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HEEDING THE CRY FOR HELP: ADDRESSING LGBT BULLYING AS A PUBLIC HEALTH ISSUE THROUGH LAW AND POLICY

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The nightly news brings seemingly countless stories of students committing suicide because of severe incidents of bullying by their peers. In the span of two years, Minnesota's Anoka–Hennepin school district developed a suicide epidemic that claimed the lives of nine students.¹ Four of the nine students who committed suicide were either gay or perceived to be gay by their peers, and all were victims of bullying.² Peers taunted these students with homophobic slurs such as “dyke” and “faggot” and one student was told that he was a “fag who didn't deserve to live.”³ These students also faced frequent physical assaults, including being urinated upon and having their genitals grabbed.⁴ Countless students across the country face the same type of bullying because of their actual or perceived sexual orientation, and suffer negative health effects such as depression, self-inflicted injuries, and other mental health issues.⁵

Although the nine Anoka–Hennepin students faced relentless harassment, school officials took no action to protect them because of the school district's policy requiring school personnel to remain “neutral” on issues of homosexuality.⁶ The district's policy originated with a group of Christian conservative activists espousing the idea that gay individuals are an “abomination.” In keeping with this belief, they forced a measure through the school board forbidding any discussion

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1. Sabrina Rubin Erdely, *One Town's War on Gay Teens*, ROLLING STONE, Feb. 2, 2012, available at <http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202>.

2. *Id.*

3. *Id.*

4. CTR. FOR DISEASE CONTROL, UNDERSTANDING BULLYING FACT SHEET (2011), available at http://www.cdc.gov/ViolencePrevention/pdf/Bullying_Factsheet-a.pdf [hereinafter CDC FACT SHEET].

5. Erdely, *supra* note 1, at 3.

6. *Id.* at 7.

of homosexuality in public schools.⁷ As a result, students were forced to deal with a hostile school environment and its negative health consequences on their own.

Some Anoka–Hennepin students filed a lawsuit against the school district that led to a settlement that will hopefully lead to a healthier school environment.⁸ However, most bullied students are still denied their right to a safe, non–hostile educational environment on a daily basis. The negative public health consequences of this problem are clear and widespread. Litigation is an imperfect, costly, and time intensive approach to address this pressing issue. This Note advocates for a more holistic public health law and policy approach to address the problem of bullying based on sexual orientation and gender identity.

Part I explores lesbian, gay, bisexual and transgender (LGBT) bullying within schools. Part II examines the existing law relevant to LGBT bullying. Part III advocates a holistic public health law and policy response to LGBT bullying, including legal reforms.

I. LGBT BULLYING IN AMERICAN SCHOOLS

A. Definition of Bullying

Definitions of bullying in schools vary widely. For the purpose of this paper, school bullying is defined as an attack or intimidation with the intent to create fear, distress, or harm in another student or group of students.⁹ Bullying is characterized by repeated attacks or intimidation of the same child or group of children,¹⁰ and a real or perceived imbalance of power between the bully and his or her victims.¹¹ Bullying is often manifested through physical abuse, verbal name calling, teasing and threats, and may come in the form of social exclusion and spreading rumors.¹²

7. *Id.* at 4.

8. “The Southern Poverty Law Center and the National Center for Lesbian Rights have filed a lawsuit on behalf of five students, alleging the school district’s policies on gays are not only discriminatory, but also foster an environment of unchecked anti–gay bullying.” *Id.* at 3.; Maria Elena Baca, *Anoka–Hennepin School District Settles Bullying Lawsuit*, STAR TRIBUTE, Mar. 6, 2012, available at <http://www.startribune.com/local/north/141427303.html>.

9. CDC FACT SHEET, *supra* note 4.

10. *Id.*

11. *Id.*

12. Kathleen Hart, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1118 (2005).

The most common forms of bullying are taunts, teasing and threats.¹³ Verbal abuse is often the starting point for an “escalating pattern of harassment.”¹⁴ Verbal abuse usually carries the threat of physical harm, causing fear and apprehension in bullied youth.¹⁵ Male and female students tend to engage in different forms of bullying: boys are more likely to use physical violence and verbal abuse, while girls tend to use verbal abuse, social exclusion and the spreading of rumor to strike fear in victims.¹⁶ This overall use of degrading and abusive language and behavior creates an atmosphere of bigotry and violence within school walls.¹⁷

B. *The Breadth and Gravity of LGBT Bullying within Schools*

It is clear that any child can fall victim to bullies.¹⁸ However, bullies disproportionately target students that come out as lesbian, gay, bisexual, or transgender (LGBT) and students who bullies perceive to be LGBT.¹⁹ LGBT students experience the full spectrum of bullying behavior – from verbal abuse to aggravated physical assault.

A recent study indicated that homophobic remarks such as “you’re so gay,” “dyke,” and “faggot” were the most commonly heard types of biased language in school.²⁰ Approximately 99% of students reported hearing some type homophobic remark and 62% of students reported that they heard negative comments often or frequently about other students’ gender expression.²¹ Surprisingly, not all homophobic remarks are made by students: 60.4% of students reported hearing

13. *Id.*

14. Stephen L. Wessler, *Sticks and Stones*, 58 EDUC. LEADERSHIP 28, 30 (Dec. 2000/Jan. 2001).

15. *Id.*

16. Hart, *supra* note 12, at 1118 n.58.

17. Wessler, *supra* note 14.

18. Jason A. Wallace, *Bullicide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 737 (2011).

19. *Id.*; see also JOSEPH G. KOSCIW ET AL., GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 29 (2010), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf

(stating “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 47.0%. In addition, LGBT students in the [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”).

20. KOSCIW, *supra* note 19, at 16.

21. *Id.* at 16, 18.

homophobic remarks from their teachers or other school personnel.²² Almost 87% of students reported that they felt distressed to some degree by hearing these remarks, even when they were not the intended targets.²³

The study also notes that almost 85% of LGBT students reported being verbally harassed by name-calling or verbal threats because of their sexual orientation.²⁴ Nearly two-thirds of students were verbally harassed because of their gender expression.²⁵ In addition to verbal abuse, 40% of LGBT students suffered physical harassment, such as being shoved or pushed, and another 18.8% of students were victims of a physical assault, such as being punched, kicked, or injured with a weapon, because of their sexual orientation.²⁶ Another 12.5% of children were assaulted because of how they expressed their gender.²⁷

LGBT students also face sexual harassment at alarming rates. Lesbian, bisexual girls, and transgender youth are particularly subject to this form of abuse: 68.2% of LGBT students reported that they were sexually harassed at school, and one-fifth reported that such behavior occurred often or frequently.²⁸ Because of these staggering incidents of bullying, more than sixty percent of LGBT students felt unsafe at school because of their sexual orientation, and close to forty percent felt unsafe because of how they express their gender.²⁹

C. LGBT Bullying is Different than Other Forms of Bullying

One of the most troubling aspects of bullying of LGBT students is that many LGBT students lack the support systems that non-LGBT students may turn to in time of need, including parents, friends, teachers, and school personnel. This is evidenced by the fact that the majority of LGBT students who are victims of harassment or assault in school typically do not report the incidents to school personnel or family members.³⁰ LGBT students may perceive adults as

22. *Id.* at 16.

23. *Id.*; see also Wallace, *supra* note 18, at 737.

24. KOSCIW, *supra* note 19, at 26.

25. About a quarter of these students indicated that the harassment occurred often or frequently. *Id.*

26. *Id.* at 26–27.

27. *Id.* at 27.

28. *Id.*

29. KOSCIW, *supra* note 19, at 64–65.

30. The majority of students never reported incidents to either school staff (62.4%) or to a family member (54.9%). Additionally, few students reported incidents of harassment or

having personal or religious animus toward LGBT individuals. Some parents and teachers may simply not know how to discuss sexual orientation or LGBT bullying and avoid involving themselves in what they perceive to be an awkward or uncomfortable topic. Unfortunately, the high incidence of LGBT bullying is only exacerbated by the lack of adult intervention on behalf of LGBT students.³¹

1. School Personnel Contribute to a Hostile School Environment for LGBT Students

Despite the high incidence of bullying that LGBT students face, the majority do not notify a school administrator about the abuse, believing that no action will be taken or that the situation could actually worsen.³² Some students think that reporting an incident is “not worth it” or pointless because previous reporting did not trigger an effective response.³³ In fact, that perception is often correct: only twenty–seven state laws include requirements to develop model policies addressing harassment, intimidation, or bullying.³⁴ Students also note concern about how teachers would react to them if they report bullying because it would reveal their sexual orientation or gender identity.³⁵ The lack of official school policies that address LGBT bullying “may be perceived as, at most, an implicit encouragement of this harassment or, at least, a disregard for the hostilities that these students must face.”³⁶

Students’ perceived lack of support from school staff, combined with the alarming finding that school personnel participate in making homophobic remarks, and a lack of school policies on how to deal with LGBT–specific bullying make students’ hesitance to seek

assault most of the time or always to staff (13.5%). About 23% of students fear that reporting incidents of bullying to school personnel would worsen the situation. *Id.* at 32.

31. One–third of students who did report a bullying incident said that school staff did nothing in response. *Id.*

32. The largest responses to why students did not report harassment was related to beliefs about school staff intervention (39.6%). Approximately, 23% of students believed that even if they had reported it, either nothing or nothing effective would be done to address the situation. *Id.*

33. *Id.* at 32–33.

34. VICTORIA STUART–CASSEL ET AL., U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 47 (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state–bullying–laws/state–bullying–laws.pdf>.

35. KOSCIW, *supra* note 19, at 34.

36. Michael J. Ritter, *Teaching Tolerance: A Harvey Milk Day Would Do a Student Body Good*, 19 TEX. J. WOMEN & L. 59, 62 (2009); see also *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996) (stating that facts suggest that the defendants had a policy or practice of ignoring Nabozny’s plea for help, which in turn contributed to his repeated assault).

assistance well founded.³⁷ The lack of a systemic approach to address LGBT bullying in schools lends itself to anti-gay environment and student harassment.³⁸

2. *Parents and Family Offer Limited Support for Bullied LGBT Students*

Students who are bullied typically turn to their family for support.³⁹ Unfortunately, LGBT students often do not have the support of their families; the majority of LGBT bullying victims never report bullying incidents to a family member.⁴⁰ Out of the LGBT students that did tell their families about the bullying, only a quarter of those families actually advocated on behalf of the student to school personnel.⁴¹ Some students choose not to report the incidents because of concerns with coming out as LGBT to their families, or because of concerns that their family members' response will "out" the student to the school community.⁴²

Other students' parents can also be a barrier to addressing LGBT bullying in schools. Because of personal or religious beliefs, many parents oppose any discussion of sexual orientation or alternative gender identity in schools.⁴³ In several states, vocal conservative Christian parents have received support from their state legislators in preventing any mention of sexual orientation or gender

37. Wallace, *supra* note 18, at 737–38.

38. While 73% of teachers surveyed strongly agree that they have an obligation to ensure a safe and supportive learning environment for LGBT students, only about half of these teachers believe that anti-harassment and anti-discrimination policies would be most helpful in achieving a safe school environment. Half of teachers report that bullying and harassment of students is a serious problem at their school. DANA MARKOW & JORDAN FEIN, GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA, A SURVEY OF STUDENTS AND TEACHERS 8 (2005), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf.

39. John G. Culhane, *More than Victims: A Population-Based, Public Health Approach to Bullying of LGBT Youth*, 39 RUTGERS L. REC. 1, 11 (2010–2011), available at http://lawrecord.com/files/38_Rutgers_L_Rec_163.pdf (stating that students of color who are being bullied because of their race may find support from their parents. These parents may have experienced similar bullying and now know how to comfort, support and deal with bullying).

40. Only 54.9% report telling a family member about the harassment and abuse. KOSCIW, *supra* note 19, at 32.

41. *Id.*

42. *Id.* at 34.

43. See *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008) (in which Massachusetts parents challenged curriculum materials which encouraged respect for LGBT persons and couples).

expression in anti-bullying legislation.⁴⁴ Some legislators have gone as far as to specifically prohibit the recognition of sexual orientation and gender expression as protected in anti-bullying legislation because their inclusion is believed to be part of an “insidious gay agenda.”⁴⁵ School bullies witnessing their parents’ animus towards LGBT individuals may believe that their bullying behavior is appropriate and supported by the greater community. As a result, bullied LGBT students are left to fend for themselves in what should be a safe school environment.

D. Detrimental Impact of Bullying on Public Health

Bullying is causing a public health crisis in schools: rates of suicide and a wide array of mental and physical health problems are on the rise as a direct result of bullying.⁴⁶ This crisis is not limited to the LGBT victims of bullying, and the public health problems related to bullying do not always end once the bullying stops. All students are harmed when they are in a hostile school environment that perpetuates discriminatory behavior, and some harm can affect students well into adulthood.⁴⁷

1. The Negative Health Effects of Bullying on Victims: the Rise of “Bullycide” and Related Mental and Physical Health Outcomes

The most widely noted and commonly studied effect of bullying on victims’ lives is the increase in the incidence of suicide. Studies show that LGBT students are three to four times more likely to

44. Daniel Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 N.E. J. ON CRIM. & CIV. CONFINEMENT 325, 326 (2011).

45. *Id.* Missouri Representative Jane Cunningham, who believes that gays intended to use the Missouri legislature to advance their agenda in Missouri’s public schools by creating a protected class consisting of LGBT students, who would thereafter have special rights and protections other students would not have. Although she argued that a successful anti-bullying program must target all students and that an enumerated list would focus efforts on specially protected students, she made clear to a conservative Christian group that her strongest motivation was to stop an insidious gay agenda from finding its way into Missouri schools. *Id.*

46. Emily Shafer, *Bullying: What a Pediatrician Should Know*, 24 INFECTIOUS DISEASES IN CHILDREN 1, 10–12 (2011), available at http://www.childrensnational.org/files/PDF/advocacy/Bullying_Full_Article_Feb_2011.pdf.

47. *Id.* at 1; Justin Wieland, *Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California’s Public Schools: Contemporary Issues in Prevalence, Response, and Prevention*, 11 U.C. DAVIS J. JUV. L. & POL’Y 235, 241 (2007).

attempt suicide than their straight peers.⁴⁸ The increase in the suicide rate is not related to inherent psychological illness or self-destructive behaviors in LGBT students, but rather is directly attributable to a hostile school environment where continuous bullying and harassment are permitted.⁴⁹ The recent increase in LGBT suicide led anti-bullying activists to re-name these incidents “bullycide.”⁵⁰ Bullycide refers “to a suicide provoked by the depression and distress that results from bullying and harassment.”⁵¹

While suicide is clearly the gravest consequence of bullying, other negative physical and psychological effects have also been noted. Bullied students often experience depression, anxiety, low self-esteem, trouble sleeping, stomachaches, and headaches.⁵² A recent public health study demonstrated that the impact of traumatic childhood events such as bullying last well into adulthood.⁵³ For example, individuals who are gay or lesbian are twice as likely to be victims of interpersonal violence, especially during their childhood, and are twice as likely to develop post-traumatic stress disorder (PTSD) in adulthood as their straight counterparts.⁵⁴ Untreated PTSD may cause substance dependence, depression, and difficulties engaging in life activities such as maintaining employment and social relationships.⁵⁵ The lack of protection and support from family and school personnel exacerbates a hostile school environment and worsens the emotional and physical health risks that LGBT students’ face.⁵⁶

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

49. Wallace, *supra* note 18, at 740.

50. *Id.* at 741.

51. *Id.*

52. Erica Weir, *The Health Impact of Bullying*, 165 CAN. MED. ASS’N J. 1249 (2001).

53. Andrea L. Roberts et al., *Pervasive Trauma Exposure Among US Sexual Orientation Minority Adults and Risk of Posttraumatic Stress Disorder*, 100 AM. J. PUB. HEALTH 2433, 2436–37 (2010).

54. *Id.*

55. *Id.* at 2433. See also Rachel C. Vreeman & Aaron E. Carroll, *A Systematic Review of School-Based Interventions to Prevent Bullying*, 161 ARCHIVES PEDIATRICS & ADOLESCENT MED. 78 (2007).

56. Asaf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN’S RTS. L. REP. 117, 118 (2008).

2. *The Negative Health Effects of Being a Bully and Witness to Bullying*

Students who engage in bullying behavior or witness others being bullied also suffer negative health consequences. Bullies have a significantly increased risk for depressive symptoms, suicidal ideation, substance abuse, and early sexual activity.⁵⁷ Additionally, bullies are more likely to be abusive toward their romantic partners, spouses, and children as adults.⁵⁸ Engaging in bullying behavior has been shown to be a precursor to later acts of sexual violence.⁵⁹

Students who witness repeated incidents of harassment against fellow students also suffer negative health outcomes. Witnessing these incidents can lead to negative psychological and physiological effects equal to that of the direct victim of the crime or harassment.⁶⁰ As a result, these children are also more likely to experience depression and anxiety, and to abuse tobacco, alcohol or other drugs.⁶¹

3. *Addressing Bullying as a Public Health Issue*

All children, whether they are bullies, bullying victims, or witnesses, suffer negative health consequences as a result. To address the problem, the development of a holistic public health approach that includes students, parents, and school personnel is imperative.

In public health interventions, success is measured by a reduction in the incidence of the behaviors that the intervention seeks to prevent.⁶² It is well documented that the “traditional methods of punishment and reform that focus solely on the bully and the victim are not effective in reducing bullying.”⁶³ While eradicating bullying in the short term may seem like an unattainable task, a significant reduction in the number bullying incidents and the lessening of the severity of these cases would be a successful public health campaign.⁶⁴

57. *Effects of Bullying*, STOP BULLYING, <http://www.stopbullying.gov/topics/effects/index.html>.

58. *Id.*

59. Dorothy L. Espelage, Kathleen C. Basile & Merle E. Hamburger, *Bullying Perpetration and Subsequent Sexual Violence Perpetration Among Middle School Students*, 50 J. OF ADOLESCENT HEALTH 60, 61–64 (2012).

60. Paul Blaum & Vicki Fong, *Impact of Repeated Abuse can be as Severe for Bystanders as Victims*, PENN ST. U. LIVE, Dec. 14, 2004, <http://live.psu.edu/pdfstory/9438>.

61. *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/topics/effects/index.html> (last visited Apr. 24, 2012).

62. Culhane, *supra* note 39, at 170.

63. Hart, *supra* note 12, at 1120.

64. Culhane, *supra* note 39, at 170.

This can only be attained by a combination of effective school policies to address and prevent bullying and legal tools that victims of bullying and their parents can use to assert their right to a safe, non-hostile school environment.

II. FEDERAL GOVERNMENT TAKES ACTION TO PREVENT BULLYING

Under the Obama Administration, the federal government began to take important steps towards reducing the number of bullying incidents in schools by committing significant resources to address the problem. These actions sent the message to states and local school districts that bullying is a serious problem. The federal government's message also came with a warning that tolerating or failing to address bullying could put schools at risk for civil rights litigation.

The Supreme Court's 1954 decision in *Brown v. Board of Education* referred to education as "perhaps the most important function of state and local governments."⁶⁵ The federal government also takes a significant role in preparing children for active engagement in society by committing substantial funds to support the public school system and ensure equal access to education for all children.⁶⁶ Reports that millions of children are victimized by bullying each year, and the responding outcry from parents and educators about the "serious problems" of bullying and harassment in schools have triggered a response from several agencies of the federal government. The United States Department of Education held the first ever "Bullying Summit" on August 11–12, 2010 in Washington, D.C. with the goal of engaging governmental and nongovernmental partners to craft a national strategy to reduce and end bullying.⁶⁷ In a recent letter to governors and chief state school officers, U.S. Secretary of Education Arne Duncan stressed the urgent need for state and local educators and policymakers to combat the destructive effects of bullying on students, schools, and the community at large.⁶⁸ Other

65. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

66. NATIONAL SAFE SCHOOL PARTNERSHIP, BRIDGING THE GAP IN FEDERAL LAW: PROMOTING SAFE SCHOOLS AND IMPROVED STUDENT ACHIEVEMENT BY PREVENTING BULLYING AND HARASSMENT IN OUR SCHOOLS 2 (June 2007), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/912-1.pdf.

67. Press Release, U.S. Dep't of Educ., U.S. Education Secretary to Keynote Department's First-Ever Bullying Summit (Aug. 11, 2010), available at <http://www.ed.gov/news/media-advisories/us-education-secretary-keynote-departments-first-ever-bullying-summit>.

68. Letter from Arne Duncan, U.S. Sec'y of Educ., to Colleagues (Dec. 16, 2010), available at <http://www2.ed.gov/policy/gen/guid/secletter/101215.html>

federal agencies have also sought to address the issue by creating an interagency bullying website that provides information and resources for children, young adults, parents, and educators on how to identify and stop bullying.⁶⁹ Additionally, the federal government provides schools with grants to measure the school's condition for learning, and to implement programs that would address bullying and the overall safety of the school.⁷⁰

Assistant Secretary of Education for Civil Rights at the U.S. Department of Education Russlynn Ali recognized bullying as a serious school problem that “fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and creates conditions that negatively affect learning”⁷¹ In a “Dear Colleague” letter, Assistant Secretary Ali reminded school officials that student bullying behavior could also trigger the school's responsibilities under one or more of the federal antidiscrimination laws enforced by the Department of Education's Office for Civil Rights (OCR).⁷² School districts were warned that the civil rights statutes could be violated when student-on-student harassment is based “on race, color, national origin, sex, or disability[,] is sufficiently serious that it creates a hostile environment[,] and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”⁷³ The federal government has committed financial and human resources to illustrate that their full weight is behind eradicating school bullying. In spite of this, the realities of addressing and eradicating bullying in schools are played out in states and local school districts across the country in a myriad of

69. STOPBULLYING.GOV, <http://www.stopbullying.gov/topics/effects/index.html> (last visited Apr. 24, 2012).

70. Letter from Arne Duncan, *supra* note 68.

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

72. *Id.* The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin in public education; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., which prohibits discrimination on the basis of sex in federally funded education programs; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., which prohibits discrimination on the basis of disability in federally funded education programs; and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., which prohibits discrimination on the basis of disability by public entities. “School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.” Letter from Russlynn Ali, *supra* note 71.

73. *Id.*

different ways. Where schools have failed to protect students, parents and students' advocates have taken their grievances to the courts and the legislature, developing innovative strategies in an attempt to correct what the children's schools have failed to adequately address. Some of those strategies have been successful in developing federal case law and passing state statutes that protect LGBT students from bullying in schools. Other attempts, however, have met significant challenges.

A. Title IX: A Federal Remedy for LGBT bullying?

Currently, there are few tools that victims of bullying can use to seek redress in the courts. One tool that has received increasing attention in the bullying context is Title IX, which Congress enacted in 1972 to help women achieve equal opportunity in education.⁷⁴ In relevant part, Title IX 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.”⁷⁵ In 1999, the U.S. Supreme Court interpreted Title IX’s provisions as providing students protection against student–on–student sexual harassment in federally funded educational institutions in *Davis v. Monroe County Board of Education*.⁷⁶

1. Student–on–Student Harassment and the Davis standard

While in the fifth grade in at Hubbard Elementary School in Monroe County, Georgia, LaShonda Davis was the victim of a prolonged pattern of sexual harassment by another student, referred to in the court pleadings as G.F.⁷⁷ G.F. made sexual comments to LaShonda, telling her “I want to get in bed with you” and “I want to feel your boobs.”⁷⁸ G.F. repeatedly tried to touch LaShonda’s breasts and genitals, and he rubbed his body against her in a sexually suggestive manner.⁷⁹ LaShonda reported each of these incidents to her

74. See Susan Hanley Kosse & Robert H. Wright, *How to Best Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?* 12 DUKE J. GENDER L. & POL’Y 53, 57 (2005). See also Wallace, *supra* note 18, at 743–45 (discussing the history of Title IX jurisprudence and how the Supreme Court expanded Title IX coverage to student–on–student harassment).

75. 20 U.S.C. § 1681(a) (2006).

76. 526 U.S. 629 (1999).

77. *Aurelia D. v. Monroe Cnty. Bd. of Educ.*, 862 F. Supp. 363, 364 (M.D. Ga. 1994).

78. *Id.* at n.1.

79. *Id.* at 364.

school teachers and her parents.⁸⁰ Her parents followed up with LaShonda's teachers and were reassured that the school principal was aware of the harassment.⁸¹ Other female students also complained to their teachers about G.F.'s behavior, and they attempted to meet with the school principal as a group to ask that action be taken against G.F.⁸² Their request for a meeting was refused.⁸³ Despite frequent complaints from LaShonda, her parents, and other students, no disciplinary action was taken against G.F.⁸⁴ It took three months for LaShonda's teachers to even allow LaShonda to move her classroom seat away from her harasser.⁸⁵ During the months of harassment that LaShonda endured, her grades dropped, and she became depressed.⁸⁶ Her father discovered a suicide note she had written.⁸⁷ The harassment only stopped when G.F. was charged with, and pleaded guilty to, sexual battery for his conduct.⁸⁸

In 1994, LaShonda's parents sued the school board under Title IX for the school's failure to respond to G.F.'s persistent sexual harassment of their daughter.⁸⁹ The court dismissed the plaintiffs' complaint, holding that a Title IX claim is only applicable when the school board or an employee of the board is implicated in the harassment, and that the board could not be held liable for the actions of third parties.⁹⁰ LaShonda's parents appealed the decision to the Court of Appeals for the Eleventh Circuit. The appeals court originally reversed the district court's decision, holding that student-on-student harassment stated a cause of action under Title IX where "school officials fail[] to take action to stop the offensive acts" of other students.⁹¹ The Eleventh Circuit then granted a rehearing *en banc*, reversing the panel decision and affirming the district court's decision, reasoning that Title IX does not apply to student-on-student harassment because the statute does not provide schools with

80. *Id.* at 364–65.

81. *Id.* at 364.

82. *Id.* at 365.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 634 (1999).

88. *Aurelia D.*, 862 F. Supp. at 365. *See also Davis*, 526 U.S. at 634.

89. *Aurelia D.*, 862 F. Supp. at 365.

90. *Id.* at 367.

91. *Davis v. Monroe Cnty. Bd. of Educ.*, 74 F.3d 1186, 1188 (11th Cir. 1996).

unambiguous notice that they may be liable for the conduct of third parties—namely, that of other students.⁹²

The Supreme Court granted certiorari to resolve the issue of “whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student–on–student sexual harassment”⁹³ The Court, reversing the rulings below, held that a recipient of federal funding may be liable for private damages under Title IX for student–on–student harassment where the recipient is “deliberately indifferent to known acts of student–on–student sexual harassment[,] the harasser is under the school’s disciplinary authority[,]” and the harassment is so “severe, pervasive, and objectively offensive” as to interfere with the student’s equal right to education guaranteed by Title IX.⁹⁴ Although the Court’s decision created a private right of action for student–on–student harassment against school districts, it intended the reasoning of the decision to be applied in light of the “real limitations” of the new standard.⁹⁵

2. *The Davis “severe, pervasive, and objectively offensive” standard created a high but ambiguous threshold*

While advocates may seek to apply *Davis* to combat LGBT bullying, there are several challenges. The first is clearing the high threshold set by the *Davis* Court to prove sufficiently severe harassing conduct. In expanding Title IX protection to student–on–student harassment, the *Davis* Court failed to provide clear guidance as to what constitutes “severe, pervasive, and objectively offense” conduct, stating only that an actionable level of student–on–student harassment depends on “a constellation of surrounding circumstances, expectations, and relationships” surrounding the harassing conduct.⁹⁶ Furthermore, the Court excused certain kinds of student behavior, such as “simple acts of teasing and name–calling among school children” even if these comments are directed at a student because of his or her gender,⁹⁷ noting that children act in ways unacceptable for adults.⁹⁸

92. *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1401 (11th Cir. 1997).

93. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637 (1999).

94. *Id.* at 646–47, 652.

95. *Id.* at 652.

96. *Id.* at 651.

97. *Id.* at 652. See Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 162 (2009) (explaining that although the *Davis* Court does not plainly require physical harassment to reach the “severe, pervasive, and objectively offensive” threshold, it implies this by stating that name–calling is not enough).

This exception gravely affects LGBT students because they are often subjected to teasing and name-calling, and such conduct is very often the first step in the escalating progression to more serious forms of bullying.⁹⁹ Based on the Court's limited guidance, lower courts could easily interpret even pervasive and offensive name-calling associated with LGBT bullying as insufficient to state a cause of action under Title IX. A victim of bullying may have to wait until the bullying escalates into physical violence before Title IX protection is triggered.

Justice Kennedy's dissent in *Davis* criticized the majority for failing to provide a clear definition of "actionable peer harassment" under Title IX.¹⁰⁰ In addition to leaving the "severe, pervasive, and objectionably offensive" standard open for interpretation, the dissent claimed that the majority failed to define when "an actionable denial of 'equal access to education'" exists.¹⁰¹ Although Justice Kennedy feared that the majority's new test would open the doors for endless litigation for student-on-student harassment lawsuits,¹⁰² in actuality, the test remains extremely narrow, and only situations with egregious circumstances, including acts of violence, assault, and rape, are granted relief.¹⁰³

In one example of a successful claim, the Sixth Circuit Court of Appeals found that a student's Title IX claim for student-on-student harassment satisfied the *Davis* standard where the harassment escalated to acts of physical and sexual violence in *Vance v. Spencer County Public School District*.¹⁰⁴ As a middle school and high school student, Alma was verbally and physically harassed by her peers over the course of three and a half years.¹⁰⁵ Her peers called her names such

98. *Davis*, 526 U.S. at 651–52 (“[I]n the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.”).

99. See Wallace, *supra* note 18, at 749 (“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.”).

100. *Davis*, 526 U.S. at 656–57, 677 (Kennedy, J., dissenting).

101. *Id.* at 678 (purporting that creating a “severe, pervasive, and objectionably offensive” standard is not a sufficient definition “since the touchstone for determining whether there is a Title IX liability is the effect on the child’s ability to get an education”). Courts have noted that when sexual harassment forces the student to leave the school, that it sufficient denial of equal education. See, e.g., *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1309 (D. Kan. 2005).

102. *Davis*, 526 U.S. at 677 (Kennedy, J., dissenting)

103. See Sacks & Salem, *supra* note 97, at 162–63 (describing the result of the high threshold established in *Davis*).

104. 231 F.3d 253, 259 (6th Cir. 2000).

105. *Id.* at 256–57.

as “German gay girl,” “whore,” and other sexually explicit terms.¹⁰⁶ Alma was continually propositioned and inappropriately touched during her classes.¹⁰⁷ In one incident in seventh grade, Alma was physically assaulted by a group of male students who pinned her to the wall, pulled her hair, and tried to remove her shirt; another male student stabbed Alma’s hand with a pen.¹⁰⁸ Alma complained to the administration, but the harassment continued.¹⁰⁹ As a result, Alma developed depression and withdrew from high school.¹¹⁰ Based on these facts, the court found that “[a]lthough one incident can satisfy a claim, Alma has presented several instances that reflect not only severity and pervasiveness, but also circumstances that effectively denied her education.”¹¹¹ The court also found that the school district had actual knowledge of these incidents – particularly after Alma was stabbed in the hand and pinned against a wall by a group of male students – but acted with deliberate indifference by failing to discipline the bullies.¹¹²

The *Vance* case demonstrates the severity of violence required by the *Davis* standard. With the high bar created by the *Davis* decision, Title IX’s protections will remain out of reach for many LGBT student victims of bullying until the harassment reaches the level of physical and sexual assault, when it may already be too late to reverse the severe physical and psychological toll bullying takes on LGBT victims.

3. *The Davis standard improperly places the burden on the victim to show that the school had actual knowledge and acted with “deliberate indifference”*

The second challenge for a plaintiff seeking to succeed in a Title IX claim is overcoming the “deliberate indifference” prong of the test. According to *Davis*, a school can only be held liable when they had actual knowledge of sexual harassment and chose to act with deliberate indifference.¹¹³ The test to determine deliberate indifference is whether the school’s response, or lack thereof, was “clearly

106. *Id.* 256.

107. *Id.* at 257.

108. *Id.* at 256.

109. *Id.* at 257.

110. *Vance*, 231 F.3d at 257.

111. *Id.* at 259.

112. *Id.* at 262.

113. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

unreasonable in light of the known circumstances.”¹¹⁴ Based on this standard, a school administrator could have actual knowledge of severe student-on-student harassment, take only limited actions that do not resolve the conflict, but escape liability if the administrator’s actions were not “clearly unreasonable.”¹¹⁵ Additionally, some courts will not even address the “severe, persistent, and objectively offensive” prong if there is no deliberate indifference on the part of the school.¹¹⁶

Furthermore, the “deliberate indifference” prong of the Title IX test places the entire burden of the school’s actual knowledge on the bullying victim, who may be too embarrassed and emotionally shaken by the harassment to alert the school of the harassing conduct.¹¹⁷ The victim may also fear retaliation from the bully if he or she reports the incidents. LGBT students have the added burden that their sexual orientation may lead to additional discrimination. According to *Davis*, Title IX imposes no affirmative duty for teachers and staff to intervene or prevent this behavior among students unless they have actual, direct knowledge of the harassing behavior.¹¹⁸

4. *Lower courts are left to define the boundaries of Title IX, leading to inconsistent results*

The lack of guidance from the *Davis* Court on the parameters of the Title IX standard has led to varying results in the lower courts. By not providing examples of actionable student-on-student sexual harassment, the Supreme Court gave significant deference to the lower courts to interpret what constitutes actionable harassment under the law. Additionally, the *Davis* opinion grants deference to schools to discourage lower courts from “second-guessing the disciplinary decisions made by school administrators” because the schools themselves are in the best situation to remedy harassment in their own

114. *Id.* at 648. The Court was careful not to require schools to respond to student-on-student harassment with a specific disciplinary response. *Id.* Rather, the “clearly unreasonable” standard, according to the *Davis* Court, will allow schools the flexibility to determine the best disciplinary actions. *Id.*

115. The dissent in *Davis* also criticized the majority’s “clearly unreasonable” standard as inviting the jury to second guess the decisions of school administrators to intervene, who are usually in a better position to decide what is a reasonable intervention. *Davis*, 526 U.S. at 678–79 (Kennedy, J., dissenting).

116. *See, e.g.*, *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008) (declining to determine whether conduct met the “severe, persistent, and objectively offensive” standard because it found that the school was not deliberately indifferent to verbal and physical harassment on the basis of the plaintiff’s disability).

117. *See Wallace, supra* note 18, at 744.

118. *See Davis*, 526 U.S. at 644–45.

schools.¹¹⁹ As a result, lower courts will likely defer to the school board's policies to determine whether the school's response or lack of response was "clearly unreasonable." Deference to school policies could result in court-sanctioned support of anti-gay policies which perpetuate and encourage a hostile environment for LGBT students.¹²⁰ This deference will also lead to inconsistent and widely varied protections—or lack thereof—for LGBT victims of bullying.

5. *Title IX does not clearly cover acts of harassment based on sexual orientation*

Courts have inconsistently interpreted whether Title IX applies to harassment for sexual orientation, drastically affecting the utility of the law to protect LGBT students from harassment. On its face, Title IX only protects students from harassment "on the basis of sex."¹²¹ As a result, courts do not automatically interpret anti-gay taunts as an indicator that the bullying was gender-motivated.¹²²

For example, in *Estate of Carmichael v. Galbraith*, a Texas court denied the plaintiffs' Title IX claim following the suicide of their son, Jon, because the parents of suicide victim Jon Carmichael could not demonstrate that the student-on-student harassment was based on Jon's male gender.¹²³ Jon was harassed and bullied on a daily basis at school.¹²⁴ On one occasion, bullies accosted Jon, called him "fag, queer, homo, and douche," destroyed his belongings, forced his head into a toilet, and threw him into a dumpster.¹²⁵ During another incident, this one videotaped, Jon was stripped naked and stuffed into a trashcan.¹²⁶ The following day, Jon committed suicide.¹²⁷ A school counselor knew of the bullying but did not report it.¹²⁸ Despite the anti-gay slurs used by the bullies, the court found that the plaintiffs failed to demonstrate that Jon was bullied based on his gender.¹²⁹ The

119. See *id.* at 648 ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.").

120. See Erdely, *supra* note 1 (demonstrating the devastating effect school's policies, such as the Minnesota's school's neutrality policy, on bullied LGBT students).

121. 20 U.S.C. § 1681(a) (2006) (emphasis added). See Wallace, *supra* note 18, at 747 (referring to this interpretation as the "sexual orientation loophole" for LGBT students).

122. See *Estate of Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 WL 13568, at *7-8 (N.D. Tex. Jan. 4, 2012).

123. *Id.*

124. *Id.* at *1.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Galbraith*, 2012 WL 13568, at *1.

129. *Id.* at *6.

court noted that the plaintiffs' complaint alleged that Jon was bullied because he was short and because other kids found it funny.¹³⁰ The court also found that the incident where Jon was stripped naked, though it had sexual overtones, was not based on Jon's gender, nor was the fact that the harassers used anti-gay terms, because it was only on one occasion.¹³¹ Therefore, the Title IX claim was denied.¹³²

To determine if harassment was gender-based, other courts have asked whether the harassers were motivated by the victim's nonconformance to gender stereotypes. The court found sex-based discrimination under Title IX when a male student named Dylan Theno was harassed by his peers for not conforming to gender stereotypes.¹³³ Throughout middle and high school, Dylan was repeatedly taunted with names such as "flamer," "fag," and "queer."¹³⁴ Students would make obscene gestures towards Dylan, mimicking acts of oral sex with food.¹³⁵ Although the school district argued that Dylan was bullied for not conforming to *social* stereotypes and that the harassers just used "sexually charged words" as a part of "teenage banter," the court found this argument unconvincing.¹³⁶

However, courts are inconsistent in finding that taunts for perceived sexual orientation are motivated by gender stereotypes. In *Wolfe v. Fayetteville, Arkansas School District*, the Eighth Circuit Court of Appeals held that a student did not state a claim under Title IX because the student could not demonstrate a gender-based motive for the harassment.¹³⁷ Beginning in middle school, William Wolfe was harassed by his peers several times a week over the course of five years.¹³⁸ Wolfe was pushed, shoved, and called names that incorrectly identified him as gay.¹³⁹ Wolfe was punched and had his head slammed into a window on a school bus.¹⁴⁰ His peers also created a Facebook page using Wolfe's picture with the word "HOMOSEXUAL" written on it.¹⁴¹ Offensive, anti-gay comments

130. *Id.*

131. *Id.* at *7.

132. *Id.* at *8.

133. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1304 (D. Kan. 2005).

134. *Id.* at 1305.

135. *Id.*

136. *Id.* at 1304.

137. 648 F.3d 860, 867 (2011).

138. *Id.* at 862.

139. *Id.*

140. *Id.*

141. *Id.*

were written about Wolfe in textbooks and on bathroom stalls.¹⁴² Wolfe's peers and teachers claimed that Wolfe acted in conformity with male stereotypes, and they did not think he was gay.¹⁴³ Wolfe's peers claimed that they did not attack him based on his sexuality.¹⁴⁴ Wolfe's teachers never reported these incidents to the school's Title IX Coordinator because they felt that these incidents represented bullying, not sexual harassment.¹⁴⁵ Wolfe argued that the court should uphold a Title IX claim for name-calling and rumor spreading by peers in an attempt to degrade his masculinity.¹⁴⁶ However, the court found this argument unpersuasive and denied his Title IX claim.¹⁴⁷ Because Title IX does not clearly protect against acts of sexual harassment over a student's perceived sexual orientation, LGBT students may not find relief by bringing an action under Title IX.

B. State Anti-Discrimination Statutes: An Imperfect Solution

State anti-discrimination laws that prohibit student-on-student harassment in schools apply a similar standard to Title IX, requiring both "severe, pervasive, and objectively offensive conduct" by the student harasser and "deliberate indifference" of the school to the harassment.¹⁴⁸ However, unlike Title IX, some state laws explicitly prohibit harassment on the basis of sexual orientation. For example, § 363A.13 of Minnesota's Human Rights Act prohibits discrimination that denies equal access to education on the basis of enumerated characteristics, including sexual orientation.¹⁴⁹ As a result, the Minnesota statute, like many other states' anti-discrimination statutes, is seemingly more inclusive than Title IX. However, state anti-

142. *Id.*

143. *Wolfe*, 648 F.3d at 862.

144. *Id.* at 862-63.

145. *Id.*

146. *Id.* at 865.

147. *Id.*

148. *See, e.g., Washington v. Pierce*, 179 Vt. 318, 332 (2005) (requiring a showing under the state anti-discrimination statute of "severe, pervasive, and objectively offensive conduct"). *But see L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ.*, 189 N.J. 381, 407 (2007) (declining to extend the "deliberate indifference" prong of the Title IX standard to the state's anti-discrimination law).

149. MINN. STAT. ANN. § 363A.13 (West 2004). It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons. *Id.* This provision does not include "gender identity" or "gender expression," excluding transgender students. *Id.*

discrimination laws are still not a viable solution for bullied LGBT students because those laws present the same hurdles as Title IX: the victims must meet the high “severe, persistent, and objectively offensive” standard and show that the school was deliberately indifferent to actual knowledge of the harassment.¹⁵⁰ Similar to Title IX, these statutes require bullying to reach an unacceptably high level before the victim may take action in court.

As of this writing, Minnesota, like many states, does not define bullying in any statute.¹⁵¹ How will LGBT students seek civil remedies for bullying if the states’ statutes do not recognize bullying explicitly as a cause of action? To provide more protection to bullied LGBT students, states should enact anti-bullying legislation that includes a similar enumerated provision protecting students from bullying on the basis of sexual orientation. Enumerated provisions, combined with a well-drafted definition of bullying can raise awareness and provide a remedy for bullied LGBT students.¹⁵²

Currently, nineteen states and Washington, D.C. include enumerated provisions as part of their anti-bullying legislation.¹⁵³ However, of these states, not every provision is completely LGBT-inclusive. Two states, Alabama and Florida, only prohibit sexual discrimination, similar to Title IX.¹⁵⁴ Five states, Colorado, New Mexico, New York, Oregon, and Washington, include the term “sexual orientation,” but exclude “gender identity” and/or “gender

150. *See, e.g.*, *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000) (finding that a student who, for ten years, was harassed by his peers for his gender and perceived sexual orientation, was conduct sufficient severe to satisfy a claim under Minnesota’s Human Rights Act).

151. MINN. STAT. ANN. § 121A.0695 (West 2008).

152. *See* N.H. REV. STAT. ANN. § 193:F2–F4 (LexisNexis 2011).

153. Alabama, Arkansas, California, Colorado, District of Columbia, Florida, Hawaii, Illinois, Iowa, Maryland, New Hampshire, New Jersey, North Carolina, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. ALA. CODE § 16–28B–3 (LexisNexis Supp. 2011); ARK. CODE ANN. § 6–18–514 (Supp. 2011); CAL. EDUC. CODE § 234.1 (West Supp. 2012); COLO. REV. STAT. ANN. § 22–32–109.1(2)(a)(X) (West Supp. 2011); CONN. GEN. STAT. ANN. § 10–222d (West Supp. 2012); D.C. MUN. REGS. tit. 5 § B2599 (2009); FLA. STAT. ANN. § 1006.147 (West 2009); HAW. CODE R. § 8–19–2 (LexisNexis 2009); 105 ILL. COMP. STAT. 5/27–23.7 (West Supp. 2012); IOWA CODE ANN. § 280.28 (West Supp. 2011); MD. CODE ANN., EDUC. § 7–424 (LexisNexis 2008); N.H. REV. STAT. ANN. § 193–F:2 (LexisNexis 2011); N.J. STAT. ANN. § 18A:37–14 (West 2011); N.M. CODE R. § 6.12.7.7 (LexisNexis 2006); N.Y. EDUC. LAW §§ 11–12 (McKinney Supp. 2012); N.C. GEN. STAT. § 115C–407.15 (2011); OR. REV. STAT. § 339.351 (2011); R.I. GEN. LAWS § 16–21–33 (2011); VT. STAT. ANN. tit. 16 § 11(26)(A) (Supp. 2011); WASH. REV. CODE ANN. § 28A.300.285 (West 2011).

154. *See* ALA. CODE § 16–28B–3 (LexisNexis Supp. 2011); ALA. DEP’T OF EDUC., MODEL ANTI-HARASSMENT POL’Y § 3 (2009), available at <http://www.alabamaschoolboards.org/PDFs/Harassment%20Policy%20Act%202009.pdf>; FLA. STAT. ANN. § 1006.147 (West 2009).

expression” from the list of protected characteristics.¹⁵⁵ As a result, while lesbian and gay students are protected against harassment motivated by sexual orientation in these states, transgender students fall through a statutory loophole if they are bullied for their gender identity or gender expression. Furthermore, some states which exclude “gender identity” have also written these provisions with exclusive, rather than inclusive language, which may lead to the interpretation by courts that “gender identity” or “gender expression,” were intentionally excluded from the list.¹⁵⁶

In fact, LGBT-inclusive language is frequently left out of enumerated provisions and anti-bullying statutes for fear by some conservative organizations that it will advance the “gay agenda.”¹⁵⁷ These organizations, such as Focus on Family, oddly believe that anti-bullying legislation with LGBT-inclusive language is being used to “promote homosexuality to kids” and to teach them about gay marriage before their parents have an opportunity to do so.¹⁵⁸ The voice of conservative Christian groups were so strong in Missouri that lawmakers included a provision *prohibiting* an enumerated provision in the state’s anti-bullying statute specifically to prevent some students from receiving “special treatment” — mainly, LGBT students and students of color.¹⁵⁹ An additional challenge for advocates and lawmakers attempting to create comprehensive statutory protections for LGBT students is the reality that even where anti-bullying laws with enumerated provisions exist, amendments can always be introduced in an attempt to eliminate this language.¹⁶⁰

155. COLO. REV. STAT. ANN. § 22-32-109.1(2)(a)(X) (West Supp. 2011); N.M. CODE R. § 6.12.7.7 (LexisNexis 2006); N.Y. EDUC. LAW §§ 11-12 (McKinney Supp. 2012); OR. REV. STAT. § 339.351 (2011); WASH. REV. CODE ANN. § 28A.300.285 (West 2011).

156. *See, e.g.*, COLO. REV. STAT. ANN. § 22-32-109 (1)(II)(I) (2010) (“The schools in the district are subject to all federal and state laws and constitutional provision prohibiting discrimination on the basis of disability, race, creed, color, sex, sexual orientation, national origin, religion, ancestry, or need for special education services.”). The language of this statute does not use the phrase “without limitation,” suggesting protection is limited to the characteristics in the list.

157. *See* Weddle, *supra* note 44, at 326.

158. Russell Goldman, *Some School Anti-Bullying Programs Push Gay Agenda*, *Christian Group Says*, ABC NEWS (Sept. 1, 2010), <http://abcnews.go.com/US/school-anti-bullying-programs-push-gay-agenda-christian/story?id=11527833#.Tz7AzVzXHY8>.

159. MO. REV. STAT. § 160.775(3) (West Supp. 2012) (“Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment. Policies may include age appropriate differences for schools based on the grade levels at the school.”).

160. A bill was introduced into the New Hampshire House of Representatives in 2011 that would remove the enumerated provision from the anti-bullying statute. H.R. 370, 2011

The thirteen jurisdictions with LGBT-inclusive enumerated provisions¹⁶¹ represent a small percentage of the country, yet are an indication of shifting attitudes in addressing LGBT bullying. These states not only provide comprehensive protection to LGBT students, they help create a safer school environment for all students.

III. REFORMS NECESSARY TO COMBAT LGBT BULLYING

A. *The Need for a Holistic Approach to LGBT Bullying*

Legislation has its limits. Although some states have comprehensive laws addressing bullying for LGBT students, utilizing the protections of these laws may still be a challenge. Hurdles to bringing a civil case include a lack of financial resources to acquire counsel.¹⁶² Additionally, for an LGBT student to seek relief under a bullying statute, it may mean revealing their sexual orientation or gender identity to their parents, peers, and those who bullied them for these perceived characteristics.¹⁶³ Because civil litigation may not be a feasible option for some bullied students, it is critical to adopt holistic policies to prevent and combat instances of LGBT bullying.

Bullying is a complex issue and requires a complete approach to address issues related to the bully and the victim. Additionally, bullying of LGBT students is compounded due to conflicting religious and social opinions about gay youth. Differences in school climates require an individualized approach in every school system to effectively combat bullying. Statutes can mandate a holistic approach by requiring schools to develop policies such as clear reporting procedures for instances of bullying, strategies for discipline and intervention, counseling for both the victim and the bully, and involvement of the parents of both parties.¹⁶⁴ Schools should also

Sess. (N.H. 2011), available at <http://www.gencourt.state.nh.us/legislation/2011/HB0370.html>.

161. Arkansas, California, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maryland, New Hampshire, New Jersey, North Carolina, Rhode Island, and Vermont. ARK. CODE ANN. § 6-18-514 (Supp. 2011); CAL. EDUC. CODE § 234.1 (West Supp. 2012); CONN. GEN. STAT. ANN. § 10-222d (West Supp. 2012); D.C. MUN. REGS. tit. 5 § B2599 (2009); HAW. CODE R. § 8-19-2 (LexisNexis 2009); 105 ILL. COMP. STAT. 5/27-23.7 (West Supp. 2012); IOWA CODE ANN. § 280.28 (West Supp. 2011); MD. CODE ANN., EDUC. § 7-424 (LexisNexis 2008); N.H. REV. STAT. ANN. § 193-F:2 (LexisNexis 2011); N.J. STAT. ANN. § 18A:37-14 (West 2011); N.C. GEN. STAT. § 115C-407.15 (2011); R.I. GEN. LAWS § 16-21-33 (2011); VT. STAT. ANN. tit. 16 § 11(26)(A) (Supp. 2011).

162. Wieland *supra* note 47, at 259.

163. *Id.*

164. See Culhane, *supra* note 39.

provide training to teachers and staff that addresses bullying and how to respond. For example, states such as Alabama and New Jersey require teacher training on suicide prevention policies.¹⁶⁵ And, while legislation has its limits, improvements in legislation are a necessary component of this holistic approach to LGBT bullying.

B. Enumerated Provisions: A Better Approach

Enumerated provisions which clearly designate protected characteristics are a critical component of a comprehensive anti-bullying statute. Commentators have argued that a comprehensive bullying policy would improve prevention and intervention by school staff to combat harassment of LGBT students.¹⁶⁶ The Supreme Court in *Romer v. Evans* noted the importance of these enumerated provisions to protect LGBT individuals from discrimination, stating that “enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.”¹⁶⁷ In addition to including enumerated provisions, states should aim to draft broad definitions of “bullying” and/or “harassment” that will allow LGBT students to seek relief before bullying reaches an egregious level. Such reforms would better alert teachers to inappropriate behavior toward LGBT students and will enable teachers to intervene and prevent future instances of bullying.

Enumerated provisions are important to LGBT students because these provisions provide notice not only to teachers and staff, but also to LGBT students themselves that bullying on the basis of sexual orientation and sexual identity is not permitted in the school.¹⁶⁸ Teachers are on notice that it is their duty to intervene and provide a safe school environment for their students. Likewise, enumerated provisions alert LGBT students that they do not have to suffer through

165. See ALA. CODE § 16-28b-8 (LexisNexis Supp. 2011); N.J. STAT. ANN. § 18A:6-112 (West 2011).

166. See Weddle, *supra* note 44, at 333; Wallace, *supra* note 18 at 752 (“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.”).

167. *Roper v. Evans*, 517 U.S. 620, 628 (1996). See also Sacks & Salem, *supra* note 97, at 190 (“[Bullying prevention] policies should: (1) explicitly enumerate protected traits or characteristics, particularly those subject to community prejudices such as sexual orientation and gender expression; (2) change school norms by promoting school-wide respect for diversity; and (3) require all personnel, including non-decision makers, to intervene.”).

168. Wallace, *supra* note 18, at 754; See Ritter, *supra* note 36, at 70 (arguing that by not including enumerated provisions, schools are failing to prevent harassment aimed at LGBT students).

bullying.¹⁶⁹ With a statute that specifically protects their interests, LGBT students may find the confidence to report harassment sooner, knowing that their problem is worth reporting and that school officials will take their claims seriously.¹⁷⁰

Enumerated provisions also send a broader message about societal values to other students and their families.¹⁷¹ Many children are accustomed to hearing anti-gay terminology at home, and from their friends, movies, and music.¹⁷² By specifically enumerating sexual orientation and gender identity, states send a clear message that harassment of LGBT students is not just “kids being kids,” but hurtful, unacceptable behavior to engage in while at school.

Critics of enumerated laws claim they give special protection to a specific group of people. However, neutral laws that do not specify protection for groups targeted by animus often lead to lack of enforcement and protection.¹⁷³ In addition, enumerated provisions in anti-bullying laws are drafted to ensure protection to *all* students, including those not explicitly mentioned in the statute.¹⁷⁴ For example, Arkansas’s anti-bullying statute § 6–18–514 prohibits bullying motivated by any attribute of another student.¹⁷⁵ The statute defines attribute as “any actual or perceived personal characteristics *including without limitation*”¹⁷⁶ By drafting enumerated provisions similar to Arkansas’s law to be illustrative, legislatures can protect all students, including LGBT students, from being the targets of anti-gay harassment and other forms of discrimination.¹⁷⁷

169. *Id.*

170. *Id.* See Ritter, *supra* note 36, at 63 (explaining that the absence of school rules explicitly prohibiting bullying on the basis of sexual orientation or gender identity sends the message to LGBT students that this kind of harassment is unimportant).

171. Wallace, *supra* note 18, at 754.

172. *Id.*

173. See Erdely, *supra* note 1. The neutrality policy in the Minnesota case study encouraged teachers and staff to not discuss LGBT issues. After a string of suicides, teachers reminded not to show support towards LGBT students in the classroom. *Id.*

174. See 105 ILL. COMP. STAT. 5/27–23.7 (West Supp. 2012) (“Bullying on the basis of actual or perceived race, color, religion, sex . . . or any other distinguishing characteristic is prohibited”); see also IOWA CODE ANN. § 280.28 (West Supp. 2011) (“[‘]Trait or characteristic of the student[‘]” includes but is not limited to”).

175. ARK. CODE ANN. § 6–18–514 (Supp 2011).

176. *Id.* (emphasis added).

177. Wallace, *supra* note 18, at 753.

C. *Anti-bullying statutes should include broad definitions of “bullying” and “harassment”*

Many states do not define bullying in any statute.¹⁷⁸ Well-drafted definitions of “bullying” and “harassment” in state anti-bullying statutes support a holistic approach to addressing LGBT bullying in schools by providing students with a cause of action before bullying reaches an egregious, potentially irreversible level of harm. Currently, the definitions of bullying and harassment found in state anti-bullying statutes are a combination of many different elements that affect LGBT students’ ability to take civil action, including: (1) an intentional act requirement;¹⁷⁹ (2) a reasonable person standard;¹⁸⁰ (3) a pattern of conduct;¹⁸¹ or (4) a single incident.¹⁸²

The intent requirement in state bullying statutes is interpreted differently depending on how “bullying” is defined. For example, in Colorado, bullying is defined as “any written or verbal expression, or physical or electronic act or gesture, or a pattern thereof, that is *intended* to coerce, intimidate, or cause any physical, mental, or emotional harm to any student.”¹⁸³ For an LGBT student to find relief under the Colorado statute, they must demonstrate that the bully actually, subjectively, intended to cause harm.

In contrast, Delaware’s definition of bullying combines the element of an intentional act with a reasonable person standard. Bullying is defined as an “*intentional* written, electronic, verbal or physical act against student, volunteer or employee that a *reasonable person* should know will have effect of”¹⁸⁴ Delaware’s definition of bullying lowers the threshold for a victim to gain relief because he or she would not have to prove that the bully actually *intended* harm. Instead, a bullied plaintiff in Delaware must establish that the bully intended to commit the *act*, but need not establish the intent. The reasonable person standard lessens the burden on the victim in civil

178. See, e.g., MINN. STAT. ANN. § 121A.0695 (West 2008).

179. See, e.g., ALASKA STAT. ANN. § 14.33.250 (2010).

180. See, e.g., MO. REV. STAT. § 160.775 (West 2012).

181. See, e.g., MISS. CODE ANN. § 37-11-67 (Supp. 2011).

182. See, e.g., LA. REV. STAT. ANN. § 17:416.13 (Supp. 2012).

183. COLO. REV. STAT. ANN. § 22-32-109.1 (2)(a)(X) (West Supp. 2011) (emphasis added).

184. DEL. CODE ANN. tit. 14, § 4112D (2007). See also LA. REV. STAT. ANN. § 17:416.13 (Supp. 2012) (combining an intentional act element and a reasonable person standard for the effect of the act).

cases. Only four states have neither an intentional act requirement nor a reasonable person standard.¹⁸⁵

State definitions of bullying also require either a single act of bullying or a repeated pattern of conduct. Although bullying definitions with a single act allowance seem broader than those requiring a repeated pattern of conduct, legislatures restrict the definition by requiring the single act be egregious. For example, Pennsylvania and Illinois both define bullying to allow for a cause of action from a single act.¹⁸⁶ However, both states raise the threshold for relief by incorporating the terms “severe” and “pervasive” to describe the single act, mirroring the language of the Title IX standard.¹⁸⁷

To support a holistic approach to address bullying, state legislatures should move toward a definition of bullying which may be triggered from a single instance of bullying. Iowa’s bullying definition is an example which affords a victim a broad range of protection:

“Harassment” and “bullying” shall be construed to mean *any* electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that meets *one or more* of the following conditions:

- (1) Places the student in *reasonable fear* of harm to the student’s person or property;
- (2) Has a substantially detrimental effect on the student’s physical or mental health;
- (3) Has the effect of substantially interfering with a student’s academic performance;
- (4) Has the effect of substantially interfering with the student’s ability to participate in or benefit from the services, activities, or privileges provided by a school.¹⁸⁸

185. HAW. CODE R. § 8–19–2 (LexisNexis 2009); NEB. REV. STAT. § 79–2, 137 (2008); N.H. REV. STAT. ANN. § 193–F:3 (LexisNexis 2011).

186. 24 PA. CONS. STAT. ANN. § 13–1303.1–A(e) (West 2012); 105 ILL. COMP. STAT. ANN. 5/27–23.7 (West Supp. 2011).

187. 24 PA. CONS. STAT. ANN. § 13–1303.1–A(e); 105 ILL. COMP. STAT. ANN. 5/27–23.7.

188. IOWA CODE ANN. § 280.28 (West Supp. 2011) (emphasis added).

Iowa's definition of bullying also does not have a mandatory intent or reasonableness standard.¹⁸⁹ Instead, the victim must demonstrate that the conduct in question created an "objectively hostile school environment."¹⁹⁰ Additionally, the definition allows for multiple scenarios to trigger the protection of the statute, such as reasonable fear by the victim.¹⁹¹ A reasonable fear element focuses on the effect the conduct has on the victim, as opposed to requiring the victim to prove actual intent of the bully to cause harm. By broadening the definition of bullying in state statutes and lowering the threshold for relief, victims of bullying, particularly in the LGBT community, may be encouraged to come forward before their harassment reaches an egregious level.

IV. CONCLUSION

The need for schools, policymakers, parents, and communities to work together to ensure safe schools for students is clear. Bullying denies children their right to education in a safe, non-hostile environment. LGBT students in particular require protection from bullying because they are targeted disproportionately and experience higher rates of suicide and other negative health impacts.¹⁹² LGBT students are in a uniquely vulnerable situation in that they often face bias from not only their peers, but school administrators and parents as well. This makes it even more difficult for these students to seek help.

Although there are federal and state laws in place to provide bullied students a civil remedy, these laws are imperfect and provide inconsistent protection to LGBT students. Title IX, while providing a remedy for student-on-student sexual harassment, does not explicitly protect against harassment for a student's perceived sexual orientation.¹⁹³ Additionally, Title IX and similarly worded state anti-discrimination laws are counterproductive to a preventative approach to bullying because they require a bullying victim to experience "severe, pervasive, and objectively offensive" conduct before a cause of action arises.¹⁹⁴

189. *Id.* For example, under § 280.28(2)(b)(3), a student could bring a cause of action for bullying if the effect of the acts substantially interferes with the student's academics.

190. *Id.*

191. *See id.* § 280.28(2)(b)(1)-(4).

192. *See supra* Part I.D.

193. *See supra* Part II.A.

194. *See supra* Part II.B.

Evidence-based public health policy demands a better solution. Comprehensive state anti-bullying statutes that include an enumerated provision specifically providing protection against bullying for sexual orientation, gender identity, and gender expression are a more effective approach.¹⁹⁵ In addition to state laws, school districts should strive to create specific procedures for training, intervening, disciplining, and reporting acts of bullying.¹⁹⁶ These procedures must involve school counselors and parents of both the victim and bully. Additionally, schools should foster a peer support system for bullied students, such as the creation of Gay-Straight Alliances or similar student clubs. Through a holistic approach to LGBT bullying that includes school policy, public health interventions, and legal remedies for bullied students, schools can live up to their role as “the most important function of state and local governments”¹⁹⁷ and ensure a higher quality of education and a healthier, safer student body.

195. *See supra* Part III.B.

196. *See supra* Part III.A.

197. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).