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SPELLING OUT LGBT: ENUMERATING SEXUAL ORIENTATION IN VIRGINIA'S ANTI-BULLYING LAW

INTRODUCTION

“Faggot.” It was the word that followed fifteen-year-old gay student Justin Aaberg through the halls of his Minnesota high school.¹ Through his middle school years and the beginning of high school, students bullied Justin by pushing him into lockers, telling him he was going to hell for being gay, and even sexually assaulting him.² Justin hoped that the bullying would diminish as he progressed into high school but found that the torment continued, aided by adults and local churches.³ Although he had come out to his supportive mother, Justin felt as though he could not burden his family with his issues at school while the family struggled through bankruptcy and home foreclosure.⁴ Finally, the bullying and pressure became too much for Justin—his mother found him hanging in his room the summer after his freshman year of high school.⁵ Justin’s death was one of nine suicides that occurred in his school district in a less than two-year period.⁶ Four of those students were openly lesbian, gay, bisexual or transsexual (“LGBT”), or perceived to be LGBT, and all were bullied.⁷

Bullying has long been a problem in American schools. Whether it is elementary-age students teasing each other, or high school students becoming physically violent, bullying has remained a constant and pervasive part of life for one set of students—those

1. Sabrina Rubin Erdely, *School of Hate*, ROLLING STONE, Feb. 16, 2012, at 50, 54.

2. *Id.* at 54–55.

3. *Id.* A “Day of Truth” was held at Justin’s high school, where students wore T-shirts reading “Be Happy, Not Gay.” *Id.* at 55. Local churches supported the event, including one whose mission was to attempt to “usher gays back to wholeness and ‘victory in Christ.’” *Id.*

4. *Id.* at 54.

5. *Id.* at 56.

6. *Id.* at 52.

7. *See id.* at 53.

who identify as, or are perceived to be, LGBT.⁸ Studies performed on a national level indicate that while many students face bullying on a daily basis, LGBT students are much more likely to be the subject of bullying than their heterosexual counterparts.⁹ Within the general population of students in the United States, 17% of students reported being bullied two to three times each month or more.¹⁰ However, more than half of LGBT students in the United States reported frequent bullying in school.¹¹

LGBT bullying is not limited to specific schools or states but instead affects students across the country.¹² While virtually all states have passed legislation to combat bullying, few states have taken the initiative to include LGBT students as an enumerated group protected against bullying.¹³ In the Commonwealth of Virginia, the General Assembly passed legislation to help the approximately 50% of students that reported being bullied in Virginia schools.¹⁴ Individual school districts are also required to enact their own policies to prevent bullying.¹⁵ Studies have shown that enumerating sexual orientation in anti-bullying laws can ef-

8. See JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS at xix–xx (2010) [hereinafter 2009 NATIONAL SCHOOL CLIMATE SURVEY], available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf (stating that LGBT students' experiences of harassment and assault have remained relatively constant over time). But see JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS xvii–xviii (2012) [hereinafter 2011 NATIONAL SCHOOL CLIMATE SURVEY], available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2105-1.pdf (stating that between 2001 and 2009, LGBT students' reports of harassment and assault remained relatively constant, but that there was a significant decrease in victimization based on sexual orientation in 2011).

9. R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58, 61 (2011) ("LGBT students face bullying at a significantly higher frequency than the general student population.").

10. VA. DEPT. OF HEALTH, ABOUT BULLYING (2012) [hereinafter ABOUT BULLYING], available at <http://www.vdh.virginia.gov/ofhs/prevention/preventbullyingva/documents/2012/pdf/About%20Bullying.pdf>.

11. See 2009 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 26–28.

12. See 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xiv, 100–03 (examining regional frequencies of victimization of LGBT students).

13. *Policies and Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/index.html> (last visited Feb. 8, 2013) [hereinafter *Policies and Laws*]. Montana is the only state to not pass anti-bullying legislation, though it does have an anti-bullying policy. *Id.*

14. See VA. CODE ANN. § 9.1-184 (Repl. Vol. 2011 & Supp. 2012); VA. CODE ANN. § 22.1-208.1, -279.3:1, -279.6 (Repl. Vol. 2011); ABOUT BULLYING, *supra* note 10.

15. VA. CODE ANN. § 22.1-279.6 (Repl. Vol. 2011).

fectively lessen the harassment that LGBT students face.¹⁶ However, the Virginia anti-bullying law does not enumerate any specific groups of students who must be protected but protects students generally.¹⁷ Virginia school district policies including specific LGBT protections are few and far between.¹⁸ In order to successfully combat LGBT bullying, Virginia needs to amend its anti-bullying law and implement a statewide policy that includes enumerated protection against bullying for LGBT students.

This comment explores the various steps being taken to stop LGBT bullying in the Commonwealth of Virginia. Section I discusses why it is important to address the issue of bullying and the deep impact that bullying can have on students' lives. Section II provides a comprehensive look at how other states have addressed bullying and provided enumerated protection for LGBT students. This section also examines federal laws that have been used in bullying claims in the absence of federal anti-bullying legislation. Section III focuses specifically on Virginia anti-bullying legislation and the steps that Virginia has taken to combat LGBT bullying in particular. This section will focus on the discontinuity among school districts in Virginia regarding LGBT anti-bullying legislation. This section argues that Virginia needs to reevaluate its anti-bullying legislation and enumerate LGBT students as a targeted group instead of leaving the decision to enumerate LGBT students up to each individual school district. Section IV argues why enumerating sexual orientation in Virginia's anti-bullying law would be beneficial to LGBT students. Section V addresses additional steps that Virginia can take to combat LGBT bullying. It also highlights the positive steps Virginia has already taken to help LGBT students.

I. THE EFFECTS OF BULLYING ON STUDENTS

The definition of bullying in schools differs from state to state but generally has common themes.¹⁹ School bullying is typically

16. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, ENUMERATION: A TOOL FOR ADVOCATES 2 [hereinafter A TOOL FOR ADVOCATES], available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/754-3.pdf.

17. VA. CODE ANN. § 22.1-279.6 (Repl. Vol. 2011).

18. See *infra* note 115 and accompanying text.

19. See, e.g., Cristina M. Meneses & Nicole E. Grimm, *Heeding the Cry for Help: Addressing LGBT Bullying as a Public Health Issue Through Law and Policy*, 12 MD. L.J. RACE, RELIGION, GENDER & CLASS 140, 141 (2012).

considered to be an attack or intimidation with the intent to create fear, distress, or harm in another student or group of students.²⁰ Bullying usually includes a real or perceived imbalance of power between the bully and victim and repeated attacks or intimidation between the same children over time.²¹ Many people today consider bullying to be “just a part of life” that virtually all students must deal with at one point or another.²² However, bullying can have serious consequences and can affect a student’s physical and mental health.²³ Bullying may result in physical injuries, emotional distress, and, in the most serious cases, death.²⁴ Children who are bullied also have an increased risk for mental health problems, including depression, anxiety, and poor school adjustment.²⁵

Bullying has become such a problem that the federal government has begun to take notice and address the issue. The Office for Civil Rights in the United States Department of Education issued a “Dear Colleague” letter to all public school districts in 2010 to address the problem of bullying.²⁶ The letter stressed that bullying “fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”²⁷ Even the White House took notice of the increasing instances of severe bullying.²⁸ In March 2011, the White House held the first

20. NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL AND PREVENTION, UNDERSTANDING BULLYING (2011) [hereinafter UNDERSTANDING BULLYING], available at http://www.cdc.gov/ViolencePrevention/pdf/Bullying_Factsheet-a.pdf.

21. *Id.*

22. See Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 IND. L.J. 827, 867–68 (2011); Bob Casey, *Focus on the Family Stands Up for Bullying*, HUFFINGTON POST (Sept. 8, 2010), http://www.huffingtonpost.com/bob-casey/focus-on-the-family-stand_b_709651.html (discussing conservative opposition to addressing the problem of bullying in schools).

23. UNDERSTANDING BULLYING, *supra* note 20.

24. *Id.*

25. *Id.*

26. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

27. *Id.* at 1.

28. See Mimi Hall, *White House Conference Tackles Bullying*, USA TODAY, Mar. 10, 2011, at 2A.

ever Conference on Bullying Prevention.²⁹ There, President Obama stated, “If there is one goal of this conference . . . it’s to dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up.”³⁰ The conference came weeks after the suicides of a number of homosexual teens because of bullying.³¹

A. *LGBT Bullying*

While bullying may occur for non-LGBT students in American schools, LGBT students often face severe and persistent bullying.³² LGBT students may experience bullying at twice the rate of non-LGBT students in their schools.³³ One survey reports that 81.9% of LGBT students claim to have been verbally harassed because of their sexual orientation, 38.3% were physically harassed, and 18.3% were physically assaulted.³⁴ Additionally, 84.9% of students surveyed had heard “gay” used in a negative way at school frequently or often.³⁵ Unfortunately for LGBT students, despite the increased rates of bullying, teachers and administrators are typically less likely to punish bullies who target LGBT students.³⁶ This lack of response may be attributed to the prejudices of

29. *Id.*

30. Darlene Superville, *Obama on Bullying*, THE TIMES (Trenton), Mar. 11, 2011, at A8 (internal quotation marks omitted).

31. Steven Thomma, *Conference to Take on Bullying*, THE TIMES (Trenton), Mar. 10, 2011, at A4.

32. 2009 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 29 (footnote omitted) (“LGBT students in the current study were much more likely to have been verbally harassed at school in the past year because of a personal characteristic than the general population of students—91.9% versus 47%. In addition, LGBT students in the [2009 National School Climate Survey] were more likely to report being sexually harassed, having their property stolen or deliberately damaged at school, or having rumors or lies told about them at school than the general student population.”).

33. Higdon, *supra* note 22, at 842.

34. 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xiv–xv (describing “physically harassed” as “pushed or shoved” and “physically assaulted” as “punched, kicked, injured with a weapon”). These numbers have decreased slightly since the 2009 survey, where 84.6% of respondents were verbally harassed, 40.1% were physically harassed, and 18.8% were physically assaulted. 2009 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xvi.

35. 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 14 (internal quotation marks omitted) (noting that using the word “gay” in a negative way includes phrases such as “that’s so gay” and “you’re so gay”).

36. See Higdon, *supra* note 22, at 843–44 (noting that sexual orientation and gender nonconformity were the two forms of harassment teachers were least likely to do anything about).

teachers and administrators against LGBT individuals.³⁷ One survey of LGBT students reported that 84.5% of respondents state that teachers rarely or never intervened when they heard homophobic remarks.³⁸

As a result of the increased rates of bullying and social reactions to homosexuality, LGBT students are generally more susceptible to negative and suicidal behaviors than heterosexuals.³⁹ LGBT bullying creates greater incidents of problems at schools. One study found that 75% of bullied LGBT students reported a deterioration of their performance in school.⁴⁰ Another 39% of students reported truancy as a problem, and 28% of bullied LGBT students dropped out of school because of the harassment.⁴¹ Additionally, researchers have found that 39% of gay and bisexual male youths have attempted suicide, while only about 11% to 16% of heterosexual youths attempted suicide.⁴² Furthermore, 52% of those who attempted suicide tried to commit suicide more than once.⁴³

Several bullying stories featuring LGBT students have recently received widespread media attention due to their graphic nature⁴⁴ and have focused attention on the difficulties that LGBT students face.⁴⁵ While these incidents did not take place in Virginia, the widespread nature of bullying makes it clear that these types of bullying-induced suicides can happen anywhere. One homosexual student who faced severe and persistent bullying is Jamie Nabozny.⁴⁶ After coming out as gay in the seventh grade, Nabozny's school life changed dramatically.⁴⁷ Nabozny's bullies began with the standard "fag" and "queer" name-calling but escalated to severe physical assaults that lasted throughout middle school and

37. See Nicolyn Harris & Maurice R. Dyson, Essay, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 188 (2004).

38. See 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 16, 17 fig. 1.8.

39. See Sharon L. Nichols, *Gay, Lesbian, and Bisexual Youth: Understanding Diversity and Promoting Tolerance in Schools*, 99 ELEMENTARY SCH. J. 505, 510 (1999).

40. *Id.* at 511.

41. *Id.*

42. *Id.* at 510.

43. *Id.*

44. See Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9.

45. Piacenti, *supra* note 9, at 61.

46. *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996).

47. *Id.* at 451.

high school.⁴⁸ Nabozny was “mock rape[d]” by two boys in front of twenty other students who simply looked on and laughed.⁴⁹ School administrators and guidance counselors were essentially useless; they even told Nabozny that he should expect such incidents for being openly gay.⁵⁰ After two suicide attempts and continued assaults, including being urinated on by another student, Nabozny filed suit against his bullies.⁵¹ Fortunately for Nabozny, the Seventh Circuit held that the school district and Nabozny’s bullies had violated his Fourteenth Amendment right to equal protection by discriminating against him on the basis of his gender or sexual orientation.⁵² The court noted that the school was unwilling to punish the male students who mock raped Nabozny but had aggressively punished male-on-female battery and harassment.⁵³ The court found no rational basis for “permitting one student to assault another based on the victim’s sexual orientation.”⁵⁴

Another student, Seth Walsh, also faced years of bullying before he finally committed suicide on September 19, 2010, at the age of thirteen.⁵⁵ Seth’s bullying began in fourth grade, long before he came out as gay.⁵⁶ Family members reported that even then the bullying was bad enough that he had to be home schooled on two separate occasions.⁵⁷ By the time Seth came out as gay in middle school, students were harassing him on the way home from school and calling him a “queer” in the hallways.⁵⁸ On the afternoon of September 19th, Seth hung himself from a tree in his backyard after another bullying incident occurred at a local park.⁵⁹ Tragically, Seth’s mother found him still breathing, and he spent over a week on life support before passing away on September 27, 2010.⁶⁰ Unfortunately, Seth’s family could not press

48. *Id.* at 451–52.

49. *Id.* at 451.

50. *Id.*

51. *Id.* at 452–53.

52. *Id.* at 460.

53. *Id.* at 454–55.

54. *Id.* at 458.

55. Paul J. Nyden, *W. Va. ACLU Dinner to Feature Talks about LGBT Rights*, CHARLESTON GAZETTE, Sept. 17, 2011, at C7.

56. See Thomas Curwen, *A Gay Teenager’s Daily Gantlet*, L.A. TIMES, Oct. 8, 2010, at 1.

57. *Id.*

58. *Id.* (internal quotation marks omitted).

59. *Id.*

60. See *id.*

charges against Seth's bullies because school bullying was not a crime in California at the time.⁶¹

II. ANTI-BULLYING LEGISLATION IN THE UNITED STATES

While bullying has always been present in the United States, the crusade to take legislative action against bullying has become particularly robust since the Columbine High School shooting in 1999.⁶² As of March 19, 2012, forty-nine states had passed anti-bullying legislation, and forty-one of those states had created additional policies to try to specifically prevent bullying.⁶³ Each of these laws differs in its protections, and few specifically protect LGBT students. However, the federal government has not directly taken any action in the arena of bullying, and there is currently no federal anti-bullying legislation to protect students.⁶⁴ A number of bills have been proposed on the federal level to help students who are victims of bullying and provide funding for anti-bullying measures in states,⁶⁵ but no bills have been passed to specifically help LGBT students.⁶⁶ Instead, LGBT students are

61. *See id.*

62. VICTORIA STUART-CASSEL ET AL., U.S. DEPT OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 1 (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>.

63. JAMES C. HANKS, SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW? 1 (2012) (noting that South Dakota became the forty-ninth state to enact anti-bullying legislation); *Policies and Laws*, *supra* note 13 (showing which states have enacted policies, laws, or both); *see, e.g.*, 24 PA. CONS. STAT. § 13-1303.1-A (Repl. Vol. 2012) (requiring school districts to adopt policies relating to bullying); S.C. CODE ANN. §§ 59-63-130, 59-63-140 (Cum. Supp. 2012) (prohibiting students from engaging in bullying and requiring school districts to adopt policies prohibiting bullying); WASH. REV. CODE § 28A.300.285 (Repl. Vol. 2009 & Cum. Supp. 2013) (defining bullying and requiring school districts to adopt an anti-bullying policy that incorporates the model policy).

64. *Federal Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/federal/index.html> (last visited Mar. 8, 2012) [hereinafter *Federal Laws*]. Federalist concerns also play a role in the lack of comprehensive federal protection for LGBT students and individuals. There has been a "hesitation to regulate . . . various matters relating to the family and issues that are considered to be within the scope of states' 'police powers.'" Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 966-67 (2012).

65. *See, e.g.*, Bullying Prevention and Intervention Act of 2011, H.R. 83, 112th Cong. (2011) (amending the Omnibus Crime Control and Safe Streets Act of 1968 to allow block grants to be used for bullying prevention and intervention programs); Safe Schools Improvement Act of 2011, S. 506, 112th Cong. (2011) (amending the Elementary and Secondary Education Act of 1965 to provide assistance to local education agencies related to bullying prevention).

66. *See Federal Laws*, *supra* note 64; DENA T. SACCO ET AL., KINDER & BRAVER WORLD PROJECT: RESEARCH SERIES, AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS 14-16 (2012), available at <http://cyber.law.harvard.edu/sites/cy>

left with existing federal laws that may or may not cover their bullying claims.

A. *State Law and Policy Analysis*

In the absence of federal anti-bullying laws to protect students, states have taken it upon themselves to create laws and policies that address bullying. States have taken a variety of routes to combat bullying, including passing laws while simultaneously creating model anti-bullying policies, passing only a law to prevent bullying, or creating only a model policy to combat bullying.⁶⁷ States have a multitude of considerations to take into account when creating anti-bullying laws as well, including whether they will enumerate specific classes of students.⁶⁸

Although enumeration of classes is considered by many to aid in the battle against bullying,⁶⁹ few of the fifty states provide enumerated protection for specific classes of students. Only seventeen states in total have enumeration language that covers specific classes of students.⁷⁰ Of these, only fifteen states and the District of Columbia have created enumerated anti-bullying laws that protect students based on sexual orientation and gender identity.⁷¹ Virginia has refrained from enumerating sexual orientation and gender identity in both its state law and model policy, despite the inclusion of race, gender, religion, and physical abilities in its model anti-bullying policy.⁷² As a result, Virginia school districts are not required to enumerate any classes in their individual anti-bullying policies.

ber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf.

67. *Policies and Laws*, *supra* note 13.

68. *Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/key-components/index.html> (last visited Mar. 8, 2013).

69. *See supra* note 18 and accompanying text.

70. STUART-CASSEL ET AL., *supra* note 62, at 27–28; *see, e.g.*, FLA. STAT. § 1006.147 (2009 & Cum. Supp. 2013) (enumerating race, sex, and religion).

71. *States with Safe Schools Laws: No Promo Homo Laws & Laws that Prohibit Enumeration*, GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, [hereinafter *States with Safe Schools Laws*] available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/2344.html> (last visited Apr. 19, 2012) (noting that Wisconsin enumerates only sexual orientation and not gender identity); *see, e.g.*, WASH. REV. CODE § 9A.36.080 (Repl. Vol. 2009 & Cum. Supp. 2013) (enumerating race, color, religion, ancestry, national origin, gender, sexual orientation, and mental, physical, or sensory handicap).

72. VA. SCH. BOARDS ASSOC., STANDARDS OF STUDENT CONDUCT ¶8 (2005) [hereinafter *VSB MODEL POLICY*], available at http://www.vaschoolboards.org/images/uploads/Anti-bullying_Policies_summary_1.pdf.

B. *State Tort Law*

Students have the option of pursuing a lawsuit against their school under state tort law as well. However, this process is frequently unsuccessful due to the common law doctrine of sovereign immunity, which prevents a government from being sued in its own courts without consent.⁷³ Sovereign immunity in Virginia seeks to protect the state from an interference in the orderly administration of government.⁷⁴ LGBT students, therefore, have to overcome the long-established doctrine of sovereign immunity in order to prove their state law claims.⁷⁵ Part of the anti-bullying legislation passed in 2005 also provides teachers and school personnel with civil immunity and states that

[a]ny teacher employed by a local school board in the Commonwealth shall not be liable for any civil damages for any acts or omissions resulting from the supervision, care or discipline of students when such acts or omissions are within such teacher's scope of employment and are taken in good faith in the course of supervision, care or discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct.⁷⁶

As a result, Virginia's LGBT students are forced to prove that a teacher was grossly negligent or willfully did not report bullying in order to hold the school or teacher liable for failing to address the issue of bullying.⁷⁷ Recent case law has also indicated that Virginia courts are unwilling to find a special relationship between principals and students in regard to protecting the student from bullying and fighting.⁷⁸ Ultimately, unless an LGBT student can prove that a teacher was grossly negligent or willfully ignored the bullying issues, the only other cause of action may be to sue under the often equally unresponsive Title IX of the Education Amendments Act of 1972 ("Title IX") or hate crime laws.

73. BLACK'S LAW DICTIONARY 818 (9th ed. 2009); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 149–50 (2009).

74. *Hinchey v. Ogden*, 307 S.E.2d 891, 894 (Va. 1983).

75. *See Burns v. Gagnon*, 727 S.E.2d 634, 646 (Va. 2012) (explaining how the common law doctrine of sovereign immunity can extend to school employees).

76. VA. CODE ANN. § 8.01-220.1:2(A) (Repl. Vol. 2007).

77. *See id.*

78. *Burns*, 727 S.E.2d at 642–43.

C. *Federal Anti-Bullying Laws and Other Avenues for LGBT Students*

Despite the lack of a federal law directly protecting students from bullying, other federal laws have been utilized by students who have faced severe bullying. These statutes include Title IX and federal hate crime laws.⁷⁹ If a school fails to respond appropriately to the harassment of students that are covered under a certain protected class, the student may hold the school or school district liable under one of these federal laws. However, despite these and other laws protecting a student's right to be free from discrimination on the basis of race, religion, sex, disability, and various other characteristics, none of these federal laws provide protection from bullying in school on the basis of sexual orientation or gender identity.

1. Title IX

Title IX is the law most frequently utilized to address anti-gay school bullying.⁸⁰ However, Title IX does not explicitly provide any protections for homosexuals or prohibit discrimination on the basis of sexual orientation.⁸¹ Instead, Title IX was enacted to provide women with equal access to higher education.⁸² The law states 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.”⁸³

Because Title IX protection requires that the bully's conduct be sex-based, LGBT bullying victims are often forced to fit their claims into discrimination on the basis of sex, instead of alleging

79. See 18 U.S.C. § 245 (2006); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (Supp. V 2012); 20 U.S.C. § 1681(a) (2006).

80. Jason A. Wallace, Note, *Bullicide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 745 (2011); see also J. Dalton Courson & Abigail C. Farris, *Title IX Liability for Anti-Gay Bullying*, AM. BAR ASS'N (Jan. 23, 2012), <http://apps.americanbar.org/litigation/committees/lgbt/articles/winner2012-title-ix-liability-anti-gay-bullying.html>.

81. Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 407 (2012).

82. Wallace, *supra* note 80, at 743.

83. 20 U.S.C. § 1681(a) (2006).

discrimination because of sexual orientation.⁸⁴ As a result, Title IX provides only a limited measure of protection to students facing anti-gay bullying.⁸⁵ The only consolation provided to LGBT students under Title IX is the Department of Education's Office of Civil Rights' statement that "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX."⁸⁶ As a result, many LGBT students bring their bullying claims as sexual harassment claims.⁸⁷

While some students have been successful in bringing Title IX claims against their peers, the high standards set for Title IX violations have made victories few and far between.⁸⁸ In *Davis v. Monroe County Board of Education*, a male student repeatedly sexually harassed a fifth-grade female classmate by groping her and making inappropriate statements.⁸⁹ The harassment continued for months while the teachers and school principal largely ignored the behavior of the male student.⁹⁰ The United States Supreme Court held the school district liable under Title IX and stated that in order to violate Title IX, peer-on-peer sexual harassment must be "severe, pervasive, and objectively offensive."⁹¹ Because this standard is so high, courts are reluctant to rule in favor of bullied students, and only the most egregious cases are decided in favor of the victims.⁹²

In another Title IX case, *Gebser v. Lago Vista Independent School District*, the Court held that a school official with the authority to institute corrective measures on the district's behalf must have actual notice of the harassment and must fail to re-

84. Waldman, *supra* note 81, at 407.

85. Piacenti, *supra* note 9, at 62.

86. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

87. See Waldman, *supra* note 81, at 407.

88. 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, 60 (2005).

89. 526 U.S. 629, 633-34 (1999).

90. *Id.* at 634-35.

91. *Id.* at 650.

92. Kosse & Wright, *supra* note 88, at 60.

spond adequately in order for the student to successfully hold the school liable for the harassment.⁹³ Additionally, a school does not have to completely stop the harassment in order to “respond adequately,” leaving the plaintiff with a subpar response to potentially severe harassment.⁹⁴ As a result, Title IX fails to provide adequate protection to bullied LGBT students unless they can prove discrimination on the basis of sex and the bullying is a severe form of sexual harassment.

2. Hate Crime Laws

Hate crime laws have also been suggested as the legal foundation for potential causes of action for LGBT students who have faced extreme incidents of bullying.⁹⁵ Hate crime laws exist on the federal and state level, including in Virginia.⁹⁶ However, these laws are only applicable in certain severe situations and seldom apply to the bullying of LGBT students. The predominant hate crime law that provides protection for LGBT individuals, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, criminalizes willfully causing bodily injury, or attempting to cause bodily injury because of “actual or perceived . . . gender, sexual orientation, gender identity, or disability of any person,” but only if the acts affect interstate commerce.⁹⁷ Virginia also has a hate crime law; however, it only covers intimidation, harassment, violence, or vandalism motivated by racial, religious, or ethnic animosity.⁹⁸ Unless bullying against LGBT students falls within the narrow Virginia hate crime law, LGBT students

93. 524 U.S. 274, 277 (1998). In *Gebser*, a teacher sexually harassed an eighth grade female student before beginning a sexual relationship with her which continued through the summer and into her ninth-grade year; however, school officials were not aware of the harassment until a police officer discovered the teacher and student engaging in sexual intercourse. *Id.* at 277–78.

94. Kosse & Wright, *supra* note 88, at 58.

95. SACCO ET AL., *supra* note 66, at 20.

96. See, e.g., Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (Supp. V 2012); 18 U.S.C. § 245 (2006); VA. CODE ANN. § 52-8.5 (Repl. Vol. 2009).

97. 18 U.S.C. § 249(a)(2). Acts that affect interstate commerce can take a variety of forms but still limit the availability of this law for LGBT students. For example, the victim or defendant must travel across a state line or national border, use an instrumentality of interstate commerce, use a firearm or weapon that has traveled in interstate commerce, or interfere with the economic or commercial activity of the victim at the time of the conduct. See *id.*

98. VA. CODE ANN. § 8.01-42.1(A) (Repl. Vol. 2007).

in Virginia are left with only the option of using federal hate crime laws.

While the federal laws do provide some protection for bullied individuals, it is unlikely that these laws would be especially beneficial for LGBT students. The interstate commerce limitation will likely remove many LGBT students from the protections of this law unless the LGBT students have been threatened either with a weapon that has crossed state lines or by a person who has crossed state lines to target their victims.⁹⁹ Additionally, the bullying must be extreme and severe to qualify as a hate crime.¹⁰⁰ This requirement prevents many of the “standard” and less severe bullying cases from falling under this law. As a result, many LGBT students may be more successful using Title IX or state laws to bring their bullying claims.

III. VIRGINIA ANTI-BULLYING LEGISLATION

Virginia is one of the forty-nine states that has passed laws to address bullying in her schools.¹⁰¹ While there are several different laws addressing the issue of bullying, the most pertinent law instructs the Virginia Board of Education how to deal with bullying in Virginia.¹⁰² Section 22.1-279.6 of the Code of Virginia requires that

[t]he Board of Education shall establish guidelines and develop model policies for codes of student conduct to aid local school boards in the implementation of such policies. The guidelines and model policies shall include . . . standards, consistent with state, federal and case laws, for school board policies on . . . hazing, . . . threats, . . . intentional injury of others, . . . bullying, the use of electronic means for purposes of bullying, harassment, and intimidation, and dissemination of such policies to students, their parents, and school personnel¹⁰³

99. 18 U.S.C. § 249(a)(2).

100. See SACCO ET AL., *supra* note 66, at 20.

101. See VA. CODE ANN. § 22.1-279.6 (Repl. Vol. 2011); see e.g., 24 PA. CONS. STAT. § 1303.1-A (Repl. Vol. 2012) (requiring school districts to adopt policies related to bullying); S.C. CODE ANN. §§ 59-63-130, 59-63-140 (Cum. Supp. 2012) (prohibiting students from engaging in bullying and requiring school districts to adopt policies prohibiting bullying); WASH. REV. CODE § 28A.300.285 (Repl. Vol. 2011 & Cum. Supp. 2013) (defining bullying and requiring school districts to adopt a bullying policy that incorporates the model policy); *supra* note 63 and accompanying text.

102. See VA. CODE ANN. § 22.1-279.6 (Repl. Vol. 2011).

103. *Id.*

Additionally, “[e]ach school board shall include, in its code of student conduct, prohibitions against bullying.”¹⁰⁴ Finally, pursuant to the Code of Virginia, school boards are required to provide character education on bullying to students.¹⁰⁵

The Virginia School Board Association (“VSBA”) has assisted school districts in complying with the Code of Virginia by creating a model anti-bullying policy for schools to adopt.¹⁰⁶ The language in the VSBA’s model policy, labeled as “JFC-R Standards of Student Conduct” is the most commonly adopted language by Virginia school districts in their own policies.¹⁰⁷ The policy states

[a] student, either individually or as a part of a group, shall not harass or bully others either in person or by the use of any communication technology including computer systems, telephones, pagers, or instant messaging systems. Prohibited conduct includes, but is not limited to, physical, verbal, or written intimidation, taunting, name-calling, and insults and any combination of prohibited activities. Prohibited conduct includes verbal conduct consisting of comments regarding the race, gender, religion, physical abilities or characteristics or associates of the targeted person.¹⁰⁸

While Virginia has moved in a positive direction by enumerating specific subgroups as part of its model anti-bullying policy, Virginia could take its efforts much further in order to protect all students.¹⁰⁹ First, while “characteristics . . . of the targeted person” could potentially be utilized as a term to provide protection for LGBT students, it does not provide the same inclusion and sense of protection that enumeration of “sexual orientation” provides.¹¹⁰ LGBT students reported significantly lower levels of victimization related to their sexual orientation in schools that had comprehensive anti-bullying policies that included sexual orien-

104. *Id.*

105. VA. CODE ANN. § 22.1-208.01 (Repl. Vol. 2011 & Supp. 2012). Virginia school boards now are required to establish programs that deal specifically with character education in schools. The purpose of character education programs is to “instill in students civic virtues and personal character traits so as to improve the learning environment, promote student achievement, reduce disciplinary problems, and develop civic-minded students of high character.” *Id.*

106. VSBA MODEL POLICY, *supra* note 72.

107. See VA. DEP’T OF EDUC., STUDY OF THE NATURE AND EFFECTIVENESS OF VIRGINIA SCHOOL DIVISIONS’ ANTI-BULLYING POLICIES (HJR 625, 2011) 9, 32–33 (2012) [hereinafter VIRGINIA SCHOOL DIVISIONS], available at http://www.doe.virginia.gov/support/prevention/bullying/2011_legislative_study.pdf.

108. VSBA MODEL POLICY, *supra* note 72.

109. *Id.*

110. See *id.*

tation, as opposed to schools with “[g]eneric” policies that did not enumerate sexual orientation.¹¹¹ Additionally, although school boards must adopt an anti-bullying policy consistent with the guidelines of the Virginia Board of Education,¹¹² the boards are not required to utilize this specific policy in their own district policy manuals. The policy is only a model for school districts to adopt or base their own anti-bullying policies on.¹¹³ Virginia school districts are not even required to adopt the same enumerated groups into their policies, leaving each free to add more groups to their policy or not enumerate groups at all.¹¹⁴

A. *Virginia School Districts Have Created a Variety of Different Policies*

Virginia school districts have taken the freedom to create their own anti-bullying policies to heart. While all Virginia school districts comply with the Code of Virginia by adopting anti-bullying policies,¹¹⁵ not all Virginia districts break down their protections by enumerating subgroups, and some do not include subgroups at all. While one study claims that 55.3% of Virginia school districts adopted the VSBA’s definition of bullying, which includes “race, gender, religion, physical abilities or characteristics of the targeted person,”¹¹⁶ personal examination indicates that closer to 70% of school districts analyzed had adopted the VSBA’s enumerated model policy.¹¹⁷ Nineteen of the school districts surveyed contained no enumeration in their anti-bullying policies at all.¹¹⁸

111. 2009 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 75.

112. VA. CODE ANN. § 22.1-279.6 (Repl. Vol. 2011).

113. *See id.*

114. *See id.* (emphasis added) (“The Board of Education shall establish guidelines and develop model policies for codes of student conduct to aid local school boards in the implementation of such policies. The guidelines and model policies shall include, but not be limited to . . .”). By not requiring school districts to adopt one standard anti-bullying policy with enumerated groups, some students in non-enumerated school districts may feel as though they are not as protected as their peers in enumerated school districts. *See* 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xvii (“Comprehensive policies and laws—those that specifically enumerate personal characteristics including sexual orientation and gender identity/expression, among others—are most effective at combating anti-LGBT bullying and harassment.”).

115. *See* VIRGINIA SCHOOL DIVISIONS, *supra* note 107, at 9.

116. *Id.*

117. Note that the author attempted to examine all Virginia school districts but was unable to locate the policies of eighteen of the 132 school districts.

118. *See, e.g.*, VA. BEACH CITY PUB. SCHS., CODE OF STUDENT CONDUCT (2012), *availa-*

Unfortunately for Virginia's LGBT students, very few school districts include sexual orientation as a part of their anti-bullying policies. In examining each school district's policy, only six included sexual orientation or gender identity explicitly as a part of their anti-bullying policies or student conduct standards.¹¹⁹ Alexandria's Standards of Student Conduct closely tracks the wording of the VSBA's policy and prohibits anti-bullying based on race, gender, religion, physical abilities, sexual orientation, and characteristics or associates of the targeted person.¹²⁰ Gloucester's anti-bullying policy is simpler than the VSBA's model policy but notes that bullying against certain "protective status[es]" is prohibited.¹²¹ Examples of "protective status[es]" include race, color, disability, and sexual orientation.¹²² Petersburg School District adopted a similar policy to the VSBA's model policy but added sexual orientation.¹²³

Some school districts have created extensively enumerated policies to combat bullying and have included targeted groups such as LGBT students. The Virginia legislature should consider these policies as models of fully-inclusive anti-bullying statutes. One example is Arlington Public School District's policy. Arlington's anti-bullying policy goes much further than the VSBA's policy in enumerating protected groups. The enumerated groups in the school district's Bullying/Harassment Prevention Policy include race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, mental, physical, and

ble at <http://www.vbschools.com/students/conduct/code/asp>.

119. ALEXANDRIA CITY PUB. SCHS., STUDENT GUIDELINES 7–8 (2012), available at <http://www.acps.k12.va.us/student-guide.pdf>; ARLINGTON PUB. SCHS., STUDENT SAFETY BULLYING/HARASSMENT PREVENTION POLICY 1 (2008), available at <http://www.apsva.us/cms/lib2/VA01000586/centricity/shared/school%20Board%20Policies/25-student/25-1.17-bullying.harassment.prevention.pdf>; BEDFORD CNTY. PUB. SCHS., CODE OF STUDENT CONDUCT 43 (2012), available at <http://bedford.sharpschool.net/common/pages/DisplayFile.aspx?itemid=5935988>; CHARLOTTESVILLE CITY PUB. SCHS., SCHOOL BOARD POLICY MANUAL (2012), available at <http://www.css.u12.va.us/policy/introduction.pdf>; GLOUCESTER PUB. SCHS., STUDENT CODE OF CONDUCT MANUAL 38 (2012), available at <http://web.gc.k12.va.us/policymanual/J%20Students/JFC-R%20Student%20Code%20of%20Conduct%20Manual.pdf>; PETERSBURG CITY PUB. SCHS., CODE OF CONDUCT 6 (2011), available at <http://petersburg.k12.va.us/modules/groups/homepagefiles/cms/944092/File/2011-12%20Code%20of%20Conduct.pdf>.

120. ALEXANDRIA CITY PUB. SCHS., *supra* note 119, at 8.

121. GLOUCESTER CNTY. PUB. SCHS., *supra* note 119, at 38.

122. *Id.*

123. PETERSBURG CITY PUB. SCHS., *supra* note 119, at 6.

sensory disability.¹²⁴ Bedford County Public School District has also has adopted an enumerated policy protecting LGBT students.¹²⁵ Bedford County's "Anti-Bullying Pledge" states "[e]veryone should enjoy school equally and feel safe and accepted, regardless of popularity, athletic ability, school performance, family circumstances, gender, political affiliation, sexual orientation, race, and/or religion."¹²⁶ Charlottesville has also gone further than the VSBA's policy, protecting frequently targeted groups of students, including LGBT students. Charlottesville School District's anti-bullying policy states that

[p]rohibited conduct includes verbal or written conduct consisting of comments regarding the race, ethnicity, physical abilities, physical or mental disabilities, physical characteristics, religion, national origin, gender, sexual orientation, gender identity or expression of any student or such harassment or bullying about any family members, friends, or associates of the targeted person or group.¹²⁷

These enumerated policies send a clear message of inclusiveness to students and teachers and indicate that bullying against any of the groups listed will not be tolerated.¹²⁸

Some school districts have moved in the opposite direction of the VSBA's model policy. These districts have chosen to not enumerate any groups as a part of their anti-bullying policy. Nineteen of Virginia's school districts contain anti-bullying policies with absolutely no enumeration.¹²⁹ Among these are some of the larger school districts in Virginia, including Richmond City and

124. ARLINGTON CITY PUB. SCHS., *supra* note 119.

125. BEDFORD CNTY. PUB. SCHS., *supra* note 119, at 43.

126. *Id.*

127. CHARLOTTESVILLE CITY PUB. SCHS., *supra* note 119.

128. Although there is currently no in-depth Virginia study that measures the effectiveness of the various enumerated anti-bullying policies of Virginia schools, research and national studies indicate that LGBT students gain substantial benefits from having sexual orientation included in anti-bullying policies. For example, 28.3% of students in schools with "comprehensive policies" (enumerated policies) reported that staff intervened when hearing homophobic remarks, as opposed to 12.2% of students who reported the same in schools with "generic policies" (unenumerated policies), and 8.8% of students in schools with no anti-bullying policy. 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xvii. The Virginia School Health Profile also reported that schools with policies including sexual orientation had fewer problems with students safety. VA. DEPT OF EDUC., VIRGINIA SCHOOL HEALTH PROFILE 15 (2010) [hereinafter VIRGINIA SCHOOL HEALTH PROFILE], available at http://www.doe.virginia.gov/instruction/family_life_education/2010_cdc_school_health_profiles_report.pdf.

129. See, e.g., RICHMOND PUB. SCHS., STANDARDS OF STUDENT CONDUCT: SECONDARY 12-14 (2012), available at <http://newweb.richmond.k12.va.us/assets/pdfs/students/secondaryconduct0607.pdf>.

Virginia Beach.¹³⁰ These schools' anti-bullying policies fail to include even the limited number of groups listed in the VSBA's model policy.¹³¹ Chesterfield County interestingly adopted the name and policy number used by the VSBA ("JFC-R Standards of Student Conduct"), yet its policy defines bullying behaviors as "includ[ing], but . . . not limited to, threats, verbal or written abuse, physical abuse, harassment, ethnic or gender slurs, exclusion, and threatening body posture."¹³² One school district, Accomack County, did not enumerate sexual orientation in its anti-bullying policy but did enumerate race, gender, religion, physical abilities, and characteristics or associates of the targeted person.¹³³ Accomack included an extensive harassment policy in 2012 as well, which prohibited harassment on the basis of "sex, gender, race, color, national origin, disability, religion, ancestry, age, marital status, genetic information or any other characteristic."¹³⁴ Almost as an afterthought, the policy informed students and school personnel that harassing someone on the basis of their sexual orientation is not unlawful and does not rise to the level of illegal harassment but may be inappropriate and prohibited in the school setting.¹³⁵

B. Model Policy

Because of the considerable inconsistencies among the anti-bullying policies in Virginia school districts that leave certain classes of students unenumerated, Virginia should amend its anti-bullying law to require school districts to adopt a model policy that includes enumeration of LGBT students. Several Virginia school districts have created excellent anti-bullying policies that

130. See *id.* at 12–13; VA. BEACH CITY PUB. SCHS., *supra* note 118.

131. See, e.g., RICHMOND PUB. SCHS., *supra* note 129, at 12–13.

132. CHESTERFIELD PUB. SCHS., STANDARDS FOR STUDENT CONDUCT (2010), available at http://schools.chesterfield.k12.va.us/CCPS/About_CCPS/files/policy_manual/4010-R%20for%Student%20conduct.pdf.

133. ACCOMACK CNTY. PUB. SCHS., STANDARDS OF STUDENT CONDUCT (2012), available at <http://www.boarddocs.com/vsba/accomack/Board/nsf/Public#>.

134. ACCOMACK CNTY. PUB. SCHS., PROHIBITION AGAINST HARASSMENT AND RETALIATION, available at <http://www.boarddocs.com/vsba/accomack/Board/nsf/Public#> (last visited Apr. 19, 2013).

135. *Cf. id.* ("Behavior that is not unlawful or does not rise to the level of illegal harassment or retaliation may nevertheless be unacceptable for the educational environment or the workplace. Demeaning or otherwise harmful actions are prohibited, particularly if directed at personal characteristics including, but not limited to, socioeconomic level, sexual orientation, or perceived sexual orientation.").

enumerate a wide range of classes, including sexual orientation, that should be covered by Virginia law. Of these policies, the Charlottesville anti-bullying policy stands out as one of the most thorough in its enumeration of the types of bullying prohibited. The policy's inclusiveness of so many groups, particularly students targeted for their sexual orientation and gender identity and expression, could provide LGBT students with more protection at school. Virginia legislators would do well to consider adopting the policy from one of its own school districts as the anti-bullying law for the state.

IV. VIRGINIA SHOULD ENUMERATE SEXUAL ORIENTATION IN ANTI-BULLYING LEGISLATION

Virginia is one of eleven states that prohibits bullying based on a non-exhaustive list of characteristics.¹³⁶ However, simply because Virginia's law is non-exhaustive does not mean it is necessarily as inclusive as it could be to all students. Enumerating sexual orientation as part of anti-bullying laws in Virginia would send a clear message that Virginia will no longer tolerate anti-gay bullying.¹³⁷ The United States Supreme Court itself has even spoken to the issue of enumeration in *Romer v. Evans*, referring to it as an "essential device used to make the duty not to discriminate concrete."¹³⁸ As discussed below, studies conducted by the Virginia Department of Education and other groups have shown that including sexual orientation in anti-bullying statutes can help prevent LGBT bullying in schools.¹³⁹

A. *Benefits of Enumeration*

Enumerating sexual orientation as a part of Virginia's anti-bullying legislation will help LGBT students in a multitude of

136. STUART-CASSEL ET AL., *supra* note 62, at 27–28; *see, e.g.*, 105 ILL. COMP. STAT. 5/27-23.7 (2012).

137. Piacenti, *supra* note 9, at 99.

138. 517 U.S. 620, 628, 635–36 (1996). In *Romer*, the Court overturned a Colorado constitutional amendment that prohibited any "legislative, executive, or judicial action at any level of state or local government designed to protect the [homosexual, lesbian, or bisexual orientation] class." *Id.* at 624.

139. *See* VIRGINIA SCHOOL HEALTH PROFILE, *supra* note 128, at 15–16; 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 70 fig. 1.50; A TOOL FOR ADVOCATES, *supra* note 16, at 2.

ways. First, and most importantly, students will have notice that bullying on the basis of sexual orientation is not allowed in their school.¹⁴⁰ In Virginia, students from schools with a policy enumerating sexual orientation or gender identity typically have fewer problems with school safety in general.¹⁴¹ With the knowledge that the state and the school support and protect them, LGBT students will gain the confidence to report bullying to school officials.¹⁴² Additionally, enumerating certain groups, such as LGBT students, will send a message to teachers and administrators that some groups in particular are more vulnerable to bullying and, therefore, will make teachers more vigilant in preventing LGBT bullying.¹⁴³

Civil rights groups, such as the Gay, Lesbian, and Straight Education Network (“GLSEN”), have conducted studies indicating that enumeration of groups in anti-bullying legislation benefits students. GLSEN has found positive effects in schools when policies contain explicit protections for vulnerable populations such as LGBT students.¹⁴⁴ Generally, there is a lower prevalence of bullying and an increased propensity to report bullying of LGBT students when specific protections are covered under the school’s anti-bullying policy.¹⁴⁵ GLSEN also stated that students from schools with enumerated policies are less likely to hear homophobic remarks while in school.¹⁴⁶ Students reported hearing homophobic remarks almost as frequently in schools with non-enumerated anti-bullying laws as those students in schools that had no anti-bullying laws whatsoever.¹⁴⁷ Additionally, students in schools with enumerated policies may be more likely to report bullying to adults and seek help.¹⁴⁸ Enumerating protections for

140. See Meneses, *supra* note 19, at 163.

141. VIRGINIA SCHOOL HEALTH PROFILE, *supra* note 128, at 15–16 (“According to research, students from schools with a policy that includes sexual orientation or gender report fewer problems with school safety in general . . .”).

142. See Meneses, *supra* note 19, at 164.

143. See STUART-CASSEL ET AL., *supra* note 62, at 29.

144. *Id.*

145. *Id.*

146. 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xvii (“Six in ten (59.5%) students in schools with comprehensive policies heard homophobic remarks (e.g., ‘faggot’ or ‘dyke’) often or frequently, compared to almost three quarters of students in schools with generic, non-enumerated policies (73.3%) . . .”).

147. See *id.* at 68 fig. 1.49.

148. See *id.* at xvii, 70 fig. 1.51. (“Students in schools with comprehensive policies were more likely than students in schools with a generic policy or no policy to report that staff

students targeted by bullies because of their sexual orientation can have a significant impact on school safety and benefit LGBT students. Virginia LGBT students could experience these same benefits if Virginia enumerated sexual orientation into its anti-bullying law and policy.

B. *Opposition to Enumeration*

Some have questioned the need to provide enumerated protection to LGBT students at the state level at all. Opponents of enumerating certain groups in anti-bullying legislation cite a slew of reasons as to why certain individuals do not deserve protection. Some experts claim that attempting to choose certain groups to include in legislation will lengthen the debate in state legislatures, thereby delaying enactment.¹⁴⁹ Others claim that limiting bullying definitions to certain classes could be detrimental because most bullying is motivated by characteristics unrelated to group affiliation, such as personal appearance.¹⁵⁰ Some have chosen to oppose enumeration of sexual orientation out of the belief that it will give LGBT students “special rights” in school.¹⁵¹

While opponents present some legitimate arguments, the long-term benefits of enumerating protections for bullying based on sexual orientation outweigh any of the short-sighted views of the opposition. Although there may be debate over the enumeration of certain classes that will delay the process of passing a law, the end result of an enumerated law to help LGBT students would be worth the few months that it may take to pass the law itself. Spelling out inclusion of sexual orientation ensures that LGBT students are given the same protection as other students and are not treated as second-class citizens within their schools.¹⁵² The opponents’ belief that enumerated statutes would give LGBT students “special rights” is inaccurate. Enumeration of sexual orientation affords protection from bullying to not only gay students, but also to straight students from bullying by gay peers because

intervened when hearing homophobic remarks (28.3% vs. 12.2% vs. 8.8%) . . .”).

149. STUART-CASSEL ET AL., *supra* note 62, at 29.

150. *Id.*

151. Piacenti, *supra* note 9, at 92 (internal quotation marks omitted).

152. *See id.* at 90–93.

of orientation.¹⁵³ Additionally, many students are not bullied because they are LGBT but rather because they are perceived to be an LGBT individual.¹⁵⁴ Both Asher Brown and Billy Lucas committed suicide in 2010 after prolonged bullying by their peers because Asher and Billy were considered to be gay, despite the fact that neither boy publicly stated that he was a homosexual.¹⁵⁵

V. OTHER AVENUES FOR COMBATING LGBT BULLYING

Virginia generally has a positive record for handling issues of bullying¹⁵⁶ and has already taken many steps to address general bullying to begin with; 95% of the schools that responded to the Virginia legislative study provided some form of education to students on bullying.¹⁵⁷ Over 88% of schools also provided individual counseling to students who were bullied.¹⁵⁸ Additionally, 98.5% of Virginia's school districts have created specific policies regarding interventions to be used when a student is identified as a bully.¹⁵⁹ These interventions can range from the traditional suspension and expulsion to the more rehabilitative practices of counseling students who have been identified as bullies and utilizing restorative discipline practices for bullying.¹⁶⁰

Virginia schools have individually taken steps to help LGBT students in the absence of specific government protections. For example, 54% of schools participating in the Virginia School Health Profile reported that they have "safe spaces" where LGBT students can receive support from administrators, teachers, and

153. *See id.* at 92.

154. *Id.* at 92–93.

155. *See* Naomi Drew, *Because Each Life Is Precious, Teach Respect, Compassion*, THE TIMES (Trenton), Oct. 10, 2010, at A9.

156. *Virginia*, BULLY POLICE USA, http://www.bullypolice.org/va_law.html (last visited Apr. 19, 2013). Bully Police outlines twelve different points that make up the "grade" for a state's anti-bullying law and has graded all fifty states. Virginia has been given an A++ rating by this organization. *Id.* However, it should be noted that this organization does not support enumerating groups of students in anti-bullying laws. *See* Brenda High, *Making the Grade: How States are "Graded" on Their Anti-Bullying Laws*, BULLY POLICE USA, <http://www.bullypolice.org/grade.html> (last visited Apr. 19, 2013).

157. VIRGINIA SCHOOL DIVISIONS, *supra* note 107, at viii.

158. *Id.* at ix.

159. *Id.*

160. *Id.* at 17–19. Dan Olweus has also recommended intervention tactics for bullies, including discussion groups for parents of bullies and victims and help from "neutral" students. *See* DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* 64 (1993).

staff.¹⁶¹ Additionally, 60% of schools encourage their staffs to attend professional development on safe and supportive school environments for all students regardless of sexual orientation.¹⁶² Finally, 89% of schools reported that they prohibit harassment based on a student's perceived or actual sexual orientation or gender identity.¹⁶³ While a majority of schools in Virginia are willing to help LGBT students, enumerating sexual orientation in anti-bullying laws will make it mandatory for all schools to provide help, thereby making all schools a safe place for LGBT students. Until sexual orientation is enumerated in Virginia's anti-bullying laws, there are some other steps that Virginia can take to help LGBT students, including providing more services at school to foster a more welcoming environment.

A. *Adult Attitudes Toward LGBT Students Must Change*

There are a number of different steps that Virginia could take in addition to LGBT-inclusive anti-bullying legislation. First, and most importantly, adult attitudes toward LGBT students must change. One national study found that 56.9% of students heard homophobic remarks made by teachers and school personnel.¹⁶⁴ Many LGBT students do not report bullying incidents to teachers or administrators because they believe those adults have a "personal or religious animus" against LGBT individuals.¹⁶⁵ LGBT students should not have to face continued torment because their teachers and administrators are unwilling to stop bullying due to their personal views on the morality of homosexuality. One gay New York high school student faced physical violence, destruction of property, and death threats because his high school principal refused to step in and stop the bullying.¹⁶⁶ After the father's repeated efforts to get school officials to help his son, the principal finally admitted that he was not going to change the school's policies to "cater to homosexuals."¹⁶⁷ Another study revealed that one-

161. VIRGINIA SCHOOL HEALTH PROFILE, *supra* note 128, at 16 (internal quotation marks omitted).

162. *Id.*

163. *Id.*

164. 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xiv.

165. Meneses, *supra* note 19, at 143-44.

166. John G. Culhane, *More Than Victims: A Population-Based, Public Health Approach to Bullying of LGBT Youth*, 38 RUTGERS L. REC. 163, 166-67 (2011).

167. *Id.* at 167 (internal quotation marks omitted).

third of students who did report bullying to school staff received no response to their complaints.¹⁶⁸

Administrator and teacher attitudes toward LGBT students must also change to provide a safe haven for LGBT students. Students who are bullied for reasons such as physical appearance, race, or religion can often turn to their parents or older siblings who may have been bullied for the same reasons.¹⁶⁹ However, LGBT students may not feel as though they have the same opportunity to discuss their bullying and have someone relate to them. Some LGBT students may not have admitted to their parents that they are gay and consequently will be unwilling to tell their parents why they are being bullied.¹⁷⁰ As a result, teachers and administrators need to be willing to leave their own personal beliefs or biases at home in order to help LGBT students in need. For some LGBT students, their teachers may be the only adults they feel comfortable talking with. Enumerating sexual orientation in anti-bullying laws will put teachers and administrators on notice that they should expect to address these specific issues with LGBT students.

Unfortunately, one of the biggest challenges that LGBT students will face in changing adult attitudes is with Virginia politicians themselves. Virginia has not historically been considered to be an LGBT-friendly environment, and much of the legislation proposed to protect LGBT individuals has been shot down.¹⁷¹ Until 2013, the Virginia General Assembly was unwilling to extend protection from workplace discrimination to LGBT Virginians.¹⁷² Governor Bob McDonnell has also been unwilling to include sexual orientation in executive orders banning discrimination in the workforce.¹⁷³ Virginia's hate crime laws also do not enumerate sexual orientation or gender identity but do enumerate race, religion, and ethnicity.¹⁷⁴ In order to make progress toward an enu-

168. 2009 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at 32.

169. *See* Culhane, *supra* note 166, at 171.

170. *See* 2009 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 18, at 32 fig. 20.

171. *See, e.g.*, H.D. 1575, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

172. Alix Bryan, *Senate Passes LGBT Workplace Protection Bill*, WTVR.COM (Jan. 17, 2013), <http://wtvr.com/2013/01/17/ga-bills-on-workplace-protection-for-lgbt-state-employees-introduced/>.

173. *Id.*

174. VA. CODE ANN. § 8.01-42.1 (Repl. Vol. 2007).

merated anti-bullying law, Virginia's lawmakers will likely need to become more LGBT-friendly first.

B. *Gay Straight Alliances*

Another step that can help change the experiences of LGBT students in Virginia is to promote gay-friendly groups at schools, such as a Gay Straight Alliance ("GSA"). A GSA is a type of association that could benefit students across Virginia. GSAs attempt to create safe spaces for LGBT students and bring an understanding of LGBT issues to heterosexual students.¹⁷⁵ As of June 2007, 103 Virginia schools out of roughly 1800 total schools had GSAs working to empower LGBT students facing bullying.¹⁷⁶ The number of these clubs is growing, albeit slowly, to help LGBT students across Virginia.¹⁷⁷ Encouraging more schools to create GSAs, particularly middle schools, could help LGBT and questioning students find a place to fit in and escape harm from their peers.¹⁷⁸

Despite the benefits that GSAs provide to students, there have been attempts to ban the formation of GSAs in Virginia.¹⁷⁹ Some Virginia school districts have created "opt-in" programs that require parents to provide a permission slip for clubs that their child wants to join at school.¹⁸⁰ These opt-in programs could result in far fewer students joining a GSA out of fear that their parents will presume that they are LGBT or force students to come out to their parents as LGBT. In both 2005 and 2006, Virginia lawmakers even attempted to ban GSAs from Virginia schools.¹⁸¹ Fortunately, neither bill passed in the Virginia Senate.¹⁸² Had these

175. *Safe Schools*, EQUALITY VIRGINIA, <http://www.equalityvirginia.org/what-we-do/building-safe-communities/safe-schools/> (last visited Apr. 19, 2013) [hereinafter *Safe Schools*].

176. *Id.*

177. See Danielle Askini, *GSA's Thriving in Rural America*, GSA NETWORK BLOG (Mar. 4, 2010), <http://www.gsanetwork.org/news/blog/gsas-thriving-rural-america/03/04/10>.

178. 2011 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 8, at xx (stating that 52.6% of high school students reported having access to a GSA, while only 6.3% of middle school students had access to a GSA).

179. See *Safe Schools*, *supra* note 175.

180. *Id.* (noting that Rockingham and Harrisonburg have created opt-in programs).

181. H.D. 2868, 2005 Gen. Assemb., Reg. Sess. (Va. 2005); H.D. 1308, 2006 Gen. Assemb., Reg. Sess. (Va. 2006); see also Mike Holtzclaw, *Gay-Straight Clubs Imperiled by Legislation*, DAILY PRESS (Newport News, Va.), Feb. 20, 2006, at A1.

182. See Mason Adams, *Senate Kills Bill on Student Clubs*, ROANOKE TIMES, Mar. 3,

bills passed, they most likely would have created more animosity between LGBT and non-LGBT students and prolonged any chance of enumerating sexual orientation in anti-bullying laws in the near future. Today, Virginia GSAs are thriving, despite the occasional opposition from principals and parents.¹⁸³

C. Legislative Changes

While Virginia's laws, or lack thereof, regarding LGBT individuals may not directly impact LGBT students in school, the implications are clear—Virginia is not willing to extend specific protection to members of the LGBT community. Virginia recently passed a new anti-bullying law in the 2013 General Assembly session that amends its already-standing anti-bullying laws.¹⁸⁴ This law, introduced in the House of Delegates, includes measures that define bullying and requires school boards to prohibit students and school employees from engaging in bullying.¹⁸⁵ Despite the extensive revisions to the anti-bullying laws, there is no mention of including sexual orientation or gender identity as a protected class.¹⁸⁶ The last time a Virginia legislator proposed legislation that included sexual orientation was in 2011.¹⁸⁷ Unfortunately, the legislation was passed by less than thirty days after being introduced.¹⁸⁸

To Virginia's credit, it has taken less drastic steps than some other states. Eight states have enacted what are often referred to as "no promo homo" laws.¹⁸⁹ These laws expressly forbid teachers from discussing gay and transgender issues in a positive light, and some even require that teachers portray LGBT people in a negative manner.¹⁹⁰ Virginia is not one of the states that prohibits

2006, at B4; Holtzclaw, *supra* note 181, at A1.

183. See Askini, *supra* note 177.

184. H.D. 1871, 2013 Gen. Assemb., Reg. Sess. (Va. 2013) (to be codified at VA. CODE ANN. § 22.1-208.01, -276.01, -279.6, -291.4 (____)).

185. *Id.*

186. *Id.*

187. H.D. 1575, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

188. VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, HB 1575 PUBLIC SCHOOLS; ANTI-BULLYING MEASURES, <http://lis.virginia.gov/cgi-bin/legp604.exe?111+sum+HB1575> (last visited Apr. 19, 2013).

189. *States with Safe Schools Laws*, *supra* note 71 (internal quotation marks omitted) (listing Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah as states with "no promo homo" laws).

190. *Id.*

individual school districts from enumerating anti-bullying policies.¹⁹¹ Because local school districts design their own anti-bullying policies, districts are free to implement anti-bullying measures that protect all students, including LGBT students.¹⁹² However, Virginia should still work to protect all LGBT students with state-wide enumerated anti-bullying laws.

CONCLUSION

LGBT students have faced bullying and discrimination in the United States for decades. They have been taunted, verbally harassed, and even sexually assaulted.¹⁹³ Teachers and administrators have ignored the bullying of LGBT students or even actively participated.¹⁹⁴ Legislators have largely failed to help them; less than one-third of states include sexual orientation as a part of their enumerated classes in anti-bullying laws.¹⁹⁵ Other states have actively worked against LGBT students, creating “no promo homo” laws that forbid portraying homosexuality in a positive light.¹⁹⁶ As a result, LGBT students are left largely unprotected in the United States.

However, some states have taken action to help LGBT students, including enumerating sexual orientation in anti-bullying laws. Virginia has already taken significant steps toward being a leader in anti-bullying legislation in the United States, including creating a model policy, requiring schools to implement anti-bullying policies, and requiring character education for students.¹⁹⁷

191. See VA. CODE ANN. § 22.1-279.6 (Repl. Vol. 2011).

192. See *id.*; *States with Safe Schools Laws*, *supra* note 71.

193. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 451–52 (7th Cir. 1996).

194. See *Culhane*, *supra* note 166, at 166.

195. *States with Safe Schools Laws*, *supra* note 71.

196. *Id.* (internal quotation marks omitted).

197. See VA. CODE ANN. §§ 22.1-279.6, -208.01 (Repl. Vol. 2011 & Supp. 2012).

However, there are more steps that Virginia can take to protect LGBT students. It is time for the General Assembly to amend its anti-bullying law and policy to enumerate sexual orientation as a protected group. By implementing this change, Virginia could become one of the few states leading the country in supporting its LGBT students by enumerating sexual orientation in anti-bullying laws.

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