is predominantly used to refer to men and “dyke” is reserved especially for women, gay-targeted verbal abuse is inherently linked to gender and should “constitute[] an impermissible form of sex discrimination”).

106. *See* Weiner, *supra* note 92, at 199, 208; *see also* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995) (conceptualizing sex, gender, and sexual orientation as the three interconnected endpoints of a triangle and arguing that discrimination based on one of these endpoints also implicates the other two).

107. *See supra* note 95 and accompanying text.

108. *See* Weiner, *supra* note 92, at 208.

109. *See* Erin Kate Ryan, Note, *A “Queer” by Any Other Name: Advocating a Victim-Centered Approach to Title VII and Title IX Same-Sex Sexual Harassment Claims*, 13 B.U. PUB. INT. L.J. 227, 238 (2004) (“[V]ictims of same-sex peer sexual harassment will have to import the dubious ‘sexual stereotyping’ theory . . .”). Although the theory of sex stereotyping may present some gay students with a viable cause of action, the potential for victory comes with a cost. First, to avoid the “sexual orientation loophole,” any sexual orientation discrimination encountered must be subsumed under the euphemism of gender stereotyping. Second, to plead the cause of action, a gay student must admit that some aspect of his behavior, his personality, or simply his existence does not conform to society’s stereotypical gender expectations. Making such an admission implicitly reinforces the stereotype that a gay male cannot be a “real man.” Forcing students to embrace gender roles

compassion should play in the legal process,<sup>110</sup> the law should not force a child to decide between receiving protection from bullying and remaining honest about his true identity.

While at least one commenter optimistically argues that progressive and conscientious judges should expand Title IX protections on the basis of sexual orientation,<sup>111</sup> most observers realize that “barring amendments to its language, Title IX will consistently be interpreted in future cases not to forbid discrimination on the basis of sexual orientation.”<sup>112</sup>

## 2. “Severe, Pervasive, and Objectively Offensive”

Legislative action might seem like the best strategy for enacting protection for LGBT students, but even amending Title IX to prohibit discrimination “on the basis of sex *or sexual orientation*” would not stem the tide of anti-gay bullying. Although nearly all gay and lesbian students experience verbal harassment based on their sexual orientation, only a minority suffer physical abuse.<sup>113</sup> While verbal abuse can have a monumentally detrimental impact on gay students, including tragic incidents of bullycide, Title IX offers little refuge from the effects of verbal harassment.

When authorizing a cause of action under Title IX for peer-on-peer student harassment, the Supreme Court specified that “damages are available only where the behavior is so *severe, pervasive, and objectively offensive* that it denies its victims the equal access to education that Title IX is designed to protect.”<sup>114</sup> Reigning in the scope of its decision, the *Davis* Court deliberately excluded “simple acts of teasing and name-calling among school children” from the list of actionable harassment.<sup>115</sup> Because a reductionist approach could categorize even the most virulent anti-gay slurs as “teasing” and “name-calling,” LGBT students in particular are at risk of courts overlooking or dismissing their harassment.<sup>116</sup>

A survey of Title IX cases involving gay or perceived-gay plaintiffs reveals that courts establish a high violence threshold for successful complaints and respond most favorably to cases involving egregious physical and sexual assaults.<sup>117</sup> The Sixth Circuit affirmed an award for a student named Alma whose classmates called her “German gay girl” and “Lezzie,” shoved her into walls, repeatedly touched her

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(or, alternately, requiring students to admit that they subvert conventional gender expression) in order to prevail in court seems in direct opposition to the desire for gender equality that originally motivated Congress to enact Title IX. *See supra* text accompanying note 77.

110. *See, e.g.,* Republic Fed. Bank v. Doyle, 19 So. 3d 1053 (Fla. Dist. Ct. App. 2009).

111. *See* Weiner, *supra* note 92, at 232 (arguing for a more “holistic” interpretation of Title IX but offering little indication that courts are receptive to amending their analysis).

112. Bedell, *supra* note 25, at 844.

113. *See supra* notes 16, 26 and accompanying text.

114. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999) (emphasis added).

115. *Id.*

116. *Cf.* Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN’S L.J. 125, 128 (2000) (“While ‘authorities react instantly to racist terms’ and profanity, 97% of anti-gay slurs go unchallenged.” (quoting Ann Rostow, *Hostile Hallways: As Schools Ignore Antigay Harassment, Some Lesbians Are Fighting Back*, GIRLFRIENDS, June 1999, at 30, 31)).

117. *See generally* FIFTEEN REASONS, *supra* note 34.



breasts and buttocks, and once stabbed her in the hand with a pen.<sup>118</sup> In the worst assault, two bullies pinned her to the wall and removed her shirt, while another boy unzipped his pants and announced his intention to rape her; Alma was spared only after another student intervened.<sup>119</sup> A California court allowed a Title IX claim to proceed where student “O.H.” was taunted with “queer” and “faggot” and was forced to leave the school campus at knife-point by a bully who raped him three times.<sup>120</sup> A Nevada court denied a summary judgment motion by defendant-school administrators in a case where a student was bombarded with anti-gay slurs, punched in the face, and lassoed around the neck by bullies who threatened to drag him behind a truck.<sup>121</sup>

Although a number of successful Title IX suits included slurs against the victim, never has a court held that anti-gay verbal harassment alone constitutes “severe, pervasive, and objectively offensive” conduct.<sup>122</sup> Since Title IX cannot protect students based on their sexual orientation but only as victims of egregious sexually charged violence, a vast majority of bullied gay plaintiffs cannot rely on Title IX for relief. As an avenue for combating homophobic verbal harassment, Title IX should be abandoned. There must be a better way to protect vulnerable gay youth.

### III. STATE ANTI-BULLYING STATUTES: AN EFFECTIVE LOCALIZED STRATEGY?

Because Title IX cannot adequately and dependably address the type of bullying encountered by the vast majority of LGBT students, an alternate method is required. State anti-bullying statutes, which enable schools to deal with more routine, mundane verbal harassment, might at first glance seem to provide such relief. Ultimately, however, the state-by-state piecemeal approach is also flawed. Such pessimism is not to say that anti-bullying legislation lacks any merit. Studies report that gay students who attend schools with LGBT-inclusive anti-bullying policies experience less harassment based on their sexual orientation.<sup>123</sup> The difficulty with reliance on gay-inclusive state anti-bullying statutes lies in actually setting these policies in place and ensuring their enforcement.

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118. *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 256 (6th Cir. 2000); FIFTEEN REASONS, *supra* note 34.

119. *Vance*, 231 F.3d at 256. The jury awarded Vance \$220,000. *Id.* at 258.

120. *O.H. v. Oakland Unified Sch. Dist.*, No. C-99-5123 JCS, 2000 WL 33376299, at \*1, \*12 (N.D. Cal. April 14, 2000). The case later settled for a confidential monetary amount. FIFTEEN REASONS, *supra* note 34.

121. *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1069 (D. Nev. 2001). The case settled in 2002 for nearly one-half million dollars. FIFTEEN REASONS, *supra* note 34.

122. Although much of the bullying perpetrated against gay and perceived-gay students never reaches the level of egregious physical or sexual assault required for a Title IX victory, brutal verbal bullying can provoke suicide—itsself an invidious brand of violence. *See supra* Part I. The resolution of the suits brought by parents of bullycide victims Eric Mohat and Jaheem Herrera may determine what school liability, if any, results from anti-gay verbal harassment that drives a student to commit suicide. *See supra* notes 6, 69 and accompanying text.

123. HARRIS INTERACTIVE & GLSEN, *supra* note 17, at 56.

To date, forty-five states have passed anti-bullying legislation.<sup>124</sup> However, only eleven states have laws that specifically provide protection based on sexual orientation.<sup>125</sup> Although a promising start, the coverage provided by these laws is simply not expansive enough to protect a majority of gay students.<sup>126</sup> Successful enactment of LGBT-inclusive anti-bullying legislation has largely been restricted to the Northeast, Great Lakes, and West Coast, leaving wide swaths of the Midwest, South, and Mountain West uncovered.<sup>127</sup> Although many states have embraced the practice of passing anti-bullying laws, the growing trend is to pass generic

124. *State Laws on Bullying*, STOP BULLYING NOW!, [http://stopbullyingnow.hrsa.gov/adults/state-laws/StatLaw\\_Graphic.pdf](http://stopbullyingnow.hrsa.gov/adults/state-laws/StatLaw_Graphic.pdf) (last updated October 2010); *see also State-by-State: Anti-Bullying Laws in the U.S.*, FAMILY EQUALITY COUNCIL, [http://www.familyequality.org/site/PageServer?pagename=policy\\_state](http://www.familyequality.org/site/PageServer?pagename=policy_state) (last updated July 2010).

125. States with comprehensive anti-bullying laws that prohibit bullying based on sexual orientation include Illinois, Iowa, Maryland, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, and Washington. *See* 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West Supp. 2010); IOWA CODE ANN. § 280.28 (West Supp. 2010); MD. CODE ANN., EDUC. § 7-424.1 (LexisNexis Supp. 2008); N.H. REV. STAT. ANN. § 193-F:2 (Supp. 2010); N.J. STAT. ANN. §§ 18A:37-14, -15 (West Supp. 2010); N.M. CODE R. § 6.12.7 (LexisNexis 2006); N.Y. EDUC. LAW §§ 11-12 (McKinney, Westlaw through 2010 Leg. Sess.); N.C. GEN. STAT. ANN. § 115C-407.15 (West 2010); OR. REV. STAT. ANN. §§ 339.351, .356 (2009); VT. STAT. ANN. tit. 16, §§ 11, 565 (2004 & Supp. 2009); WASH. REV. CODE ANN. §§ 9A.36.080(3), 28A.300.285 (West 2006 & Supp. 2010). Additionally, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Wisconsin, and the District of Columbia prohibit schools from discriminating against LGBT students. *See* CAL. EDUC. CODE § 220 (West 2002); COLO. REV. STAT. § 24-34-601 (2008); CONN. GEN. STAT. ANN. § 10-15c (West 2002); ME. REV. STAT. ANN. tit. 5, § 4602 (West Supp. 2009); MASS. GEN. LAWS ANN. ch. 76 § 5 (LexisNexis Supp. 2010); MINN. STAT. ANN. § 363A.13 (West 2004); WIS. STAT. ANN. § 118.13 (West Supp. 2009); D.C. CODE § 2-1402.41 (2007).

126. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, STATE OF THE STATES 2004 (2004). GLSEN estimates that 12.1 million students are covered by LGBT-inclusive anti-bullying state laws and an additional 5.1 million students in other states are covered by LGBT-inclusive anti-bullying policies at the local level. However, in a country with an estimated school age population of 47.7 million, that leaves over two-thirds of children unprotected based on their sexual orientation. *Id.*

127. *See, e.g.*, KOSCIW ET AL., *supra* note 16, at 106. Students in many southern states are additionally stigmatized by laws that prohibit the positive portrayal of homosexuality in schools. *Id.* at 133 n.130. *See also* WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 362-71 (1999) (detailing state-by-state “[n]o promotion of homosexuality” education laws). A school in England has taken the opposite approach by teaching its students about the biographies and accomplishments of gay historical figures. Jessica Shepherd & Sue Learner, *School's Gay Lessons Cut Homophobic Bullying*, *GUARDIAN* (London), Oct. 26, 2010, at 5. Teachers claim that the awareness raised by these lessons has virtually eradicated anti-gay bullying at the school. *Id.* In a similar effort to combat bullying, California state senator Mark Leno has introduced a bill that would require public school textbooks to include material on the historic contributions of gays and lesbians. Susan Ferriss, *New Bill Requires Gay History in Textbooks to Fight Bullying*, *SACRAMENTO BEE* (Dec. 13, 2010, 2:31 PM), <http://blogs.sacbee.com/capitol/alert/latest/2010/12/sen-leno-hopes-gay-history-bil.html>. A similar measure was approved in 2006 but was vetoed by Governor Schwarzenegger. *Id.* California law currently requires textbooks to include information about the accomplishments of women and ethnic minorities. *Id.*

legislation that does not specifically prohibit bullying based on sexual orientation or other minority characteristics.<sup>128</sup> In order to ensure that all students are clearly protected, states need *comprehensive* anti-bullying statutes, that is, legislation that specifically enumerates sexual orientation and gender identity as characteristics upon which students shall not be harassed.

“Safe schools” advocates and legal commentators have recognized the recent emergence of legislative battles over LGBT-inclusive laws,<sup>129</sup> and many support the presence of sexual orientation-specific language in anti-bullying legislation.<sup>130</sup> Much of the opposition to LGBT-inclusive bills comes from activists on the religious right, who view the protection of gay and gay-perceived children as a component of the “homosexual agenda.”<sup>131</sup>

A recent showdown in North Carolina over an anti-bullying bill that enumerated protections based on specific characteristics, including sexual orientation, reflected the difficulty associated with passing a comprehensive law.<sup>132</sup> North Carolina House Republicans criticized the bill for providing “special” protections to certain categories of victims and sought to attach unpalatable amendments in order to derail the bill.<sup>133</sup> Democratic Representative Rick Glazier, the bill’s chief sponsor, recognized that Republican opposition stemmed mainly from the inclusion of protection for LGBT students, claiming that “[n]o one would have voted against a

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128. KOSCIW ET AL., *supra* note 16, at 130 (“[M]ore states have passed generic laws in recent years than have passed comprehensive ones.”).

129. *Id.* Even comprehensive statutes already in force are not immune from attack. In February 2010, Iowa House Republicans introduced a bill that would delete sexual orientation and gender identity from the list of traits protected by the state’s anti-bullying law. H.R. 2291, 2010 Leg., 83d Sess. (Iowa 2010); *see also* Jason Hancock, *GOP Lawmakers Want to Exclude Gay Students from Anti-bullying Bill*, IOWA INDEP. (Feb. 8, 2010, 1:15 PM), <http://iowaindependent.com/27342/gop-lawmakers-want-to-exclude-gay-students-from-anti-bullying-bill>.

130. NAT’L SAFE SCH. P’SHP, *supra* note 11, at 3; Kosse & Wright, *supra* note 87, at 71 (“At a minimum, [anti-bullying] statutes should require the anti-harassment policies to prohibit harassment based on the victim’s actual or perceived . . . sexual orientation.”). *But see* Brenda High, *Making the Grade: How States Are “Graded” on the Anti Bullying Laws*, BULLY POLICE USA, <http://www.bullypolice.org/grade.html>. High, an anti-bullying activist and mother of a bullycide victim, rates the provisions of state anti-bullying statutes and argues “[t]here *should not* be any major emphasis on defining victims” in a properly drafted law. *Id.* (emphasis in original). High warns that “[d]efining victims will slow the process of lawmaking, [thus] dividing political parties who will argue over which victims get special rights over other victims.” *Id.*

131. *See, e.g.*, Electa Draper, *Focus Points to Bully Pulpit: The Ministry Says Schools’ Policies Are Quietly Promoting a Gay Agenda*, DENVER POST, Aug. 29, 2010, at B-01; Josh Montez, *Alabama’s Anti-Bullying Law Could Further Gay Agenda*, FOCUS ON THE FAMILY (Sept. 28, 2009), <http://www.citizenlink.com/2009/09/citizenlink-alabamas-anti-bullying-law-could-further-gay-agenda> (“Parents should watch out for attempts to mandate special protections for ‘gender identity’ and ‘sexual orientation’—which can pave the way for pro-gay curriculum and mandatory ‘diversity’ training.”).

132. Lynn Bonner, Jennifer Klahre & Luci Chavez, *Bullying Bill Passes in Tight Vote: Effort to Add Punishment Fails*, CHARLOTTE OBSERVER, June 24, 2009, at 1B.

133. *Id.*

bill with enumeration if it didn't have sexual orientation in it."<sup>134</sup> After vigorous floor debate, the House Speaker cast a tie-breaking vote, sending the bill to Governor Beverly Perdue, who signed the bill.<sup>135</sup> A similar attempt in Minnesota to increase the effectiveness of existing anti-bullying legislation (which already included protection based on sexual orientation) met with the opposite fate.<sup>136</sup> Although Democratic legislators were able to overcome Republican opposition, the governor vetoed the bill.<sup>137</sup>

Identity is important. Contrary to the complaint of activist critics, comprehensive anti-bullying legislation does not restrict its protection to the vulnerable groups specifically enumerated in the statute.<sup>138</sup> Bills, including the one passed in North Carolina, are carefully drafted to enumerate protected characteristics, without excluding from protection those who do not meet the stated descriptions.<sup>139</sup> Victim-specific clauses are written to be illustrative, not limitative.<sup>140</sup> Acknowledging the reality that students who belong to a minority or a disfavored class will often receive the brunt of harassment, comprehensive anti-bullying bills "focus[] attention on children who are the most likely targets."<sup>141</sup> Additionally, the protections afforded by LGBT-inclusive laws are not limited to gay students alone; they protect *all* students from being targeted with anti-gay slurs and harassment, regardless of their actual sexual orientation.<sup>142</sup>

Provisions enumerating protection based on sexual orientation are necessary and should be embraced by anti-bullying advocates. First, anti-harassment policies send an important message about what a community values. Children encounter homophobic slurs in all types of speech, from television, video games, and rap

134. Matt Comer, *Perdue to Sign Gay-Inclusive Bully Bill*, Q-NOTES (June 22, 2009), <http://www.q-notes.com/2840/perdue-to-sign-bully-bill>. Another supporter of the bill remarked that "[t]o oppose this bill because you object to one of those categories is to fight the culture wars on the back of a child." Killian Melloy, *NC Approves Anti-Bullying Law, Protects Gay Students*, EDGE (June 23, 2009), <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=92898>.

135. Bonner et al., *supra* note 132; Matt Comer, *Perdue Signs Two Controversial, Historic Bills*, Q-NOTES (July 11, 2009), <http://goqnotes.com/3035/perdue-signs-two-controversial-historic-bills>.

136. John Croman, *St. Paul Considers Domestic Partners Registry*, KARE (June 23, 2009), [http://www.kare11.com/news/news\\_article.aspx?storyid=817374](http://www.kare11.com/news/news_article.aspx?storyid=817374).

137. *Id.* ("Governor Pawlenty has made it very clear that anything that benefits the lesbian, gay, bisexual or transgender community is going to be vetoed no matter what.")

138. See, e.g., Erik Eckholm, *In Schools' Efforts To End Bullying, Some See Agenda*, N.Y. TIMES, Nov. 7, 2010, at A21.

139. See, e.g., N.C. GEN. STAT. ANN. § 115C-407.15 (West 2009) ("Bullying or harassing behavior *includes, but is not limited to* . . .") (emphasis added).

140. E.g., *Bloate v. United States*, 130 S. Ct. 1345, 1363 (2010) (Alito, J., dissenting) (noting that provisions "preceded by the phrase 'including but not limited to[]' are illustrative, not exhaustive"); cf. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) ("As the use of the term 'such as' confirms, the list is illustrative, not exhaustive.")

141. Bonner et al., *supra* note 132.

142. See, e.g., N.J. STAT. ANN. § 18A:37-14 (West 2007) ("'[B]ullying' means any . . . act . . . motivated either by any *actual or perceived characteristic*, such as . . . sexual orientation . . .") (emphasis added).

music to political stump speeches and church sermons.<sup>143</sup> Because of the ubiquity of anti-gay remarks in popular culture, many children think that anti-gay expressions are acceptable in polite society.<sup>144</sup> An LGBT-inclusive anti-bullying law will alert bullies that, regardless of what they may hear in the outside world, anti-gay language will not be tolerated within the walls of the school. Second, comprehensive legislation puts teachers and school administrators on notice that, regardless of their personal views on homosexuality (or any other protected characteristic), they are required by law to create a safe learning environment for children and intervene when that environment is threatened by anti-gay bullying.<sup>145</sup> Third, and perhaps most importantly, anti-bullying statutes alert gay and lesbian students that they do not have to suffer harassment in silence. Because of the stigma attached to homosexuality, LGBT students often feel (and are sometimes explicitly told) that they deserve to be vilified by bullies.<sup>146</sup> Because generic anti-bullying statutes contain no mention of sexual orientation, gay students may not understand that they, too, are covered.<sup>147</sup> Comprehensive policies put gay students, teachers, and bullies on alert: if a victim of harassment can mount the courage to report it, their concern will be sincerely and respectfully addressed.<sup>148</sup>

Courts and commentators often refer to the states as constitutional “laboratories” where new policies and strategies can be put to the test.<sup>149</sup> Under this theory, states

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143. See, e.g., *Talk of the Nation: What's Life Like for Gay Kids in Public Schools?* (NPR radio broadcast June 17, 2010). A survey by the Public Religion Research Institute found that two-thirds of Americans believe that the negative messages about homosexuality conveyed by churches and other houses of worship are at least partially responsible for spurring gays and lesbians to commit suicide. Richard Allen Greene, *Churches Contribute to Gay Suicides, Most Americans Believe*, CNN (Oct. 21, 2010, 3:14 PM), <http://religion.blogs.cnn.com/2010/10/21/churches-contribute-to-gay-suicides-most-americans-believe>. Prompted by the suicide of bullied Indiana teen Billy Lucas, advice columnist Dan Savage created the “It Gets Better Project” to counteract the harassment and negativity experienced by vulnerable gay youth. Tara Parker-Pope, *Showing Gay Teenagers a Happy Future*, N.Y. TIMES (Sept. 22, 2010, 2:46 PM), <http://well.blogs.nytimes.com/2010/09/22/showing-gay-teens-a-happy-future>. The Project is centered around a series of YouTube videos featuring people in the gay community who all convey a similar message: “life really does get better after high school.” *Id.* Because many gay youth encounter only negative portrayals of homosexuality in their daily lives at home and in school, the aim of the series is to allow gay adults to communicate directly with bullied gay youth by discussing sexual orientation in a positive light, sharing personal survival stories, and spreading messages of hope. *Id.* The Project’s ultimate goal is to provide bullied gay teens with an alternative to suicide. *Id.*

144. See, e.g., Cayne, *supra* note 72, at 80 (noting that gays and lesbians can still be “called out” on television).

145. See, e.g., KOSCIW ET AL., *supra* note 16, at 129.

146. See *supra* text accompanying note 32.

147. See, e.g., KOSCIW ET AL., *supra* note 16, at 129.

148. *Id.* at 131–32. Compared to states with generic statutes, in states with specific gay-inclusive anti-bullying legislation, students report hearing fewer anti-gay slurs, school staff is more likely to intervene when a student makes a homophobic remark, and gay students report lower levels of harassment based on sexual orientation. *Id.*

149. E.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may, if its citizens choose, serve as a laboratory;

have experimented with a variety of strategies for curtailing peer-on-peer student harassment. Eleven states have decided that the best method for ending this abuse is to enact state anti-bullying statutes.<sup>150</sup> Now that the tests have been run at the state level, Congress should take over the process and implement a national anti-bullying policy. Only a comprehensive national law can effectively stem the tide of the bullycide epidemic affecting American students.

#### IV. NATIONAL ANTI-BULLY LEGISLATION: AN IDEA WHOSE TIME HAS COME

One commentator has recognized that federal anti-bullying “legislation creating an explicit sexual orientation category . . . would close the sexual orientation loophole, delegitimizing anti-gay discrimination and allowing legal action on many forms of anti-gay discrimination at the federal level.”<sup>151</sup> An LGBT-inclusive federal anti-bullying statute could offer the best of both worlds and remedy the defects that plague contemporary approaches to combating anti-gay harassment. First, accounting for Title IX’s primary weakness, a federal law would specifically enumerate protection for sexual orientation, in addition to a number of other targeted characteristics. Second, a federal law would by definition create a blanket policy for the entire nation, whereas the reach of current state statutes is limited to coastal states and progressive portions of the Midwest. Third, while the enforcement of state laws is hampered by a severe lack of funding and data, a federal anti-bullying law would have access to a supply of both. This exercise demonstrates that an effective federal anti-bullying law is easy to imagine—the real inquiry is whether it could actually be enacted.

##### A. Congressional Involvement in Education

Although conventional wisdom describes education as a local issue,<sup>152</sup> one cannot underestimate the role played by the federal government. The No Child Left Behind Act (NCLB), a “signature legislative accomplishment[.]” of Republican George W. Bush’s presidency, injected an enormous amount of federal funding and oversight into the realm of education.<sup>153</sup> Between 2002 and 2006 alone, NCLB resulted in an additional \$120 billion in federal spending on education.<sup>154</sup> The

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and try novel social and economic experiments . . . .”); *see also* *Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (recognizing that states have “a constitutional right to experiment with a variety of different programs to promote educational opportunity”).

150. *See supra* notes 125–26 and accompanying text. Studies report that anti-bullying efforts are generally successful. In states or school districts with LGBT-inclusive anti-bullying policies, students hear fewer homophobic remarks and are less likely to be harassed because of their sexual orientation. HARRIS INTERACTIVE & GLSEN, *supra* note 17, at 56.

151. Weiner, *supra* note 92, at 218 (acknowledging the argument that “such an approach is a better solution than shoe-horning sexual orientation into current law,” while nonetheless favoring an expansive reading of Title IX to redress sexual orientation harassment).

152. *See* U.S. DEP’T OF EDUC., *supra* note 10 (categorizing education in America as “primarily a State and local responsibility”).

153. Julian E. Zelizer, *5 Myths About George W. Bush*, WASH. POST, Nov. 7, 2010, at B3.

154. Editorial, *Some Students Left Behind*, WALL ST. J., Apr. 25, 2005, at A14.

American Recovery and Reinvestment Act of 2009 provided the U.S. Department of Education with an additional \$96.8 billion in discretionary funding.<sup>155</sup>

Additionally, because it impacts the security of children across America, school safety should be considered a national priority. Congress has repeatedly shown a willingness to intervene in educational matters when school safety is at issue. Rather than demonstrating a reluctance to impose federal will in matters of education, Congress has embraced the opportunity. For example, under the Gun-Free Schools Zone Act of 1990,<sup>156</sup> Congress made it unlawful “for any individual knowingly to possess a firearm . . . [in] a school zone.”<sup>157</sup>

In *United States v. Lopez*,<sup>158</sup> the Supreme Court ruled that in passing the Gun-Free Schools Zone Act, Congress exceeded its authority under the Commerce Clause.<sup>159</sup> Finding that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce,” the Supreme Court declared the law unconstitutional.<sup>160</sup> In order to create the missing “nexus” between guns and economic activity, Congress later amended the law to prohibit possession of “a firearm that has moved in or that otherwise affects interstate or foreign commerce.”<sup>161</sup> Because it affects interstate commerce, federal anti-bullying legislation would be a constitutional exercise of Commerce Clause authority. As it did with the corrected Gun-Free School Zone Act, Congress could find that “the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country” which “has an adverse impact on interstate commerce . . . of the United States.”<sup>162</sup> The Court would likely be receptive to this argument, having itself already declared education to be central to the economic health of the nation.<sup>163</sup>

### B. A National Perspective on LGBT Issues

While a sexual orientation-inclusive anti-bullying bill is not truly a “gay” issue,<sup>164</sup> national reception to other LGBT causes may give some indication of the possibility for success. For example, although polling data indicates that the

155. U.S. DEP’T OF EDUC., *supra* note 10.

156. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

157. *Id.*

158. 514 U.S. 549 (1995).

159. *Id.* at 567.

160. *Id.*

161. 18 U.S.C. § 922(q)(2)(A) (2006).

162. 18 U.S.C. § 922(q)(1)(F)–(G).

163. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (finding that education “is a principal instrument . . . in preparing [a child] for later professional training”).

164. See *supra* notes 138–42 and accompanying text; see also Dan Ring, *Sirdeaner Walker of Springfield, 2 Other Mothers, Urge Mass. Lawmakers to Approve Anti-Bullying Proposal*, MASS LIVE (Nov. 17, 2009), [http://www.masslive.com/news/index.ssf/2009/11/sirdeaner\\_walker\\_of\\_springfiel.html](http://www.masslive.com/news/index.ssf/2009/11/sirdeaner_walker_of_springfiel.html) (“I know now that bullying is not a race issue or a religious issues [sic] and it’s not a gay issue or a straight issue. . . . It’s a safety issue.” (quoting a mother whose thirteen-year-old son was a victim of bullycide)).

national electorate is divided over granting marriage equality to gays and lesbians,<sup>165</sup> American voters appear much more receptive to a host of other equality and antidiscrimination policies. Americans overwhelmingly supported the repeal of “Don’t Ask, Don’t Tell,” the policy that prevented gay and lesbian soldiers from serving openly in the military.<sup>166</sup> Voters also support laws that would prohibit employment discrimination based on sexual orientation.<sup>167</sup> Even civil unions, a corollary to marriage equality, have gained acceptance in recent years.<sup>168</sup> The recent repeal of “Don’t Ask, Don’t Tell” and the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which added sexual orientation to the list of designated hate crime modifications, shows that Congress has the political will and the votes to pass LGBT-inclusive policies.<sup>169</sup> Given these facts, it seems possible that the more “cosmopolitan” gathering of national legislators would be likely to pass a federal LGBT-inclusive anti-bullying bill, even if their insular counterparts at the state level would not necessarily enact such a policy.<sup>170</sup> Ultimately, senators and representatives would be wise to view a comprehensive anti-bullying bill as protecting children of all races, genders, religions, and sexual orientation, but most importantly as a bill protecting *all children*.

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165. See, e.g., Andres Gellman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 21, 2010, at WK3, available at [http://www.nytimes.com/2010/08/22/weekinreview/22gay.html?\\_r=2](http://www.nytimes.com/2010/08/22/weekinreview/22gay.html?_r=2) (noting that, for the first time, a slight majority of Americans surveyed favor marriage equality).

166. Carl Hulse, *Senate Ends Military Ban on Gays Serving Openly*, N.Y. TIMES, Dec. 19, 2010, at A1; Ed O’Keefe & Jennifer Agiesta, *75% Back Letting Gays Serve Openly*, WASH. POST, Feb. 12, 2010, at A25, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/11/AR2010021104873.html>.

167. See, e.g., *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/laws\\_and\\_elections/enda.asp](http://www.hrc.org/laws_and_elections/enda.asp).

168. Jennifer Agiesta, *Post-ABC Poll: Views on Gay Marriage Steady, More Back Civil Unions*, WASH. POST (Feb. 12, 2010, 6:00 AM), [http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc\\_poll\\_views\\_on\\_gay\\_mar.html?wprss=behind-the-numbers](http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc_poll_views_on_gay_mar.html?wprss=behind-the-numbers) (finding that 66% of Americans surveyed favored legalizing civil unions).

169. Pub. L. No. 111-84, § 4707, 123 Stat 2835 (2009). Congress is able to implement policies encompassing the entire nation that could not be passed individually by legislatures in all fifty states. For example, at the time of passage of the Matthew Shepard Hate Crimes Act, only thirty states and the District of Columbia had hate crime legislation that covered sexual orientation. *State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf).

170. Although this Note contemplates a comprehensive federal anti-bullying bill as it would relate to sexual orientation, other characteristics would also be included in the proposed law. This Note does not single out gay and lesbian students as deserving of special accommodation or extra protection. Rather, it argues that they should be afforded the same protections provided to other students, especially in light of the disproportionate harassment faced by LGBT students. See *supra* Part I. This Note focuses on sexual orientation because, without pressure from LGBT advocates, it is the category most likely to be omitted from a national anti-bullying law. See, e.g., NAT’L SAFE SCH. P’SHIP, *supra* note 11, at 8 n.13 (noting that federal law already prohibits harassment of students based on race, color, national origin, sex, and disability).



*C. Safe Schools Improvement Act of 2009*<sup>171</sup>

Shortly after the deaths of bullycide victims Carl Walker-Hoover and Jaheem Herrera, California Democratic Representative Linda Sanchez introduced the Safe Schools Improvement Act of 2009 (SSIA).<sup>172</sup> The anti-bullying SSIA is fully comprehensive and would “include[] conduct that is based on a student’s *actual or perceived*” race, color, national origin, sex, disability, sexual orientation, gender identity, religion, or “any other distinguishing characteristics that may be defined by a State or local educational agency.”<sup>173</sup> Additionally, the SSIA amends the Safe and Drug-Free Schools and Communities Act to specifically prohibit bullying and harassment against the enumerated groups.<sup>174</sup> By increasing the scope of the bill beyond mere “violence,” the SSIA will protect students from verbal abuse as well as physical abuse, thus avoiding one of the pitfalls that reduces the effectiveness of Title IX.<sup>175</sup>

The SSIA would also require states to use the grants they receive under the Safe and Drug-Free Schools and Communities Act to collect and report incidents of bullying and harassment, a task that state anti-bullying statutes are often unequipped to do.<sup>176</sup> To increase awareness of anti-bullying policies, the SSIA would require schools to provide “annual notice to parents and students describing the full range of prohibited conduct” and to detail the “grievance procedures for students or parents that seek to register complaints” about incidents of bullying.<sup>177</sup>

To its detriment, the SSIA does not create a direct cause of action that would allow bullied students to sue the school directly, as is done with Title IX. Instead, the SSIA routes their complaints through an administrative review procedure that is usually established at the discretion of the local school board.<sup>178</sup> A private right of action is not necessarily a requirement for effective anti-bullying legislation, but it does provide students with an important tool to compel schools to take harassment seriously. While the SSIA would not alleviate all the loopholes with the Title IX and state statute approaches, it is still a promising start. Perhaps most importantly, the comprehensive LGBT-inclusive nature of the bill will send the symbolic message that Congress values *all* children, gay or straight, and is dedicated to passing laws that will protect them from harm.<sup>179</sup>

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171. H.R. 2262, 111th Cong. (2009).

172. *GLSEN Lauds Introduction of Safe Schools Improvement Act*, H.R. 2262, GLSEN (May 5, 2009), <http://www.glsen.org/cgi-bin/iowa/all/news/record/2432.html>.

173. H.R. 2262 § 2(g)(4)(B)(i)(I)–(VIII) (emphasis added). This definition includes enumerated characteristics, but does not limit protection to them, and would protect both gay and gay-perceived students. *See supra* notes 139–42 and accompanying text.

174. *Id.* § 2(a).

175. *See supra* Part II.B.2.

176. H.R. 2262 § 2(e).

177. *Id.* § 2(c)(2)(C).

178. *See, e.g.*, Kosse & Wright, *supra* note 87, at 66.

179. The bill garnered 125 cosponsors and enjoyed bipartisan support. H.R. 2262 Bill Summary & Status, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.2262>. It was referred to the House Subcommittee on Early Childhood, Elementary, and Secondary Education. *Id.* No further action was taken in the House. The SSIA was introduced in the

*D. Student Non-Discrimination Act of 2010*<sup>180</sup>

The Student Non-Discrimination Act of 2010 (SNDA) was introduced in the House of Representatives by Democratic Representative Jared Polis of Colorado on January 27, 2010.<sup>181</sup> The bill opens with powerful legislative findings that testify to the pervasive nature of bullying in schools.<sup>182</sup> In accord with the results of numerous studies, the bill finds that the targeted bullying of LGBT students in particular represents “a distinct and especially severe problem.”<sup>183</sup> It also notes that the inordinate amount of bullying “has contributed to high rates of absenteeism, dropout, adverse health consequences, and academic under-achievement among LGBT youth.”<sup>184</sup> Finally, the SNDA also acknowledges that while federal protections prohibit discrimination on the basis of race, color, sex, religion, disability, and national origin, no comparable protections exist for sexual orientation and gender identity.<sup>185</sup>

Although the SNDA shares the same goals as the SSIA, this bill takes a distinct approach toward combating anti-gay bullying. According to the bill’s sponsor, the aim of the SNDA is to put LGBT students “on equal footing with their peers” by closing the gaps in student antidiscrimination law left by Titles VI and IX.<sup>186</sup> The SNDA is modeled as a sexual orientation analog to Title IX and mirrors the language at the heart of Title IX. The SNDA provides that

*[n]o student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.*<sup>187</sup>

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Senate by Democrat Robert Casey, Jr. of Pennsylvania on August 5, 2010. S. 3739, 111th Cong. (2010). It had twelve cosponsors and was referred to the Senate Committee on Health, Education, Labor, and Pensions. S. 3739 Bill Summary & Status, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.3739:>.

180. H.R. 4530, 111th Cong. (2010).

181. *Id.* The bill received bipartisan support and had 125 cosponsors. H.R. 4530 Bill Summary & Status, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.4530:>. It was referred to the House Subcommittee on Early Childhood, Elementary, and Secondary Education and the House Subcommittee on Higher Education, Lifelong Learning, and Competitiveness. *Id.* The SNDA was introduced in the Senate by Democrat Al Franken of Minnesota on May 20, 2010. S. 3390, 111th Cong. (2010). It had twenty-five cosponsors and was referred to the Senate Committee on Health, Education, Labor, and Pensions. S. 3390 Bill Summary & Status, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.3390:>.

182. Student Non-Discrimination Act of 2010 § 2(a).

183. *Id.* § 2(a)(2).

184. *Id.* § 2(a)(3).

185. *Id.* § 2(a)(6).

186. Press Release, Congressman Jared Polis, 2nd Dist. of Colo., Polis Seeks to Protect LGBT Students from Discrimination in Schools Through Introduction of Student Non-Discrimination Act (Jan. 27, 2010), *available at* <http://polis.house.gov/News/DocumentSingle.aspx?DocumentID=167989>.

187. H.R. 4530 § 4(a), 111th Cong. (2010) (emphasis added to show overlap with Title IX); *see supra* text accompanying note 78.

The SNDA also defines harassment to mean “conduct that is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from a public school education program or activity, or to create a hostile or abusive educational environment at a public school including acts of verbal, nonverbal, and physical aggression.”<sup>188</sup>

The type of harassment faced by many LGBT students seems to clearly limit their ability to participate in the education experience,<sup>189</sup> at least according to the plain meaning of the phrase. However, the bill’s definition of harassment also contains language reminiscent of the Supreme Court’s “severe, pervasive, and objectively offensive” standard, raising the possibility that courts may find non-physical harassment insufficient to meet such an exacting standard.<sup>190</sup> Similar to the difficulties potentially faced in amending Title IX to cover sexual orientation, the SNDA also may not properly address the verbal abuse that commonly leads to bullying.

Despite its flaws, the SDNA possesses a notable strength: like Title IX (but unlike the SSIA), a violation of the Act provides aggrieved students with a private cause of action to bring suit against their negligent school in federal court.<sup>191</sup> The SNDA provides for a host of remedies, including equitable relief, compensatory damages, and attorney’s fees.<sup>192</sup> By giving victimized students the power to enforce the SDNA in federal court, the bill provides a powerful tool to ensure that schools comply with its nondiscrimination policies or face harsh adverse judgments.

#### CONCLUSION

However well-crafted anti-bullying laws might be, the ultimate goal of these efforts is not to obtain tort judgments for the families of bullying victims or emerge victorious from the negotiation table. The real aim is to use these programs to prevent verbal harassment, physical abuse, and bullycidings from ever occurring. Court verdicts alone will not bring an end to bullying. But through the education and awareness these verdicts produce, incidents of bullying can be targeted, reduced, and perhaps one day eliminated. The *Brown* Court recognized education as “the very foundation of good citizenship.”<sup>193</sup> The Court, concerned with the stark inequalities in the public school system, was “doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>194</sup> Students targeted by anti-gay bullying were not who the Court had in mind when it wrote those words, yet the statement rings equally true today.<sup>195</sup>

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188. H.R. 4530 § 3(3).

189. See *supra* notes 16–25 and accompanying text.

190. See *supra* Part II.B.2.

191. H.R. 4530 §§ 6(a), 7(a).

192. *Id.* §§ 6(a), 8.

193. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

194. *Id.* (“Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).

195. Fifty years after *Brown*, the United States Departments of Justice and Education shared a similar concern that “[f]or youth to fulfill their potential in school, schools should be safe and secure places for all students.” JILL F. DEVOE, KATHARIN PETER, PHILLIP

Surely the Court would not endorse the exclusion of gay and gay-perceived students from the benefit of a public education. If peer-on-peer harassment is to be eliminated so that all students can have an opportunity to succeed, schools must be where students learn one simple lesson: bullying of anyone, for any reason, is wrong.

