Bullied LGBQ Students Are Afraid but Their Schools Aren't (and That's the Problem): Why It's Time to Move On from Broken Title IX to State Tort Law as a Solution

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INTRODUCTION

"It gets better" was the message of President Barack Obama on October 21, 2010.[1] President Obama joined everyone from Secretary of State Hillary Clinton to pop sensation Ke$ha in the "It Gets Better" YouTube campaign, which supported gay youth being targeted by bullies.[2] The President's message to gay youth was simple: "You are not alone. You didn't do anything wrong. You didn't do anything to deserve being bullied . . . There are people out there who love you and care about you just the way you are."[3]

A decade later, this begs two questions. First, over the past decade, have we kept our promise to Lesbian, Gay, Bisexual, and Queer ("LGBQ")[4] students in elementary and secondary schools? That is, has it gotten better? Second, if it has not gotten better, why not and how do we—a decade later—make it better?

Perhaps unsurprisingly, the answer to the first question is that, over the past decade, it has not gotten much better for students bullied on the basis of their sexual orientation. Comparing data from 2009 and data from the most recent surveys, while there has been a slight trend of improvement with respect to anti-gay peer-to-peer harassment—the school climate overall remains problematically hostile to LGBQ students.

The answer to the second question is more interesting, more complicated, and the focus of this Article, which argues that the reason it has not gotten better is that schools do not fear liability for failing to keep all students, including especially LGBQ students, safe from bullying. Over the past decade, too much attention has been paid to Title IX of the Education Amendments Act of 1972 as a solution for addressing peer-to-peer bullying, including the bullying of LGBQ students. Title IX

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[1] Aliyah Shahid, *Obama releases video supporting gay youth as administration tries to enforce "Don't ask, Don't Tell,"* N.Y. Daily News (Oct. 22, 2010), https://www.nydailynews.com/news/politics/obama-releases-video-supporting-gay-youth-administration-enforce-don-don-article-1.188904 [https://perma.cc/P7QV-D4PJ].

[2] *See* It Gets Better Project, https://itgetsbetter.org/stories/ [https://perma.cc/W64W-G8JF].

[3] Shahid, *supra* note 2.

[4] This Article's use of the "LGBQ" acronym is done with the understanding that it is not all-encompassing of all sexualities outside of heterosexual and that each person's sexuality is unique. Also, while this Article recognizes that transgender students also suffer from bullying and harassment and that these students are often grouped together with LGBQ students, gender identity and sexual orientation are not one in the same. Because the bullying of transgender students raises its own unique issues, concerns, and solutions, it is beyond the scope of this Article, which focuses on students bullied on the basis of their sexual orientation.

provides: "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance."[5] Title IX's "on the basis of sex" does not include harassment on the basis of sexual orientation, such that "harassment or discrimination based upon a person's sexual orientation cannot form the basis of a cognizable [Title IX] claim."[6] This exclusion of sexual orientation from Title IX has led to calls that Title IX be "fixed" to make it apply to harassment on the basis of sexual orientation and, thereby, create a solution to LGBQ peer-to-peer bullying.[7]

However, this Article proposes that seeking to "fix" Title IX in this way would do little to nothing to combat LGBQ bullying. This is because the real problem with Title IX is not that it is limited by the "on the basis of sex" requirement. To the contrary, over the past decade, courts have been increasingly uniform in applying Title IX to protect students bullied on the basis of sexual orientation, and this uniformity should strengthen as a result of two recent landmark circuit court holdings.[8] Instead, the problem with continuing to focus on Title IX as a solution to anti-gay bullying is that a "law's regulation of behavior is only as good as the mechanisms that enforce it," [9] and, simply put, schools do not fear liability under either of Title IX's enforcement mechanisms. While Title IX has two clear enforcement mechanisms—enforcement by private cause of action and enforcement by the U.S. Department of Education Office of Civil Rights ("OCR")—neither have the ability to motivate schools to change their behavior.

With respect to private causes of action, the Supreme Court case *Davis ex rel. LaShonda D. v. Monroe County Board of Education* provides an almost impenetrable shield for school districts against liability for peer-to-peer sexual harassment.[10] Under *Davis*, a school district will not be liable to a student-plaintiff (whether LGBQ or not) unless the school had "actual knowledge" of "severe, pervasive, and objectively

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[5] 20 U.S.C. § 1681(a) (1972).

[6] *See, e.g.*, Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012).

[7] *See, e.g.*, R. Kent Piacenti, *Toward A Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POLICY & L. 58, 96 (2011) ("Title IX should be amended to prohibit not just "discrimination based on sex" but also discrimination based on sexual orientation, perceived sexual orientation, gender identity, and gender expression. Such a change would make it clear that discrimination against LGBT students is unlawful and that schools have a legal obligation to take appropriate steps to address anti-gay bullying.").

[8] *See* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc). Additionally, in the context of Title VII, the Sixth Circuit held that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., No. 16-2424, 2018 WL 1177669, at *9 (6th Cir. Mar. 7, 2018).

[9] *See* Megan W. Shaner, *The (Un)enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 281–82 (2014).

[10] Davis ex rel. LaShonda D. v. Monroe Cty. Board of Educ., 526 U.S. 629, 633 (1999).

offensive" peer harassment but stayed "deliberately indifferent" to it.[11] Thus, the *Davis* standard not only "incentivizes willful ignorance" on the part of schools,[12] but also limits actionable conduct under Title IX to only the most egregious physical bullying and means that verbal bullying—which is what LGBQ students most commonly experience—goes entirely unremedied by Title IX.[13] Thus, as long as schools are shielded by this excessively high *Davis* standard, amending Title IX to apply to sexual orientation would not change schools' climates to make them safer for bullied LGBQ students.

The OCR enforcement mechanism also cannot motivate schools to change their behavior with respect to any peer-to-peer harassment. While Title IX gives the OCR the power revoke federal funding from schools that violate Title IX, to date no school has ever lost federal funding such that schools do not fear being held accountable pursuant to it.[14] Not only that, under the Trump administration, the OCR has "sharply scale[d] back the scope of sexual-violence investigations" under Title IX and no longer includes anti-gay bullying in its definition of sexual harassment.[15] Thus, if we accept the underlying tort principle that "assumes that people will not behave appropriately unless they are subject to sanctions and that sanctions will coerce appropriate behavior,"[16] the solution to combating LGBQ peer-to-peer bullying cannot lie with Title IX because as long as *Davis* stands and the OCR neglects to investigate anti-gay bullying claims schools will not fear liability at the federal level.

This Article also analyzes how focusing on "fixing" Title IX through new federal legalization such as Student Nondiscrimination Act ("SNDA"),[17] which is purported to be modeled after Title IX and aims to combat LGBQ bullying in public K-12 schools, is also not a workable solution. The reason is that, in order to actually address the kind of verbal harassment that LGBQ students overwhelmingly suffer in schools on a daily basis, the drafters of the SNDA—though claiming to model it after Title IX—in actuality had to vastly depart from Title IX and the caselaw

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[11] *Id.* at 650.

[12] *See infra* section II.D.

[13] Kathleen Mary Elaine Mayer, Note, *Schools are Employers too: Rethinking the Institutional Liability Standard in Title IX Teacher-on-Student Sexual Harassment Suits*, 50 GA. L. REV. 909, 944 (2016).

[14] *See infra* section II.E.

[15] Nick DeSantis, *Education Dept. Stops Providing Details on Resolved Title IX Cases*, THE CHRONICLE OF HIGHER EDU., March 15, 2018, https://www.chronicle.com/article/Federal-Sex-Assault/240848 [https://perma.cc/GM5B-RHYA].

[16] Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 132 (1993); Mark A. Rothstein, *The Impact of Behavioral Genetics and the Law and the Courts*, 83 JUDICATURE 116, 122 (1999) ("Regardless of the scientific community's position on the evidence, the fear of liability often motivates the actions of individuals, institutions, and companies.")

[17] Student Nondiscrimination Act of 2018, H.R. 5374, 115th Cong. (2018) 2d Session, https://www.congress.gov/bill/115th-congress/house-bill/5374/text [https://perma.cc/B8SS-XZS4].

interpreting its definition of "harassment."[18] While this makes the SNDA's protection on the basis of sexual orientation broader than Title IX's protection on the basis of sex, it also raises First Amendment concerns that Title IX has avoided.[19]

If we cannot currently create a fear of liability at the federal level, how then can we change the school climate to make it safe for all students, including LGBQ students? This Article proposes that, if we accept the underlying principles of tort law and classic deterrence theory, the solution requires creating a fear of liability for peer-to-peer LGBQ bullying on the part of schools at the state level. Currently no real fear of liability exists at the state level largely because state anti-bullying statutes do not contain mechanisms of enforcement and schools are overwhelmingly protected by the doctrine of immunity.[20]

Over the past decade, there has been a push for states to adopt enumerated (i.e., specifically including bullying on the basis of sexual orientation) and comprehensive anti-bullying legislation.[21] While this has been a good first step, this Article argues that it is necessary to push states to go a step farther and make those statutes enforceable. This is because, if a school is not penalized for failing to comply, even the best state anti-bullying statute requiring a school to adopt the best anti-bullying policy will not motivate a school to change its behavior. This Article proposes that the solution to combating LGBQ bullying is, therefore, an enumerated, comprehensive state anti-bullying statute coupled with enforcement mechanisms that hold schools liable for failing to keep all students, regardless of sexual orientation, safe.[22]

Part I explores whether we have kept our promise to LGBQ students that it would "get better" in K-12 schools—comparing the day-to-day life of LGBQ students over the past decade. Part II analyzes Title IX caselaw and how Title IX—despite not expressly applying to sexual orientation—is largely being interpreted to cover anti-gay peer-to-peer harassment. Part II also analyzes how, ultimately, it is the incredibly high *Davis* standard that precludes amending Title IX as a solution to address anti-gay bullying. Part III analyzes whether Title IX could be "fixed" by adopting new Title IX-like legislation specific to sexual orientation and discusses the shortcomings of the proposed SNDA. Finally, Part IV suggests that the solution to anti-gay bullying rests with the states, who all

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[18] *See infra* section III.B.

[19] *Id.*

[20] Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299, 325-26 (2014) ("Although many states adopted anti-bullying laws in recent years, very few claim rulings were based on a state anti-bullying law. Their paucity is attributable to their lack of a private right of action.").

[21] *See infra* section II.E.

[22] *See* discussion *infra* Section II.E.

currently have anti-bullying statutes but lack effective mechanisms to enforce them.

I. THE PROBLEM REMAINS: IT HAS NOT GOTTEN BETTER FOR LGBQ K-12 STUDENTS

In September 2010—over the course of a two-and-a-half-week period—at least five gay youth committed suicide after enduring relentless bullying. Billy Lucas, fifteen, who was tormented because his peers thought he was gay, hanged himself in his grandmother's barn.[23] Seth Walsh, thirteen, who was subject to "chronic teasing" by his peers, hanged himself in his backyard.[24] Asher Brown, thirteen, shot himself after being—as put by his family—"bullied to death" for, among other things, being gay.[25] Tyler Clementi, eighteen, jumped off the George Washington Bridge after his roommate secretly recorded him kissing another man.[26]

This caused the nation's attention to turn to the issue of students being bullied based on their sexual orientation[27] and, as a result, the "It Gets Better Project" was launched.[28] The project's goal was lofty but simple: post videos of personal testimonies to "help gay teenagers who feel isolated and who may be contemplating suicide."[29] The "It Gets Better Project" quickly went viral—receiving thousands of video submissions and millions of views in a matter of months.[30]

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[23] LGBTQ Nation Staff Reports, *On Anniversary of Billy Lucas' Suicide, Family Files Wrongful Death Lawsuit*, SDGLN, Sept. 10, 2012, http://sdgln.com/news/2012/09/10/billy-lucas-suicide-family-files-wrongful-death-lawsuit [https://perma.cc/GR5R-YJ3U].

[24] Bryan Alexander, *The Bullying of Seth Walsh: Requiem for a Small-Town Boy*, TIME, Oct. 2, 2010, http://content.time.com/time/nation/article/0,8599,2023083,00.html [https://perma.cc/5YB7-FH2V].

[25] Peggy O'Hare, *Parents: Bullying drove Cy-Fair 8th grader to suicide*, Sept. 27, 2010, HOUSTON CHRONICLE, https://www.chron.com/life/mom-houston/article/Parents-Bullying-drove-Cy-Fair-8th-grader-to-1698827.php [https://perma.cc/KJ7L-6KPB].

[26] Richard Gonzales, *Roommate Pleads Guilty In Rutgers Suicide Case*, NPR, Oct. 27, 2016, https://www.npr.org/sections/thetwo-way/2016/10/27/499663847/roommate-pleads-guilty-in-rutgers-suicide-case [https://perma.cc/HXJ3-LX2G].

[27] Dr. Dale Archer, *5 Important Lessons From 3 Tragic Bullying Deaths*, FOXNews.com, Oct. 7, 2010, http://www.foxnews.com/opinion/2010/10/07/dr-dale-archer-tyler-clementi-seth-walsh-asher-brown-billy-lucas-teenboys-gay.html [https://perma.cc/QHB2-EWPR]; Thomas Curwen, *Gay teen endured a daily gauntlet*, L.A. TIMES, Oct. 8, 2010, http://articles.latimes.com/2010/oct/08/local/la-me-seth-walsh-20101008 [https://perma.cc/RDV2-XLJU]. A few months earlier in July 2010, a similar tragedy occurred in Anoka, Minnesota where Justin Aaberg, fifteen, hanged himself after being subject to harassment and bullying. David Crary, *Suicide Surge: Schools confront anti-gay bullying*, Oct. 10, 2010, http://www.nbcnews.com/id/39593311/ns/us_news-life/t/suicide-surge-schools-confront-anti-gay-bullying/#.Xs_oBmhKjIU.

[28] Brian Shetler, *Campaign Offers Help to Gay Youth*, N.Y. TIMES, Oct. 18, 2010, http://www.nytimes.com/2010/10/19/us/19video.html [https://perma.cc/KNU2-LH5V].

[29] *Id.*

[30] *Peter Mongillo, It Gets Better Project Takes Off Via Social Media,* THE AUSTIN STATESMAN, Oct. 25, 2010, https://www.statesman.com/lifestyles/gets-better-project-takes-off-via-social-media/Pp2VS1FwzC4n3TrOsSjCsM/ [https://perma.cc/5EXZ-A4K3].

It has now been a decade since the "It Gets Getter Project" was launched and America promised LGBQ students bullied by their peers in K-12 schools that it would "get better." Which begs the question: did it?

A. Then: A Day in the Life of a Gay Student — Harassment, Homophobia, & Hell

Looking back at data regarding the environment of public schools with respect to LGBQ students in 2010, it is hardly surprising that the "It Gets Better" project was ripe to go viral. That year, the Gay, Lesbian and Straight Education Network ("GLSEN") released the 2009 National School Climate Survey, which was a culmination of ten years of research documenting the experiences of lesbian, gay, bisexual and transgender students ("LGBT")[31] in public schools.[32] The survey sample included a total of 7,261 students (from 2,783 school districts all across the country) between the ages of thirteen and twenty-one.[33] The survey's key finding was that, for the majority of LGBT students, school was a "hostile" place, and there was an "urgent need for action."[34] In response to their sexual orientation, 84.6 percent of LGBT students reported being verbally harassed, 40.1 percent reported being physically harassed, and 18.8 percent reported being physically assaulted at school.[35] In response to gender expression, 63.7 percent reported being verbally harassed, 26.2 percent reported being physically harassed, and 12.5 percent reported being physically assaulted.[36] Homophobic remarks such as "faggot" or "dyke" were frequently heard by 72.4 percent of LGBT students.[37] Nearly two-thirds (61.1 percent) of students reported that they felt unsafe in school because of their sexual orientation, and more than a third (39.9 percent) felt unsafe because of their gender expression.[38] This feeling of unsafety caused 30 percent of students to miss at least one day of school in the prior month.[39] The majority of students (62.4 percent) did not report harassment or assault to school staff or officials and, of the students

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[31] This section of the Article uses the LGBT acronym, which includes transgender students, to mirror the results and terminology of the 2009 GLSEN study.

[32] Kosciw, J. G., Greytak, E. A., Diaz, E. M. & Bartkiewicz, M. J., *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, GLSEN (2010), at xv, https://www.glsen.org/sites/default/files/2009%20National%20School%20Climate%20Survey%20Full%20Report.pdf [https://perma.cc/W2PD-76F8] [hereinafter 2009 National School Climate Survey].

[33] *Id.* at xvi.

[34] *Id.* at xvi, xx.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (comparing missed class and school days of LGBT students to a sample of secondary school students and finding that 8.0 percent of average students missed class once and 6.7 percent missed at least of one day of school in a given month because of a safety concerns).

who did report, 33.8 percent said the school did nothing in response.[40]

B. Now: Harassment, Homophobia, and Mostly Still Hell

According to the most recent GLSEN National School Climate Survey released in 2018, things have not gotten that much better for gay students over the past decade. The most recent survey—consisting of 23,001 students between the ages of thirteen and twenty-one from all across the United States—concluded that "[s]chools nationwide are hostile environments for a distressing number of LGBTQ students"[41] While compared to the 2009 numbers, the most recent GLSEN study showed the environment has gotten somewhat better, it also showed that progress was stalling—noting that it had seen "fewer positive changes" in the most recent survey than it had in the previous one.[42]

First, the good news. Comparing data from 2009 with the most recent data, the results revealed that there has been a drop in the amount of LGBQT[43] students reporting frequently hearing homophobic remarks like "fag or "dyke" (60.3 percent compared to 72.4 percent in 2009).[44] There also has been a positive trend with respect to harassment and assault suffered by LGBTQ students. The most recent survey showed that, in response to their sexual orientation: 70.1 percent LGBTQ students (down from 84.6 percent in 2009) reported being verbally harassed; 28.9 percent (down from 40.1 percent in 2009) reported being physically harassed; and 12.4 percent (down from 18.8 percent in 2009) reported being physically assaulted at school.[45] In response to gender expression: 59.1 percent reported being verbally harassed (down from 63.7 percent in 2009); 24.4 percent reported being physically harassed (down from 26.2 percent in 2009); and 11.2 percent reported being physically assaulted

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[40] *Id.*

[41] Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M. & Truong, N. L., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN (2018), at xvii, https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf [https://perma.cc/GG7T-YM9F], [hereinafter 2017 National School Climate Survey].

[42] *Id.*

[43] This section of the Article uses the LGBQT acronym, which includes lesbian, gay, bisexual, queer, and transgender students, to mirror the results and terminology of the 2017 GLSEN study.

[44] 2017 National School Climate Survey, *supra* note 42, at xviii–xix.

[45] 2009 National School Climate Survey, *supra* note 33, at xvi; 2017 National School Climate Survey, *supra* note 42, at xviii-xix; Kosciw, J. G., Greytak, E. A., Giga, N. M., Villenas, C. & Danischewski, D. J, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN (2016), at xvi-xvii, https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf [https://perma.cc/4TV6-4YUX] [hereinafter 2015 National School Climate Survey"].

(down from and 12.5 percent in 2009).[46]

However, a comparison of the most recent survey to the next most recent survey (taken in 2015) revealed that progress has "stalled" in some areas.[47] For example, while there had previously been a decline throughout the years in the number of students reporting that homophobic remarks were used "pervasively," the number remained static between 2015 and the most recent survey.[48] The percentage of students who reported hearing homophobic remarks frequently remained almost the same (60.3 percent compared to 58.8 percent in 2015). The frequency of verbal harassment on the basis of sexual orientation also did not change (70.1 percent compared to 70.8 percent in 2015). The frequency of physical harassment on the basis of sexual orientation increased slightly (28.9 percent compared to 27 percent in 2015), and the frequency of physical assault decreased slightly (12.4 percent compared to 13 percent in 2015).[49]

With respect to gender expression, between the two most recent surveys, while there was a "small decrease" in hearing negative remarks about gender expression, there was a "small but significant increase" in verbal harassment and no change with respect to physical harassment and assault.[50]

Additionally, survey results with respect to behavior of teachers and staff moved entirely in the wrong direction. While the hearing of school staff making homophobic remarks has stayed largely static, the hearing of school staff making negative remarks about gender expression has been on an upward trend over the past decade—with the most recent survey being the all-time high.[51] Moreover, and perhaps most troubling, is that students are not reporting harassment to school staff: the most recent survey showed that "only a fifth or fewer of students reported victimization most of the time or always."[52] Even worse, of the few students who did report, the effectiveness of the report did not show a trend of improvement.[53] The most recent survey revealed that 60.4 percent of students said the school did nothing in response or told the student to ignore it—this is compared to 63.5 percent in 2015, and only 33.8 percent who did nothing in response in 2009.[54]

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[46] *Id.*

[47] 2017 National School Climate Survey, *supra* note 42, at 123.

[48] *Id.* at 120.

[49] 2009 National School Climate Survey, *supra* note 33, at xvi; 2015 National School Climate Survey, *supra* note 46, at xvi, 4–5; 2017 National School Climate Survey, *supra* note 42, at xviii-xix.

[50] 2017 National School Climate survey, *supra* note 42, at 119, 122.

[51] *Id.* at 120–21.

[52] *Id.* at 122.

[53] *Id.* at 123.

[54] 2009 National School Climate Survey, *supra* note 33, at xvi; 2015 National School Climate Survey, *supra* note 46, at xvi; 2017 National School Climate Survey, *supra* note 42, at xix.

Perhaps most telling is that LGBTQ students still reported feeling unsafe at school at similar percentages because of their sexual orientation (59.5 percent compared to 57.6 percent in 2015 and 61.1 percent in 2009) and gender expression (44.6 percent compared to 43.4 percent in 2015 and 39.9 percent in 2009).[55] And, there has been an increasing trend of these students missing at least one day of school per month because of safety concerns or feeling uncomfortable (34.8 percent compared to 31.8 percent in 2015 and 30 percent in 2009).[56]

In conclusion, to say schools have gotten much better for LGBQ students would be disingenuous, and there is still much work to be done to make school climates safe for LGBQ students. That is, LGBQ-bullying is still a problem in need of a solution. The next Part discusses whether Title IX could be that solution.

II. AMENDING TITLE IX TO APPLY TO SEXUAL ORIENTATION IS AN EMPTY SOLUTION

When it comes to a national solution to the anti-gay peer harassment of LGBQ students, much focus over the past decade and before has been on Title IX, which provides the main remedy for victims of sexual harassment in the context of education.[57] Title IX prohibits harassment "on the basis of sex,"[58] however, as interpreted by courts, "harassment or discrimination based upon a person's sexual orientation cannot form the basis of a cognizable [Title IX] claim."[59] This has resulted in calls to "fix" Title IX to apply it to harassment on the basis of sexual orientation.[60] However, as set forth below, amending Title IX to expressly address sexual orientation would not "fix" Title IX to make it a solution for anti-gay bullying.

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[55] 2009 National School Climate Survey, *supra* note 33, at xvi; 2015 National School Climate Survey, *supra* note 46, at xvi; 2017 National School Climate survey, *supra* note 42, at xix.

[56] 2009 National School Climate Survey, *supra* note 33, at xvii; 2015 National School Climate Survey, *supra* note 46, at xvi; 2017 National School Climate Survey, *supra* note 42, at xviii.

[57] *See, e.g.*, Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2012–13 (2016); Piacenti, *supra* note 8, at 63.

[58] 20 U.S.C. § 1681(a).

[59] *Kalich*, 679 F.3d at 471; *see also* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (holding claims asserted by the plaintiff based on discrimination due to his sexual orientation or perceived sexual orientation were not actionable under Title IX and must be dismissed).

[60] Piacenti, *supra* note 8, at 96 ("Title IX should be amended to prohibit not just 'discrimination based on sex' but also discrimination based on sexual orientation, perceived sexual orientation, gender identity, and gender expression. Such a change would make it clear that discrimination against LGBT students is unlawful and that schools have a legal obligation to take appropriate steps to address anti-gay bullying.").

A. Title IX Overview

Title IX is a remedial statute with "two principal objectives . . . : 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'"[61] Although the language of Title IX was modeled after Title VI, when interpreting Title IX (which was designed to address sexual discrimination and harassment in the context of education), courts regularly look to Title VII (which was designed to address the same in the employment context).[62]

Title IX applies to public and private schools that receive federal funding.[63] The OCR is the administrative agency charged with enforcing the requirements of Title IX and a school's violation of Title IX can lead to the loss of federal funding.[64] Although Title IX itself does not expressly include a private cause of action, in 1979 the Supreme Court created a private cause of action for individuals to enforce Title IX by seeking monetary damages against the school district that receives federal funds.[65]

It was not until 1999, however, that the Supreme Court held that an individual could bring a private cause of action against a school district for peer-to-peer sexual harassment in the seminal case *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.[66]

B. *Davis's* incredibly high standard for recovery under Title IX in cases of peer-to-peer harassment

In Davis, the plaintiff was the mother of a fifth grade student, LaShonda, who had been the victim of prolonged sexual harassment at her public elementary school by one of her classmates, G.F.[67] The plaintiff alleged that G.F. would attempt to touch LaShonda's breasts and genital

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[61] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286–290 (1998) (internal citation omitted).

[62] *See, e.g.*, Jennings v. Univ. of N. Carolina, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994) (citations omitted) (noting that courts interpret "Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII."); Doe v. Ohio State Univ., 239 F. Supp. 3d 1048, 1065 (S.D. Ohio 2017), *on reconsideration in part*, 323 F. Supp. 3d 962 (S.D. Ohio 2018) ("Because the statutes share the same substantive goals and because Title IX mirrors the same substantive provisions of Title VII of the Civil Rights Act of 1964, courts interpret Title IX by looking to case law interpreting Title VII employment discrimination cases.").

[63] 20 U.S.C. §§ 1681-1688.

[64] 34 C.F.R. § 106.1; 20 U.S.C.A. § 1682.

[65] Cannon v. Univ. of Chicago, 441 U.S. 677, 694–97 (1979).

[66] *Davis*, 526 U.S. at 633.

[67] *Id.* at 634–35.

area while making "vulgar statements" such as "I want to go to bed with you."[68] In one incident, G.F. put a doorstop in his pants and acted in a sexually suggestive manner toward LaShonda.[69] In another incident, G.F. rubbed his body against her in the hallway.[70] Each time LaShonda would report the incident to her mother and her teachers.[71] Although the principal was made aware of the incidents, no disciplinary action was taken against G.F. nor was an effort to separate the two made.[72] LaShonda was the subject of the sexually harassing behavior for six months until it finally ended when G.F. pleaded guilty to sexual battery for his conduct.[73] As a result of G.F.'s conduct, LaShonda's previously high grades dropped; she became unable to concentrate on her studies; and she authored a suicide note.[74]

LaShonda's mother brought a complaint in district court under Title IX against the school district, but the court dismissed it under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[75] The Supreme Court granted certiorari to answer the question of whether a private cause of action under Title IX may be brought against the school district for student-on-student sexual harassment.[76]

Because Title IX was enacted pursuant to the Spending Clause, the Court held that a school district could be held liable for private damages, but it could only be held liable when it had adequate notice of its potentially liability. That is, the Court held that a school district could only be liable "for its own misconduct."[77] To ensure that a school district would be liable "only for its own misconduct," a plaintiff-student bringing a Title IX cause of action against a school for peer-to-peer bullying, must prove what can be broken into three elements: (1) the plaintiff was harassed "on the basis of sex"; (2) the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities and benefits provided by the school"; and (3) the school had "actual knowledge" of the harassment but stayed "deliberately indifferent" to it.[78]

Each of these elements are discussed in detail infra, but it is the last two elements—as opposed to the "on the basis of sex" element—that

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[68] *Id.* at 634.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 634–35.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 636.
[76] *Id.* at 637 ("We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages.").
[77] *Id.* at 639–40.
[78] *Id.* at 650.

preclude Title IX as solution to LGBQ-bullying. This is because the Title IX private cause of action for peer harassment applies only "in certain limited circumstances" to a narrow type of "actionable harassment" (that which rises to the "high standard" of being severe, pervasive, and objectively offensive) and then only when the school knew about that actionable harassment but responded in a way that was "clearly unreasonable."[79]

C. The real problem with Title IX for bullied LGBQ students is not its "on the basis of sex" requirement such that Title IX's language need not be amended

Pursuant to *Davis*, in order to establish a private Title IX cause of action against a school district, the first element the plaintiff must prove is that the harassment was "on the basis of sex."[80] Harassment "on the basis of sex" includes (1) sexual harassment and (2) gender-based harassment.[81] "In other words, was Plaintiff being harassed because of [his or her] gender or for some other reason?"[82]

Unlike Title VII, where circuit courts have held sexual orientation is a protected class, for purposes of Title IX, harassment "on the basis of sex" does not include sexual orientation.[83] As summarized by the Sixth Circuit, "sexual orientation is not a protected classification" under Title IX, "[t]hus, harassment or discrimination based upon a person's sexual orientation cannot form the basis of a cognizable claim."[84]

This has led to calls for Title IX to be amended to include sexual orientation; however, such an amendment is both unnecessary and amounts to a false sense of action because, even for LGBQ students, this

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[79] *Id.* at 643, 650; *see also* Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 619 (6th Cir. 2019).

[80] Title IX, 28 U.S.C. § 1681(a); *Davis*, 526 U.S. at 652.

[81] *See, e.g.*, Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 864-5 (8th Cir. 2011).

[82] Nungesser v. Columbia Univ., 169 F. Supp. 3d 353, 365 (S.D.N.Y. 2016).

[83] *See* Department of Education, Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039-12040 (1997) (OCR Title IX Guidelines)("Title IX does not prohibit discrimination on the basis of sexual orientation."); *see also* Corral v. UNO Charter Sch. Network, Inc., No. 10-cv-03379, 2013 WL 1855824, at *5 (N.D.Ill. May 1, 2013) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex or conformity to gender norms) is not a basis for a sex discrimination claim.").

[84] *Kalich*, 679 F.3d at 471; *see also* Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 879-80 (N.D. Ohio 2003) (permitting plaintiff to pursue a Title IX suit against the school district for its alleged failure to discipline students for sexually suggestive harassment, e.g., calling plaintiff a "fag" and "queer," because whether harassment was motivated by "sexual stereotyping" or on the basis of his perceived sexual orientation was a question of fact for the jury); Montgomery, 109 F. Supp. 2d at 1090 (holding claims asserted by the plaintiff based on discrimination due to his sexual orientation or perceived sexual orientation are not actionable under Title IX and must be dismissed).

is the least difficult *Davis* element to establish.[85]

1. Title IX is already being applied to sexual orientation

Since *Davis*, courts have been willing to do "contortions"[86] to protect students from harassment based on sexual orientation, and "there has been a significant and growing line of Title IX cases involving harassment of K-12 students based on gender stereotypes and perceived LGBQ status."[87]

An analysis of twenty-one post-Davis cases revealed that courts use "two main rationales in finding that peer harassment of LGBQ students is actionable sex discrimination under Title IX."[88] First, is the "widely accepted gender stereotyping rationale" where courts "interpret what appears to be sexual orientation discrimination—such as anti-gay epithets—as actually based on sexist stereotypes about masculinity and femininity."[89] As explained by one court, "sexual orientation discrimination . . . falls under the broader umbrella of gender stereotype discrimination" because "[s]tereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women—and the relationships between them."[90] For example, in *Theno v. Tonganoxie*

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[85] *See, e.g.*, Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 963 (D. Kan. 2005) ("Therefore, the court readily concludes that same-sex student-on-student harassment is actionable under Title IX to the same extent that same-sex harassment is actionable under Title VII.").

[86] Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment As Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RIGHTS L. REV. 189, 191 (2005).

[87] Kimmel, *supra* note 58, at 2015.

[88] *Id.* at 2019.

[89] *Id.*

[90] Bowe v. Eau Claire Area Sch. Dist., 16-CV-746-JDP, 2017 WL 1458822, at *3 (W.D. Wis. Apr. 24, 2017) (holding plaintiff bullied for "failure to adhere to traditional male stereotypes" supported a Title IX claim); J.R. v. New York City Dept. of Educ., 14 CIV. 0392 ILG RML, 2015 WL 5007918, at *6 (E.D.N.Y. Aug. 20, 2015) (holding bullying based on the plaintiff's "feminine mannerisms supports the Title IX claim"); Videckis v. Pepperdine U., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015); *see also Wolfe*, 648 F.3d at 867 (stating that the plaintiff was required to prove that the "harasser intended to discriminate against him 'on the basis of sex,' meaning the harassment was motivated by either [his] gender or failure to conform with gender stereotypes"); Doe v. East Haven Bd. of Educ., 200 Fed. App'x. 46, 48 (2d Cir. 2006) (unpublished) ("A reasonable fact-finder could conclude that, when a fourteen-year-old girl reports a rape and then is persistently subjected by other students to verbal abuse that reflects sex-based stereotypes *and* questions the veracity of her account, the harassment would not have occurred but for the girl's sex."); Reed v. Kerens Indep. Sch. Dist., 3:16-CV-1228-BH, 2017 WL 2463275, at *10 (N.D. Tex. June 6, 2017) (holding that the plaintiff had stated Title IX cause of action when bullied because "of his failure to adhere to traditional gender stereotypes and his female-like appearance."); Bittenbender on behalf of S.B. v. Bangor Area Sch. Dist., CV 15-6465, 2017 WL 1150642, at *3 (E.D. Pa. Mar. 28, 2017) ("When taken in the light most favorable to the plaintiff, the plaintiff's sexuality was the crux of the harassment that lead to repeated comments such as "slut," "lesbian," "gay," and "you have a disease because you're a lesbian."); J.R. v. New York City Dept. of Educ., 14 CIV. 0392 ILG RML, 2015 WL 5007918, at *6 (E.D.N.Y. Aug. 20, 2015) ("Although Title IX does not protect against bullying based solely on homosexuality, the Supreme Court has held that harassment based on aversion to given gender preferences can support a Title VII claim, and district courts in this Circuit have extended this holding to Title IX claims."); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d

Unified School District, a plaintiff-student sued his school district for peer harassment under Title IX based on name calling ("faggot," "queer," etc.), persistent joking regarding the plaintiff being caught masturbating in the school bathroom (which was untrue), and some physical altercations (pushing, shoving, tripping, fistfights).[91] The court held that the conduct satisfied Title IX's "on the basis of sex" requirement because "the plaintiff was harassed because he failed to satisfy his peers' stereotyped expectations for his gender because the primary objective of plaintiff's harassers appears to have been to disparage his perceived lack of masculinity."[92]

Second, far fewer courts use the more "controversial per se sex discrimination rationale" where "courts treat sexual orientation discrimination claims as straightforward sex discrimination claims under Title IX."[93] As reasoned by one court applying the sex per se rationale to a Title IX claim based on anti-gay harassment, there is "no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instances in which a male student is insulted and abused due to his harasser's perception that he is homosexual" because, "[i]n both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality."[94]

135, 152 (N.D.N.Y. 2011) (allowing plaintiff's Title IX claim to proceed when plaintiff "was harassed and discriminated against based on his sex, including nonconformity, or perceived nonconformity, to sexist stereotype"); Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (noting that when "an individual is being harassed because of a failure to adhere to specific sexual stereotypes, and not because of his sexual orientation, he has an actionable claim.").

[91] *Theno*, 377 F. Supp.2d at 954–61 (holding there was sufficient evidence to support jury's finding that harassment was "on the basis of sex" when harassment "appeared to have been motivated by his peers' belief that he failed to conform to stereotypical gender expectations for a teenage boy in their community" and "[m]otivated by his failure to conform to those expectations, they used his sexuality to denigrate his masculinity.").

[92] *Id.* at 964–65.

[93] Kimmel, *supra* note 58, at 2016.

[94] Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000); *see also* S.E.S. v. Galena Unified Sch. Dist. No. 499, 18-2042-DDC-GEB, 2018 WL 3389880, at *3 (D. Kan. July 12, 2018) (holding "taunts based on alleged homosexuality" supports a "viable Title IX claim of harassment based on sex."); Est. of Brown v. Ogletree, 11-CV-1491, 2012 WL 591190, at *17 (S.D. Tex. Feb. 21, 2012), *on reconsideration, sub nom.* Est. of Brown v. Cypress Fairbanks Indep. Sch. Dist., 863 F. Supp. 2d 632 (S.D. Tex. 2012) ("Almost every incident of alleged harassment was overtly sexual or involved sexual innuendo, and the Complaint adequately alleges that students' harassment of Asher was based on their perception that Asher was gay."); Roe ex rel. Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1027 (E.D. Cal. 2009) ("Although Title IX was not intended and does not function to protect students from bullying generally, the homophobic language used by the perpetrators appears to be part of a larger constellation of sexually-based conduct, which included assaulting Plaintiff with an air hose, exposing their genitalia, and grabbing his bare buttocks in the shower."); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006) ("The verbal taunting targeted at Andree is clearly gender-oriented language. If not for her status as a female, a reasonable trier of fact could conclude that Andree would not have been called the offending slurs. As such, Andree, a female student, targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual, has established a genuine issue of fact as to whether this harassment amounts to gender-based discrimination, actionable under Title IX."); *Schroeder*, 296 F. Supp. 2d at 880 (relying on Title VII caselaw to find that students harassing another because of his perceived sexual orientation is

However, it should be noted that while there is a growing number of cases applying Title IX to peer-to-peer harassment based on sexual orientation, courts are not unanimous in extending Title IX in this way. A perfect example is the case of *Estate of D.B. by Briggs v. Thousand Island Central School District*.[95] The plaintiff in that case sued on behalf of D.B., a sixteen-year-old male victim who committed suicide after years of suffering harassment and bullying from his peers.[96] In the plaintiff's complaint, it was alleged that the victim was "consistently subjected to" "anti-gay" and "gender-related slurs" like "[y]ou're a pussy."[97] The defendant school district, seeking to dismiss the plaintiff's claim, argued that the plaintiff "tried to 'shoehorn' sexual orientation discrimination into gender discrimination protections" and was "trying to 'bootstrap protection for sexual orientation.'"[98]

The court summarized that while "gender stereotyping" was actionable sex discrimination under Title IX, sexual orientation was not.[99] Then, remarkably, the court reasoned that the "critical fact"—the fact that would determine the outcome of whether the plaintiff's Title IX claim would be dismissed—was the sexual orientation of the victim.[100] The court—in an opinion many would consider shocking for 2016—stated that, if the victim was homosexual, the Title IX claim would be dismissed; if the victim was heterosexual, the Title IX claim would proceed:

> The critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.[101]

Ultimately, the court examined the pleadings and found the victim was heterosexual and only "perceived" or "presumed" to be homosexual, such that the plaintiff's claim would survive a 12(b)(6) motion.[102]

Thankfully, the next year, in the Title VII case *Christiansen v. Omnicom Group, Inc.*, the Second Circuit abrogated the *Estate of D.B.*

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sufficient to be motivated by the plaintiff's sex for Title IX).

[95] Est. of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist., 169 F. Supp. 3d 320, 332 (N.D.N.Y. 2016), *abrogated by* Christiansen v. Omnicom Group, Inc., 852 F.3d 195 (2d Cir. 2017).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 332–33.

[101] *Id.* (internal citations omitted).

[102] *Id.*

case.[103] The court explained that while "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim"; "gay, lesbian, and bisexual individuals do not have less protection . . . against traditional gender stereotype discrimination than do heterosexual individuals." [104]

2. *Recent Title VII caselaw makes it likely courts will continue to apply Title IX to peer harassment based on sexual orientation*

While in the context of Title IX a circuit court has yet to expressly hold Title IX applies to harassment on the basis of sexual orientation, in the context of Title VII both the Second and Seventh Circuit Courts of Appeals have held that sexual orientation is a protected class under Title VII.[105]

This is good news because Title VII jurisprudence is regularly and uniformly consulted by courts when interpreting and applying Title IX.[106]

a. Hively v. Tech Community College

In the en banc decision *Hively v. Tech Community College*, the Seventh Circuit was presented with a question of statutory interpretation

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[103] *Christiansen*, 852 F.3d at 200–01 (2d Cir. 2017).

[104] *Id.*

[105] *See Equal Emp't Opportunity Comm'n*, No. 16-2424, 2018 WL 1177669, at *9. In the context of Title VII, the Sixth Circuit held that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." The Sixth Circuit explained that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping . . . There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity." *Id.* at *9.

[106] *See, e.g.*, *Davis*, 526 U.S. at 647 (relying on Title VII jurisprudence for Title IX sexual harassment case); Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75 (1992) (same); Fuhr v. Hazel Park Sch. Dist., 710 F.3d 668, 673 (6th Cir. 2013) ("[T]he standards articulated by Title VII cases are sufficient to establish the applicable legal framework here."); *Wolfe*, 648 F.3d at 866 (8th Cir. 2011) ("We recognize *Oncale* is a Title VII case and is premised on different language than a Title IX case. Specifically, Title VII requires a plaintiff to prove "discriminat[ion] . . . because of . . . sex," [], whereas Title IX requires proof of discrimination "on the basis of sex." But, these two phrases are treated interchangeably."); Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 89 (2d Cir. 2011) ("[A] Title IX sex discrimination claim requires the same kind of proof required in a Title VII sex discrimination claim"); Mabry v. State Bd. of Comm. Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards."); *Videckis*, 150 F. Supp. 3d at 1159 (applying Title VII principles in interpreting Title IX, and holding that the distinction between sexual orientation discrimination and gender stereotyping discrimination "is illusory and artificial").

under Title VII: "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."[107] The court answered the question with a resounding yes, holding "discrimination on the basis of sexual orientation is a form of sex discrimination."[108]

First, the Seventh Circuit applied the sex per se rationale, holding that it was "paradigmatic sex discrimination" when the plaintiff alleges that "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, [her employer] would not have refused to promote her and would not have fired her."[109] The court held this demonstrated that the employer was "disadvantaging her *because she is a woman*" because, if she were a man married to a woman, the decision would have been different.[110]

Second, the Seventh Circuit applied the gender-stereotyping rationale, holding that "[v]iewed through the lens of the gender non-conformity line of cases," the plaintiff, a gay woman, "represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)."[111] The court held that case was "no different" from "claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing."[112]

Third, the Seventh Circuit held that discriminating on the basis of sexual orientation "is discrimination based on an associational theory."[113] The court compared the case to *Loving v. Virginia*,[114] where the Supreme Court held a law prohibiting conduct only between members of different races rested on unjustifiable and discriminatory "distinctions" because when the race of one of the partners changed the legality of the conduct changed.[115] The Seventh Circuit held: "[s]o too, here. If we were to change the sex of one partner in a lesbian relationship, the [employment] outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex."[116]

The Seventh Circuit concluded that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and that "a

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[107] *Id.* at 342.
[108] *Hively*, 853 F.3d at 341.
[109] *Id.* at 345.
[110] *Id.* (emphasis in original).
[111] *Id.* at 346.
[112] *Id.*
[113] *Id.*
[114] Loving v. Virginia, 388 U.S. 1 (1967).
[115] *Hively*, 853 F.3d at 348.
[116] *Id.* at 349.

person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."[117] In his concurring opinion, Justice Posner stated Title VII can be interpreted to give it "a fresh meaning that infuses the statement with vitality and significance today."[118]

b. Zarda v. Altitude Express

In February 2018, the Second Circuit, in a ten-to-three decision, reached a similar holding in the en banc case *Zarda v. Altitude Express, Inc.*[119] In *Zarda*, the plaintiff, a gay man, brought a Title VII sex discrimination claim alleging that his employer fired him from his job as a skydiving instructor "because he failed to conform to male sex stereotypes by referring to his sexual orientation."[120] The issue before the court was framed as follows: "whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as 'a subset of actions taken on the basis of sex.'"[121]

First, the Second Circuit applied the sex per se rationale, holding that "the most natural reading of the statute's prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation."[122] The court first looked at the definition of sexual orientation, which "refers to '[a] person's predisposition or inclination toward sexual activity or behavior with other males or females' and is commonly categorized as 'heterosexuality, homosexuality, or bisexuality.'"[123] Using homosexuality—"characterized by sexual desire for a person of the same sex"—the court explained that in order to "operationalize this definition" one needs to "know the sex of the person and that of the people to whom he or she is attracted."[124] Therefore, "[b]ecause one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex."[125] The court concluded:

> Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual

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[117] *Id.* at 351–52.
[118] *Id.* at 352 (Posner, C. J., concurring).
[119] *Zarda*, 883 F.3d at 107.
[120] *Id.*
[121] *Id.* at 112.
[122] *Id.*
[123] *Id.* at 113 (citing Sexual Orientation, Black's Law Dictionary (10th ed. 2014)).
[124] *Id.*
[125] *Id.*

> orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.[126]

Additionally, using the "comparative test" or "but for" test, the court held, like *Hively*, that in the context of sexual orientation discrimination claims, a Title VII claim is shown because "but for" the plaintiff's sex, he or she would have been treated differently.[127]

Second, the Second Circuit applied the gender stereotyping rationale and held that it provided "yet another basis" for its holding that sexual orientation discrimination is a subset of sex discrimination because "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women."[128]

Third, the court held sexual orientation discrimination is associational discrimination, reasoning that "in most contexts where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes."[129] For example, a male employee that is terminated because he is married to or attracted to a man suffers associational discrimination "because of . . . sex" because "the fact that the employee is a man instead of a woman motivated the employer's discrimination against him."[130]

c. The reasoning of Hively and Zarda should be adopted in the context of Title IX

Given that Title VII jurisprudence "often is consulted when interpreting and applying Title IX['s]" "on the basis of sex" requirement,[131] it is probable that *Hively* and *Zarda* will further a trend of courts applying Title IX to discrimination on the basis of sexual orientation in the context of student-on-student harassment.[132] Indeed, courts are already relying on these cases in the context of Title IX. For example, in *Harrington by*

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[126] *Id.*

[127] *Id.* at 116.

[128] *Id.*

[129] *Id.* at 124.

[130] *Id.* at 124–25.

[131] Tumminello v. Father Ryan High Sch., Inc., 678 Fed. Appx. 281, 284 (6th Cir. 2017) (unpublished), cert. denied, 138 S. Ct. 121 (2017); *see also supra* note 107.

[132] *See* Devon Sherrell, *"A Fresh Look": Title VII's New Promise for LGBT Discrimination Protection Post-Hively*, 68 EMORY L.J. 1101, 1133 (2019) ("*Hively* provides possibly already sympathetic federal courts with strong rationales for explicitly identifying sexual orientation discrimination as actionable sex discrimination in Title IX instead of adjudicating LGBT discrimination through sex stereotyping or sexual harassment claims, providing significant protection for LGBT individuals in education.").

Harrington v. City of Attleboro,[133] the court held that "[a]ctionable sex stereotypes include those based on sexual orientation" such that "[d]iscrimination based on a perceived failure to conform to those gendered stereotypes constitutes actionable discrimination under Title IX."[134] The court relied on the *Hively* court's use of the "comparative method" and asked whether "holding all other things constant and changing only the plaintiff's sex, would she have endured the same harassment?"[135] The court concluded that the "comparative method" makes clear what other courts had previously explored, namely that "'[t]he gender stereotype at work here is that 'real' men should date women, and not other men,' and that the converse is equally true and actionable under Title VII or IX."[136] The court held that the plaintiff's claim of sex discrimination based on perceived or actual sexual orientation was actionable under Title IX.[137]

Moreover, as set forth above,[138] although in the context of Title IX circuit courts have thus far held "sexual orientation is not a protected classification,"[139] two of the rationales applied in *Hively* and *Zarda*—the sex per se rationale[140] and the gender stereotyping rationale[141]—have already been used by district courts to apply Title IX to sexual orientation discrimination.[142] Because all of the reasoning used by the *Hively* and *Zarda* courts under these rationales applies equally in the context of Title IX, these cases provide "possibly already sympathetic federal courts with strong rationales for explicitly identifying sexual orientation discrimination as actionable sex discrimination in Title IX."[143]

Thus, because Title IX is already being interpreted by courts to effectively cover anti-gay harassment, amending Title IX to apply it explicitly to harassment "on the basis of sexual orientation" is little more than a look-good-on-paper "solution."

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[133] Harrington by Harrington v. City of Attleboro, 15-CV-12769-DJC, 2018 WL 475000 (D. Mass. Jan. 17, 2018).

[134] *Id.* at *5.

[135] *Id.*

[136] *Id.*

[137] *Id.* at *6. *But see Bowe*, 16-CV-746-JDP, 2017 WL 1458822, at *3 (although recognizing *Hively*, held it "need not decide whether Title IX also bars discrimination on the basis of sexual orientation, because Bowe states a claim under the "sexual stereotype theory").

[138] *See supra* section II.C.1.

[139] *See, e.g.*, *Kalich*, 679 F.3d at 471.

[140] *Zarda*, 883 F.3d at 113; *Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' [sex] . . . meaningless.").

[141] *Zarda*, 883 F.3d at 119; *Hively*, 853 F.3d at 346.

[142] *See supra* notes 91 and 95.

[143] Sherrell, *supra* note 133, at 1133.

C. The problem with Title IX for bullied LGBQ students is the same as that of bullied heterosexual students: the impossibly high *Davis* standard does not motivate schools to change their behavior

The problem with Title IX that precludes it as a solution to anti-gay bullying has little to do with the "on the basis of sex" requirement and everything to do with the shields from liability given to schools under the other two *Davis* elements.

1. The "severe and pervasive" shield

After proving the peer harassment was "on the basis of sex," all students—including LGBQ students—must next prove that the peer sexual harassment is "actionable," meaning that it meets what is commonly referred to as the "severe and pervasive test."[144] For peer sexual harassment to be actionable under *Davis*, it must be "so severe, pervasive, ***and*** objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[145]

"Severe" means something "more than just juvenile behavior among students," amounting to behavior that is more than "antagonistic, nonconsensual, and crass."[146] *Davis* is clear that "simple acts of teasing and name-calling" are not severe, "even where these comments target differences in gender."[147] "Pervasive" means "systemic" or "widespread"[148]—the peer sexual harassment must be "more than episodic; it must [have been] sufficiently continuous and concerted."[149] This means "*multiple* incidents of harassment; one incident of harassment is not enough."[150] Indeed, the only circumstance where conduct under Title IX has been found "sufficiently severe" so as not to require it to also be "pervasive" or "continuous" is in the case of "extreme sexual assault or rape."[151] "Objectively offensive" means behavior that "would be offensive to a reasonable person under the circumstances," meaning that the "victim's

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[144] *See Davis*, 526 U.S. at 650.
[145] *Id.*
[146] *Kollaritsch*, 944 F.3d at 620.
[147] *Davis*, 526 U.S. at 651–52.
[148] *Id.* at 652–53.
[149] Hayut v. State Univ. of New York, 352 F.3d 733, 745 (2d Cir.2003).
[150] *Kollaritsch*, 944 F.3d at 620 (emphasis in original).
[151] Carabello v. New York City Dept. of Educ., 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013) ("However, in a narrow realm of cases, courts have found 'sufficiently severe' harassment under Title IX from a single incident, but only were the conduct consists of extreme sexual assault or rape.").

perceptions are not determinative."[152]

The Supreme Court's reasoning in *Davis* for requiring the "severe and pervasive" test was based on the fact that, in the context of peer-to-peer harassment, "schoolchildren may regularly interact in ways that would be unacceptable among adults."[153] As a result, the test has the effect of greatly limiting the scope of actionable conduct under Title IX. For example, in one case, harassment consisted of a shove into a locker, an "obscene sexual gesture," and a "request for oral sex" but did "not rise to the level of severe, pervasive, and objectively offensive conduct."[154] Moreover, the *Davis* Court deliberately excluded "simple acts of teasing and name-calling among school children" from the list of actionable harassment.[155] Therefore, Title IX does not provide an avenue to address the type of harassment that most LGBQ students experience daily at school: words. Indeed, although there have been successful suits that involved anti-gay slurs, a court has never held that anti-gay verbal slurs alone—without accompanying physical conduct—met the severe and pervasive test.[156]

Moreover, even if conduct is deemed to be "severe, pervasive, and objectively offensive," relief is still only be available under Title IX "where the behavior at issue denies a victim equal access to education."[157] To be actionable, the behavior must deny a victim equal access to education by having a "concrete, negative effect" on the victim's education.[158] "Examples of a negative impact on access to education may include dropping grades, becoming homebound or hospitalized due to harassment, or physical violence."[159] This standard is not easy to meet. For example, in *Gabrielle M. v. Park Forest-Chicago Heights, Ill. School Dist*rict, the Seventh Circuit held that a victim diagnosed with acute stress disorder and separation anxiety, placed in counseling, and then transferred to another school failed to prove she was "denied any educational opportunities by [the peer's] conduct."[160] The court reasoned that "[a]lthough she was diagnosed with some psychological problems, the record shows that her grades remained steady and her absenteeism from school did not increase."[161]

Thus, *Davis* shields schools against liability for all but the most

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[152] *Kollaritsch*, 944 F.3d at 621.
[153] *Davis*, 526 U.S. at 631.
[154] Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 363 (6th Cir. 2012).
[155] *Id.*
[156] Jason A. Wallace, *Bullycide in American Schools: Forging A Comprehensive Legislative Solution*, 86 IND. L.J. 735, 749-50 (2011).
[157] Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 823 (7th Cir.2003).
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*

extreme harassing conduct.

1. The actual knowledge and deliberate indifference shield

Assuming the student-plaintiff can get past the "severe and pervasive" shield, the student-plaintiff still must penetrate the hardest shield of all: proving that the school had "actual knowledge" of the actionable harassment but stayed "deliberately indifferent" to it.[162] Because a school district can only be held liable for its own misconduct under Title IX, unreported bullying and harassment—that which the school does not have actual knowledge of—cannot be used to hold a school district liable.[163] The actual knowledge requirement is particularly problematic for bullied LGBQ students because the majority do not regularly report victimization.[164]

Additionally, for actual knowledge to be satisfied, the student-plaintiff must not only prove not only that the actionable conduct was reported, but also that it was reported specifically[165] and to an "appropriate person," i.e., someone "who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."[166] Because the *Davis* standard "focuses on the school's response to specific incidents of known harassment rather than on the school's response to an overall climate that allows such behavior to flourish,"[167] schools have no obligation to act until ***after*** the "severe, pervasive, and objectively offensive" harassment has already happened and ***after*** it has come to the actual attention of the school.[168] Thus, *Davis* does not motivate schools to take affirmative steps to combat bullying by preventing it from happening in the first place.

Finally, even if a student penetrates the actual knowledge shield, the biggest shield of all remains: the student-plaintiff must prove that the school district acted with deliberate indifference to the known harassment.[169] The deliberate indifference standard is the biggest bar to a

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[162] *Davis*, 526 U.S. at 650.

[163] *Id.*

[164] 2017 National School Climate Survey, *supra* note 42, at xix, 123.

[165] *See, e.g.*, Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1119–20 (10th Cir. 2008) (although the student's parent met with principal and stated that student (1) was afraid to attend math class, (2) that she did not want an aide in her math class anymore, and (3) that boys were bothering her, the court held that the school district did not have actual knowledge that the student was being sexually harassed because parent was unable to communicate the student's specific concerns).

[166] P.H. v. Sch. Dist. of Kan. City, Mo., 265 F.3d 653, 661 (8th Cir.2001).

[167] Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 660 (2004).

[168] *Davis*, 526 U.S. at 632.

[169] *Id.* at 648–49 ("Before you can find that any appropriate person was deliberately indifferent, the

plaintiff's recovery and the main reason why Title IX cannot ever be a real solution to anti-gay bullying. This is because in order to negate a finding of "deliberate indifference"—and thereby avoid liability—a school only needs to "respond to known peer harassment in a manner that is not clearly unreasonable under the circumstances."[170] Under this standard, "neither negligence nor mere unreasonableness is enough" to hold a school district liable.[171] A school is permitted to have "[i]neffective responses," as long as they "are not necessarily clearly unreasonable."[172]

Under this standard, schools: (i) are "not required to remedy the harassment or accede to a parent's remedial demands";[173] (ii) are not expected to "purg[e] their schools of actionable peer harassment" or "engage in particular disciplinary action" in order to protect against Title IX liability;[174] and (iii) are not even required to comply with their own regulations because "failure to comply with [such] . . . does not establish the requisite . . . deliberate indifference."[175]

Not only that, but courts are instructed to "avoid second-guessing school administrators' disciplinary decisions"[176] and, in *Davis*, the Supreme Court advised "there is no reason why courts, on a motion . . . for summary judgment . . . could not identify a response as not 'clearly unreasonable' as a matter of law."[177]

This has resulted in the deliberate indifference standard "repeatedly and disproportionately be[ing] deployed against survivors' cases, including when administrative handling of their situations is concededly callous, incompetent, unresponsive, inept, and inapt."[178] For example, in *Doe ex. rel. Doe v. Bellefonte Area School District*, the plaintiff alleged he had been subjected to harassment between tenth and twelfth grade in the form of being repeatedly called "gay," a "faggot," and a "peter-eater."[179] Although the court found that the abuse suffered by the plaintiff was severe and pervasive, the court did not hold that the school district

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plaintiff must prove that the appropriate person was aware that a particular act or inaction was certain or substantially certain to cause the Plaintiff harm and that the appropriate person decided to act or not to act in spite of that knowledge."); Vance v. Spencer County Public School Dist., 231 F.3d 253, 263–64 (6th Cir. 2000) (noting the jury instructions given for "deliberate indifference").

[170] *Davis*, 526 U.S. at 648–49.

[171] Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 167 (5th Cir. 2011).

[172] *Id.* at 168.

[173] *Id.* at 167–68.

[174] *Davis*, 526 U.S. at 648; Stiles ex rel. D.S. v. Grainger County, Tenn., 819 F.3d 834, 848 (6th Cir. 2016).

[175] *Sanches*, 647 F.3d at 169 (citing *Gebser*, 524 U.S. at 291–92).

[176] *Stiles*, 819 F.3d at 848.

[177] *Sanches*, 647 F.3d at 158 (citing *Davis*, 526 U.S. at 649).

[178] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2040–41 (2016).

[179] Doe ex rel. Doe v. Bellefonte Area Sch. Dist., No. 4:CV-02-1463, 2003 U.S. Dist. LEXIS 25841, at * 13–14 (D. Pa. Sept. 29, 2003), *aff'd*, 106 F. App'x 798 (3d Cir. 2004) (holding that there was no deliberate indifference and granting the school district summary judgment).

was deliberately indifferent because each time the plaintiff reported an incident, the school took action that was not "clearly unreasonable."[180]

Thus, because a school only has to act in way that is not "clearly unreasonable,"[181] even at the point where actionable harassment is known schools need not do much to avoid liability. This deliberate indifference shield results in schools being both unrequired and unmotivated to change their behavior to make school climates safer.[182]

In conclusion, Title IX—to the extent it addresses bullying—does so only from an "incident-based perspective rather than from a school culture perspective," focusing on what school officials knew rather than what school officials could have done culturally to prevent bullying in the first place.[183] Title IX does not disincentivize behavior that allows sexual harassment among peers, but instead—through *Davis*—actually "incentivizes willful ignorance" on the part of the school.[184] Not only that, but Title IX only requires a school to respond only in a way that is *not* "clearly unreasonable," which means that schools are unmotivated to change behavior to protect LGBQ students beyond ensuring that the school is acting in a way that is *not* clearly unreasonable.

Thus, *Davis* has had the effect of creating an incredibly low bar that schools must meet to avoid liability—i.e., *Davis* creates a bare minimum—and, thereby, effectively insulates schools from liability for peer harassment. Because under *Davis* "the likelihood of accountability for [a school's] actions is small," a school's "incentive to comply with" Title IX and address peer sexual harassment has all but "disappear[ed]."[185]

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[180] *Id.* at *23–26; *see also* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (rejecting plaintiff's Title IX claim, under the deliberate indifference standard, because once the school district had actual knowledge of a sexual relationship between plaintiff and a teacher, it "did not 'turn a blind eye and do nothing,'" but rather the district "investigated the allegations and initiated termination proceedings once they obtained conclusive proof of the relationship"). In contrast, *Vance* .is an example of a rare case where the evidence was sufficient to establish that the school district was deliberately indifferent to the sexual harassment of a female high school student. *Vance*, 231 F.3d at 264. In *Vance*, a student harassed the plaintiff by stabbing her in the hand; and, on another occasion, two male students held the plaintiff while others pulled her hair and tried to rip her shirt off as a male student began to take his pants off. *Id.* at 256–58. While the plaintiff's mother repeatedly complained to the school and even filed a complaint with the Title IX coordinator, no investigation resulted. *Id.* at 262.

[181] *Davis*, 526 U.S. at 648.

[182] Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut's Anti-Bullying Statute*, 7 CONN. PUB. INT. L.J. 105, 127–26 (2007) ("State anti-bullying laws must reach beyond the high bar set by *Davis* for Title IX claims, which, even when the plaintiff succeeds, fail to address the underlying issues of bullying prevention and the need to change the social and educational environment in schools.").

[183] Weddle, *supra* note 168, at 658–59.

[184] Mayer, *supra* note 14, at 944.

[185] Shaner, *supra* note 10, at 281–82.

D. The New Problem with Title IX: The Trump Administration's OCR and Lack of Enforcement

While Title IX private causes of action are ineffective in combating anti-gay bullying because of the *Davis* shield, Title IX offers another mechanism of enforcement: an aggrieved student may file a complaint with the OCR, which is charged with enforcing Title IX by investigating Title IX violations and assisting schools in their efforts to comply with the law through voluntary resolutions.[186] If the school fails to reach a voluntary resolution with the OCR regarding a student's complaint (or fails to or implement such), the OCR could—in theory—withdraw federal funding from the school (although this has yet to happen).[187]

A decade ago, despite *Davis*, Title IX looked like it still could be a solution to anti-gay bullying because, under the Obama Administration, the OCR and DOJ took a strong stance against anti-gay bullying. That year, the OCR issued a Dear Colleague Letter ("DCL") explicitly explaining how anti-gay bullying could violate Title IX.[188] The DCL described a hypothetical situation where a gay student was "physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices)."[189] It then explained that "[a]lthough Title IX does not prohibit discrimination based solely on sexual orientation, 'it can be sex discrimination if students are harassed either for exhibiting what is perceived as a *stereotypical characteristic for their sex*, or for *failing to conform to stereotypical notions of masculinity and femininity*.'"[190] The DCL also made clear that "[w]hen students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX."[191]

In 2011, the OCR issued another DCL letter—deemed a "significant guidance document"—providing guidance on Title IX's application to "sexual violence" for the first time.[192] Focusing on student conduct, the

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[186] OFFICE OF CIVIL RIGHTS, *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (April 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/BWU5-73WM].

[187] Francesca Cocuzza, *Title IX's Reproductive Remedies*, 32 COLUM. J. GENDER & L. 211, 227-28 (2017).

[188] Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter: Harassment and Bullying*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. 7-8 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [https://perma.cc/DG5W-8KCS].

[189] *Id.* at 7.

[190] *Id.* at 7-8 (emphasis added).

[191] *Id.* at 8.

[192] Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. to Title IX Coordinators (Apr. 4, 2011) at 1 n.1, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-

2011 DCL stated that it was the "schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence."[193] The 2011 DCL "made explicit for the first time that a school's discipline process for sexual assault is regulated by the OCR's interpretations of Title IX" and was a "very significant, even fundamental shift in the OCR's position."[194] In 2014, the OCR issued "Questions and Answers on Title IX and Sexual Violence" ("Q&A") to provide guidance to schools about their obligations to address sexual violence under Title IX and reinforced that: (i) "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation"; and (ii) "the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations."[195] Additionally, the OCR advised that schools should consider including examples of same-sex conduct that violates their prohibitions on sexual violence and ensure proper training is provided to school staff to work with LGBQ students and same-sex violence.[196]

Thus, under the Obama Administration, the OCR guidance documents and active investigation of Title IX complaints for anti-gay bullying positioned Title IX to potentially become an effective tool to make schools change their behavior with respect to anti-gay bullying. Unfortunately, things have changed since then.

The Trump administration has withdrawn all of the Obama administration's guidance documents. On September 22, 2017, the Department of Education ("DOE") issued a new DCL "withdrawing the statements of policy and guidance" reflected in both the 2011 DCL and the 2014 Q&A.[197] In their place, the DOE issued a new Q&A, and sexual orientation is not included anywhere in this new document.[198] The way the OCR

201104.pdf [https://perma.cc/497D-V336] [hereinafter 2011 DCL].

[193] *Id.* at 2.

[194] Jacob Gersen, Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 901 (2016).

[195] Catherine E. Lhamon, Assistant Secretary for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T EDUC. 5–6 (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/5ZQY-MD3S] [hereinafter 2014 Q&A].

[196] *Id.* at 5–6. In 2016, the DOE issued a DCL directly with respect to transgender students and explained that Title IX "prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status" and that "[a] school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity." Catherine E. Lhamon, Assistant Secretary for Civil Rights & Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T EDUC. & U.S. DEP'T JUSTICE 2 (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/66AD-JBQR].

[197] Candice Jackson, Acting Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T EDUC. 1 (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/NB4P-QT89].

[198] *Q&A on Campus Sexual Misconduct*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T EDUC. (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/XR3R-

investigates complaints has also changed. Under the Trump administration, the OCR has "sharply scale[d] back the scope of sexual-violence investigations" under Title IX.[199] For example, a spokesperson for the DOE stated that the OCR will not investigate transgender students' bathroom complaints, explaining that "Title IX prohibits discrimination on the basis of sex, not gender identity."[200]

However, challenges added by the Trump administration aside, relying on the OCR to change the climate of anti-gay bullying in schools through Title IX has never been all that effective in combating bullying (and never will be) because schools have never really feared that the OCR will enforce Title IX by way of sanction. While Title IX gives the OCR the power revoke federal funding from schools that violate Title IX, to date no school has ever lost federal funding as a sanction—even in cases where multiple students reported peer-to-peer harassment and even in cases where the school had actual knowledge of such.[201] Thus, a student experiencing anti-gay harassment at the hands of a peer is not likely to cause change in the school's climate through the OCR because—even if the OCR were to investigate anti-gay bullying under Title IX (which is unlikely in and of itself)—"the likelihood that OCR would subject a school to the ultimate penalty (particularly on behalf of one individual) is low, thereby weakening the credibility of enforcement efforts."[202] If we accept that a "law's regulation of behavior is only as good as the mechanisms that enforce it,"[203] then Title IX cannot be effective at changing the behaviors of schools to make their climates safer for all students, including LGBQ students.

Thus, using Title IX as is or even amending Title IX to include sexual orientation is not a solution to combat anti-gay bullying because, despite having clear methods of enforcement, schools do not fear liability

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XB3K]. Additionally, a DCL issued on February 22, 2017, withdrew the 2016 DCL on transgender students. Sandra Battle, Acting Assistant Secretary for Civil Rights & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, *Dear Colleague* Letter, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T EDUC. & U.S. DEP'T JUSTICE 1 (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx [https://perma.cc/EF82-P66X]. However, it did state that transgender that students are not "without protections from discrimination, bullying, or harassment and that "[a]ll schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." *Id.*

[199] DeSantis, *supra* note 16.

[200] Dominic Holden, *The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints*, BUZZFEED NEWS, Feb. 12, 2018, https://www.buzzfeed.com/dominicholden/edu-dept-trans-student-bathrooms?utm_term=.gd0l4Y697#.fcjY1ZNOo [https://perma.cc/V837-TXZZ].

[201] Mayer, *supra* note 14, at 939–40 ("[N]o school has ever had its federal funding revoked, even in instances where an OCR Title IX investigation was triggered by complaints from multiple students alleging repeated violations of Title IX by schools that would each amount to actual knowledge and deliberate indifference in a private lawsuit.").

[202] *See* Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2145–46 (2016) (citations omitted).

[203] *See* Shaner, *supra* note 10, at 281–82 (citations omitted).

for their unsafe school climates that allow such bullying given that (1) the *Davis* standard is an "extreme constraint" to liability in private causes of action; and (2) schools know OCR enforcement is unlikely and that the threat of suffering the ultimate penalty of loss of federal funding is empty.[204]

III. ATTEMPTING TO "FIX" TITLE IX FOR LGBQ STUDENTS THROUGH SOMETHING LIKE THE STUDENT NONDISCRIMINATION ACT IS ALSO AN EMPTY (PLUS LIKELY UNCONSTITUTIONAL) SOLUTION

Amending Title IX to prohibit discrimination on the basis of not only sex but also sexual orientation will not motivate schools to address their hostile climates to bullied LGBQ students because schools will still be shielded from private liability under *Davis* and schools still will not fear loss of federal funding by the OCR. If amending Title IX is not the answer, is passing new Title IX-like federal legislation to specifically address anti-gay bullying a workable solution?

An analysis of the Student Nondiscrimination Act—which has been repeatedly proposed by members of Congress to specifically address anti-gay harassment—shows that this type of federal legislation is also not a workable solution. The reason is that in order for a statute such as the SNDA to be more effective than Title IX in combating peer-to-peer harassment, it has to depart from Title IX and the *Davis* standard. While departing from Title IX and the *Davis* standard is well-intentioned in its effort to combat anti-gay bullying, it is also unlikely to pass constitutional muster—which makes it nothing more than another good-on-paper "solution."

A. Overview of the SNDA

The SNDA was introduced in the 111th,[205] 112th,[206] 113th,[207]

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[204] Mayer, *supra* note 14, at 942–43.

[205] Student Nondiscrimination Act, H.R. 4530, 111th Cong. (2d Sess. 2010), https://www.congress.gov/bill/111th-congress/house-bill/4530/text [https://perma.cc/P8H7-P6T5].

[206] Student Nondiscrimination Act of 2011, S. 555, 112th Cong. (1st Sess. 2011), https://www.congress.gov/bill/112th-congress/senate-bill/555/text [https://perma.cc/LR5H-W4ED].

[207] Student Nondiscrimination Act of 2013, H.R. 1652, 113th Cong. (1st Sess. 2013), https://www.congress.gov/bill/113th-congress/house-bill/1652/text [https://perma.cc/64ZN-VTAZ].

114th,[208] and 115th[209] sessions of Congress.[210] The SNDA is a bill that seeks to establish a comprehensive federal prohibition against discrimination in K-12 public schools based on actual or perceived sexual orientation or gender identity. [211] The Act begins with findings that mirror those in the GLSEN studies, namely that students who are or are perceived to be LGBQT are "subjected to pervasive discrimination, including harassment, bullying, intimidation and violence" in public schools causing a "distinct and especially severe problem."[212] The purpose of the Act is to expand the otherwise limited legal recourse to redress discrimination on the basis of sexual orientation or gender identity because—unlike discrimination on the basis of race, color, sex, religion, disability, and national origin—current civil rights statutes do not expressly include sexual orientation and gender identity.[213]

The SNDA expressly states that it is modeled after Title IX and, like Title IX, the SNDA conditions federal funding on compliance, providing: "No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[214] It also prohibits retaliation against those who oppose conduct prohibited by the Act[215] and provides a private right of action for aggrieved students for violations of the Act.[216] This is similar to Title IX, which does not include an express statutory prohibition on retaliation or a statutory right to a private cause of action, but has been interpreted to provide the same.[217]

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[208] Student Nondiscrimination Act of 2015, S. 439, 114th Cong. (1st Sess. 2015), https://www.congress.gov/bill/114th-congress/senate-bill/439/text [https://perma.cc/NC7U-K9SK].

[209] Student Nondiscrimination Act of 2018, H.R. 1652, 115th Cong. (2d Sess. (2018), https://www.congress.gov/bill/115th-congress/house-bill/5374/text [https://perma.cc/YTV3-6CCG].

[210] The SNDA is has broad support from numerous organizations, including the American Association of University Women, American Federation of Teachers, American Civil Liberties Union, GLSEN, NAACP, National Association of School Psychologists, National Association of Secondary School Principals, the National Education Association, and National Women's Law Center. US. HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/press/student-non-discrimination-act-of-2010-introduced-in-u.s.-senate [https://perma.cc/6PKF-U8W7] (last visited March 14, 2020).

[211] H.R. 1652, 115th Cong. (2018).

[212] *Id.* at § (2)(a)(1)–(2)

[213] *Id.* at § (2)(a)(6)

[214] *Compare* H.R. 1652, 115th Cong. (2018) at §4(a) *with* Title IX, 20 U.S.C. § 1681(a ("No 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 . . . .").

[215] H.R. 1652, 115th Cong. (2018) at § 4(c)(1).

[216] *Id.* at § (6)(a).

[217] Jackson v. Birmingham Ed. of Educ., 544 U.S. 167, 171–74 (2005); *Davis*, 526 U.S. at 650.

B. The Student Non-Discrimination Act—in an effort to be more effective than Title IX—vastly departs from it and, as a result, is likely unconstitutional

While there are some similarities between Title IX and the SNDA, the SNDA departs from Title IX in three big ways,[218] which while making it more comprehensive than Title IX and arguably more effective in combating peer-to-peer anti-gay bullying, also makes it constitutionally problematic.

1. The SNDA ignores the Davis "severe and pervasive test" in favor of Title VII's "severe or pervasive" test

The first big difference between Title IX and the SNDA is that the SNDA expressly adopts Title VII's "severe ***or*** pervasive" test—ignoring the *Davis* holding that a "severe ***and*** pervasive" test applies to Title IX.[219] The SNDA defines discrimination to include harassment and defines harassment as "conduct that is sufficiently severe, persistent, ***or*** pervasive to limit a student's ability to participate in or benefit from a public school education program or activity, ***or*** to create a hostile or abusive educational environment at a public school."[220] This is akin to Title VII, which uses a "severe ***or*** pervasive" test meaning "[t]here is no minimum number of incidents required to establish a hostile work environment."[221] Rather, under the more liberal "severe or pervasive test," "'harassment need not be both severe and pervasive to impose liability; one or the other will do."'[222]

The SNDA drafters likely choose to depart from Title IX's "severe and pervasive" test because, as discussed *supra*, this high standard greatly limits actionable bullying conduct—wholly precluding purely verbal harassment and mostly precluding single physical incidents (with the exception of "extreme sexual assault or rape," where a single incident can be enough).[223] However, this is legally problematic because it

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[218] Also, unlike Title IX, which applies to "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education," the SNDA is narrower and applies only to public elementary and secondary schools. *Compare* Title IX, 20 U.S.C. § 1681(c), *with* H.R. 1652, 115th Cong. (2018) at §3(B)(4). While not legally problematic, it is worth pointing out that the SNDA's coverage is significantly narrower than Title IX.

[219] *Davis*, 526 U.S. at 650.

[220] H.R. 1652, 115th Cong. (2018) at § 3(3).

[221] Worth v. Tyler, 276 F.3d 249, 268 (7th Cir. 2001).

[222] *Id.*

[223] *Carabello*, 928 F. Supp. 2d at 643 ("However, in a narrow realm of cases, courts have found 'sufficiently severe' harassment under Title IX from a single incident, but only were the conduct consists of extreme sexual assault or rape.").

directly flies in the face of *Davis*, where the Supreme Court though certainly aware of the Title VII test for employee harassment expressly choose to adopt a more rigorous test in the context of peer-to-peer harassment because "students are still learning how to interact appropriately with their peers."[224] Indeed, the majority in *Davis* specifically reasoned that "schools are unlike the adult workplace" and that it is "not enough to show . . . that a student has been 'teased' . . . 'or called offensive names,'"[225] yet under the SNDA's more liberal "severe or pervasive test" (adopted from the workplace) such could be actionable. Given that the Supreme Court unequivocally held that "in the context of student-on-student harassment, damages are available ***only where the behavior is so severe, pervasive, and objectively offensive*** that it denies its victims the equal access to education that Title IX is designed to protect," it is unlikely the SNDA's more liberal test would survive judicial scrutiny.[226]

2. *The SNDA includes Associational Discrimination—a concept not found in Title IX peer-to-peer harassment caselaw*

The second big difference is that, while Title IX does not include associational discrimination and has never been interpreted to include associational discrimination, the SNDA expressly provides: "No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual ***or of a person with whom the student associates or has associated***, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[227] The Act defines "discrimination" to include "harassment of a student on the basis of actual or ***perceived sexual orientation or gender identity of such student or of a person with whom the student associates or has associated***"[228] and defines "harassment" to include conduct based on "(A) a student's actual or perceived sexual orientation or gender identity; or (B) ***the actual or perceived sexual orientation or gender identity of a person or persons with whom a student associates or has associated.***"[229] Thus, the SNDA's inclusion of an express associational discrimination provision would cover a student who is harassed not because he is LGBQT (or perceived to be such), but because the student associates with another student who is LGBQT (or who is perceived to be such). This is a vast departure from

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[224] *Davis*, 526 U.S. at 652; *see also Riccio*, 467 F. Supp. 2d at 226 ("In *Davis*, the Supreme Court cautioned that peer-on-peer sexual harassment is subjected to a more rigorous test than employee harassment claims under Title VII.").

[225] *Id.*

[226] *Davis*, 526 U.S. at 652.

[227] H.R. 1652, 115th Cong. (2018) at §4(a).

[228] *Id.* at §4(b).

[229] *Id.* at §3(3).

Title IX law—where discrimination on the basis of association with a person of a certain sex has never been held to exist.

The SNDA's express inclusion of an "associational provision"—which is found nowhere Title IX—is likely, again, modeled after Title VII, which does not contain an express "associational provision," but has been interpreted to protect "individuals who, though not members of a protected class, are 'victims of discriminatory animus toward [protected] third persons with whom the individuals associate.'"[230] Indeed, as discussed *supra*, associational discrimination was a basis for the *Hively* and *Zarda* courts' holdings that Title VII applied to sexual orientation discrimination.[231] Using the associational discrimination theory, these courts reasoned "that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee ***based on their own sex***, constitutes discrimination 'because of . . .sex.'"[232] Title VII has been interpreted to apply to a plaintiff "discriminated against because she advocated for protected employees," regardless of the "vigor" or lack thereof of the plaintiff's advocacy.[233]

The SNDA's borrowing of associational discrimination from the workplace (Title VII precedent) and applying it to the classroom likely would be problematic given that *Davis* clearly held that "[c]ourts . . . must bear in mind that schools are unlike the adult workplace" and that children cannot be held to the same standards as adults for peer-to-peer harassment.[234]

3. The SNDA would potentially violate the First Amendment

The third big difference is that—in direct contrast to *Davis* and Title IX caselaw—the SNDA expressly defines harassment to include "acts of ***verbal***, nonverbal, or physical aggression, intimidation, or hostility."[235] Unlike Title IX, which has failed to address verbal harassment, i.e., the

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[230] Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) (citing Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir.1999)).

[231] *Zarda*, 883 F.3d at 108–09; *Hively*, 853 F.3d at 341.

[232] *Zarda*, 883 F.3d at 128 (emphasis added); *Hively*, 853 F.3d at 349 ("This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the plaintiff would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.").

[233] *Barrett*, 556 F.3d at 514.

[234] *Davis*, 526 U.S. at 652.

[235] Wallace, *supra* note 157, at 749 ("While verbal abuse can have a monumentally detrimental impact on gay students, including tragic incidents of bullycide, Title IX offers little refuge from the effects of verbal harassment.").

most common form of harassment that LGBQ students experience,[236] the SNDA would protect students from pure verbal harassment.[237] This is a vast departure from *Davis*, which requires "behavior"[238] and both Title IX and Title VI caselaw, which "strongly mandate that pure speech cannot, by itself, create a hostile educational environment."[239] Title IX cases regularly involve "extreme patterns of conduct with incidental, if any, speech components."[240]

While an entire analysis of the First Amendment and anti-gay speech is well-beyond the scope of this Article, it is clear that there is a "very real tension between anti-harassment laws and the Constitution's guarantee of free speech."[241] However, because Title IX requires more than verbal conduct (more than "teasing and name-calling") and requires that the verbal conduct be accompanied by some physical conduct, Title IX has largely avoided First Amendment concerns.[242] The same would not be true for the SNDA. While the SNDA's extension of liability to verbal conduct is certainly well-intentioned, and while the SNDA does contain a provision establishing that it should not be construed to interfere with the First Amendment,[243] it is hard to imagine how the SNDA could pass constitutional muster. In *Tinker v. Des Moines Independent Community School District*,[244] the Supreme Court held that that school officials may not limit student speech unless it threatens to "substantially interfere" with the school environment" or "impinge[s] upon the rights of other students."[245] Under the substantial distribution prong, "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[246] Rather, the school must show some evidence of substantial disruption.[247] Under the rights-of-others prong, courts have held that "people do not have a legal right to prevent criticism of their

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[236] *See supra* section II.D.I.

[237] H.R. 1652, 115th Cong. (2018) at §3(3) ("The term 'harassment' means conduct that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from a public school education program or activity, or to create a hostile or abusive educational environment at a public school, including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility, if such conduct is based on—(A) a student's actual or perceived sexual orientation or gender identity; or (B) the actual or perceived sexual orientation or gender identity of a person or persons with whom a student associates or has associated.").

[238] *Davis*, 526 U.S. at 562.

[239] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 421–22 (2009).

[240] *Id.* at 422.

[241] *Zamecnik*, 636 F.3d at 877.

[242] Saxe v. State College Area School District, 240 F.3d 200, 206 (3d Cir. 2001) ("There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause.").

[243] H.R. 1652, 115th Cong. (2018) at §9(b) ("Nothing in this Act shall be construed to . . . affect the rights available . . .rights available to religious and other student groups under the 1st Amendment to the Constitution . . . .").

[244] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[245] *Id.* at 509.

[246] *Id.* at 508–09.

[247] *Id.*

beliefs or for that matter their way of life."[248]

Applying *Tinker*, courts have regularly held that schools cannot constitutionally prohibit anti-gay speech, such as students "speak[ing] out about the sinful nature and harmful effects of homosexuality";[249] "students wearing "Straight Pride,"[250] "Homosexuality is a sin,"[251] and "Be Happy, Not Gay"[252] shirts; or students expressing that "I don't accept gays."[253] Additionally, schools cannot allow pro-gay speech and disallow anti-gay speech because, per *Tinker*, students "may not be confined to the expression of those sentiments that are officially approved."[254] Rather, while courts have held "a school may determine that its official policy is to promote inclusion and acceptance of all students regardless of sexual orientation, that policy cannot, under *Tinker*, be used to trump a student's expression that homosexuality is sinful" because the "view that homosexuality is sinful is one still held by a large minority of Americans, and *Tinker* protects speech even when it is 'controversial.'"[255]

That said, scholars have argued that there should be a different First Amendment analysis with respect to general political or religious speech expressing an anti-gay viewpoint versus anti-gay speech that is targeted directly at another student (i.e., bullying).[256] The argument is that targeted anti-gay speech (bullying), as opposed to general, political anti-gay speech, should not be protected by the First Amendment because these comments lack a "degree of real political content" such that the reasoning of *Tinker* does not apply.[257] While this may well be a good argument, it is currently not supported by caselaw, which overwhelmingly can be viewed as avidly protecting a commitment to freedom of speech that "absorbs the risk of provoking debate, disturbance, and personal offense."[258]

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[248] *Nuxoll*, 523 F.3d at 672.

[249] *Saxe*, 240 F.3d at 203–04.

[250] *Chambers*, 145 F.Supp.2d at 1069.

[251] *Nixon*, 383 F.Supp.3d at 966.

[252] *Zamecnik*, 636 F.3d at 875.

[253] Glowacki, 2013 WL 3148272, at *7.

[254] *Tinker*, 393 U.S. at 511.

[255] Developments in the Law, *Chapter One: Pro-Gay and Anti-Gay Speech in Schools*, 127 HARV. L. REV. 1698, 1715 (2014). *But see* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *judgment vacated by* Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007) (holding, under *Tinker*, schools may regulate anti-homosexual student speech in the interest of protecting the rights of homosexual students to be free from harassment and harm).

[256] Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 491 (2008).

[257] *Id.*; *see also Tinker*, 393 U.S. at 508–09; Lisa C. Connolly, *Anti-Gay Bullying in Schools-Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U.L. REV. 248, 277 (2012) ("Given the substantial body of empirical research linking anti-gay bullying to concrete physical and emotional harm, this type of speech should lead to an automatic presumption in favor of finding substantial disruption. Judicial doctrine should not constrain a school to wait until a student experiences physical harm—at his own hands or the hands of his bully—before administrators can intervene.").

[258] Amanda L. Houle, *From T-shirts to Teaching: May Public Schools Constitutionally Regulate Antihomosexual Speech?*, 76 FORDHAM L. REV. 2477, 2501 (2008).

Thus, to the extent the SNDA is looked to as a "solution" for anti-gay slurs and remarks—i.e., the verbal bullying experienced by so many LGBQ students—it risks failing as unconstitutional because such speech is not likely to meet the "substantial disruption" standard without some accompanying likelihood of physical violence. Moreover, if the SNDA punishes anti-gay speech alone, it could violate a "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[259]

In summary, as long as *Davis* stands, it is improbable that Title IX can be "fixed" to actually provide a solution to anti-gay bullying—even through an entirely new statute purportedly based upon Title IX like the SNDA. Indeed, even if one were to assume that the SNDA could somehow not only get passed in Congress, but also survive judicial scrutiny, this type of federal legislation is still problematic because it, like Title IX, focuses "on the school's response to specific incidents of known harassment rather than on the school's response to an overall climate that allows such behavior to flourish."[260]

IV. THE SOLUTION: COUPLING CLEAR TITLE IX-LIKE ENFORCEMENT WITH COMPREHENSIVE STATE ANTI-BULLYING STATUTES

How then can we change the school climate to make it safe for all students, including LGBQ students? In order to motivate schools to create a safe school climate, schools must fear liability for failing to keep their students safe. This is an underlying principle and goal of tort law, which "assumes that people will not behave appropriately unless they are subject to sanctions and that sanctions will coerce appropriate behavior."[261] More broadly, it is "classic deterrence theory," which uses the existence of sanctions and the enforcement of such to regulate behavior.[262]

Currently, schools do not fear liability—at either the federal or state level. As discussed *supra*, at the federal level, while there are clear enforcement mechanisms under Title IX, schools still do not fear liability for failing to keep a student safe because of the *Davis* shield, which makes liability almost impossible, and the overall lack of OCR

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[259] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[260] Weddle, *supra* note 168, at 660.

[261] Shuman, *supra* note 17, at 132; Rothstein, *supra* note 17, at 132 ("Regardless of the scientific community's position on the evidence, the fear of liability often motivates the actions of individuals, institutions, and companies.").

[262] Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 896 (1999).

enforcement.

Schools also do not fear liability at the state level.[263] While all 50 states have anti-bullying legislation and such legislation, in theory requires schools to adopt anti-bullying policies to keep students safe, this legislation—in contrast to Title IX—lacks any clear method of enforcement and does not create a cause of action.[264] Moreover, students suing under state tort law often fair worse than those using Title IX because schools are shielded by immunity.[265] Thus, the one thing Title IX does right—create a clear method of enforcement—state law does wrong. This explains why despite its incredibly high bar and low level of success, Title IX is the by far the most popular cause of action brought on the part of aggrieved plaintiffs.[266] Given that schools do not fear liability and are not being held accountable for failing to keep students safe at either the state[267] or federal level, it is no surprise that schools are not motivated to change their behavior.

At the federal level under Title IX, short of overturning *Davis*, or adopting the likely unconstitutional SNDA, as discussed *supra*, there is not currently a way to make schools fear liability. Therefore, this Article proposes that the solution lies with the states. While much focus has been on pushing states to adopt comprehensive anti-bullying statutes, this Article argues that such statutes—without more—are insufficient. Rather, any push for a state to adopt a comprehensive anti-bullying statute must be coupled with a mechanism to (1) motivate individual school districts to actually follow the state mandate to adopt an anti-bullying policy; and (2) motivate individual school districts to actually enforce their own anti-bullying policies.

A. Comprehensive anti-bullying legislation without a mechanism for enforcement is an empty solution

Today, all fifty states have anti-bullying legislation—Montana being the last to adopt legislation in 2015.[268] This is a step in the right direction

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[263] Holben & Zirkel, *supra* note 21, at 326 ("Although many states adopted anti-bullying laws in recent years, very few claim rulings were based on a state anti-bullying law. Their paucity is attributable to their lack of a private right of action.").

[264] *Id.*

[265] *See infra* Section IV.A.2.

[266] Holben & Zirkel, *supra* note 21, at 325.

[267] Bloom, *supra* note 183, at 125 ("However, in order for the anti-bullying statutes to be effective, the legislators must be explicit in their intent to create a cause of action with appropriate remedies for bullying victims. Simply requiring that school districts have a written anti-bullying policy is clearly not enough. School districts must be accountable for maintaining a safe and healthy learning environment at all grade levels, for all students.").

[268] Lisa Baumann, *Gov. Bullock Signs Montana Anti-bullying Bill Into Law*, MISSOULIAN, (April 21, 2015), http://missoulian.com/news/state-and-regional/montana-legislature/gov-bullock-signs-

because research has shown that state anti-bullying legislation does, as a general matter, decrease the probability of a student being bullied.[269] However, only a minority of states—twenty-two states plus D.C.—have "enumerated" or "compressive" statutes that list sexual orientation and/or gender identity as a characteristic that motivates bullying.[270]

Each state's anti-bullying legislation is generally structured the same. First, the statutes define bullying[271]—although the definitions vary widely and only the "stronger" statutes explain that bullying may be based on enumerated specific characteristics.[272] Second, they require that school districts adopt a policy prohibiting bullying—that is, "most of these statutes do not themselves prohibit bullying; rather, they instruct school districts to prohibit bullying."[273] Some state statutes include model policies or required components that school districts must include in their own anti-bullying policies.[274] Others simply state that each school district "shall develop and adopt a policy concerning bullying prevention and

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montana-anti-bullying-bill-into-law/article_9c79a4f9-3988-562e-87f1-d9e444c3790b.html [https://perma.cc/5BDA-MW7H].

[269] *See* Dimitrios Nikolaou, *Do Anti-Bullying Policies Deter in-School Bullying Victimization?*, 50 INTL. REV. L. & ECON. 1 (2017). Using data from 3,130 public high schools across all 50 states over an eight-year period, the author, an Economics Professor at Illinois State University, determined that anti-bullying state laws decrease the probability of a student being bullied by 8.4 percent, *id.* at 3–4, but the study also showed anti-bullying state laws did not have an effect on the frequency of bullying, *id.* at 5 n.7.

[270] *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/anti-bullying [https://perma.cc/23Q9-VLWV] (last visited March 28, 2019).

[271] Arne Duncan, *Dear Colleague Letter Summarizing Examples of Department Key Components of State Bullying Laws*, U.S. DEP'T EDU. (Dec. 16, 2010), https://www2.ed.gov/policy/gen/guid/secletter/101215.html [https://perma.cc/2ZDS-J9PF]. For example, Massachusetts' definition of bullying follows all of the Department of Education's recommendations and is considered to have one of the strongest anti-bullying laws in the country. Ari Ezra Waldman, *Are Anti-Bullying Laws Effective?*, 103 CORNELL L. REV. ONLINE 135, 140–41 (2018). On the other end of the spectrum, states like Arizona do not define bullying, but leave the definition to be created by individual school districts. ARIZ. REV. STAT. ANN. § 15-341 (2016). Nikolaou, *supra* note 270, at 5 (concluding that, among the varying state anti-bullying laws, the most effective were those that explicitly defined the term "bullying" in their anti-bullying statutes: "In states where there is a clear *definition* of what comprises bullying, the beneficial effects of the policy are much stronger; defining bullying in the provisions decreases school victimization by 11.6% relative to schools in states where the law does not define bullying.").

[272] The definition of "bullying" varies widely by state. As summarized by the Department of Education: "Some state laws focus on specific actions (e.g., physical, verbal, or written), some focus on the intent or motivation of the aggressor, others focus on the degree and nature of harms that are inflicted on the victim, and many address multiple factors. In many instances, minor language, omitted or inserted into laws, can significantly alter the way in which the behavior and circumstances are legally defined (e.g., inclusion of the terms 'physical,' 'overt,' or 'repeated')." *See Analysis of State Bullying Laws and Policies*, U.S. DEP'T OF EDUC. (Dec. 2011), https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf [https://perma.cc/7CL5-6NPF] [hereinafter DOE Report]. As argued by many commentators, the definitions of bullying range from narrow to so broad that they likely could not survive constitutional muster. *See also* Piacenti, *supra* note 8, at 77–78; Kathleen Hart, *Note, Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1121 (2005) ("Although antibullying policies certainly increase awareness of the issue, it remains to be seen whether they are effective. Moreover, because they restrict student speech and other expressive conduct, they raise important free speech concerns.").

[273] Piacenti, *supra* note 8, at 77–78.

[274] *See, e.g.*, ALA. CODE § 16-28B-5.

education for all students"—no guidance is given with respect to what the policy must or should include.[275] "Stronger" state anti-bullying statutes also may include specific requirements for investigating bullying, reporting bullying, responding to reports of bullying, disciplining bullies, referring victims of bullying to counselors, or training for school staff.[276]

At the state level, much focus has been on state anti-bullying legislation, and advocates have pushed for states to adopt more comprehensive, stronger anti-bullying legislation to combat anti-gay bullying.[277] With respect to anti-gay bullying, GLSEN has identified three "key" components of state anti-bullying legislation: (1) the enumeration of both sexual orientation and gender identity as two of the non-exclusive list of characteristics that motivate bullying,[278] (2); the inclusion of a professional development requirement; and (3) the inclusion of a reporting requirement.[279] Of the three, the most focus has been on pushing for enumeration[280] and for good reason: LGBQ students in schools with enumerated, comprehensive anti-bullying policies report reduced victimization [281] and increased likeliness of the school having an effective

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[275] *See, e.g.*, NEB. REV. STAT. ANN. § 79-2137.

[276] Duncan, *supra* note 272. Nine states follow all of the DOEs recommendations and thus can be considered to have the strongest anti-bullying legislation in the country: Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, and Oregon. Waldman, *supra* note 272, at 139.

[277] Connolly, *supra* note 258, at 283 ("As more states choose to include enumeration of protected characteristics in their anti-bullying laws, the expressive power of such legislation only grows stronger, supplanting an outmoded status quo with new norms of equality and tolerance."); Mudasar Khan, Kelly McLaughlin, Peter Mezey, Daniel Robertson, *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 506–07 (2017) ("Enumerated anti-bullying policies have become the goal for organizations like GLSEN because such policies appear to be more effective at preventing anti-LGBTQ bullying and harassment than are generic anti-bullying policies."); Cristina M. Meneses, J.D., M.S. & Nicole E. Grimm, M.S., *Heeding the Cry for Help: Addressing LGBT Bullying As A Public Health Issue Through Law and Policy*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 140, 163–64 (2012) ("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."); 2017 National School Climate Survey, *supra* note 42, at 76; *Enumeration*, GLSEN, http://www.glsen.org/sites/default/files/Enumeration_0.pdf [https://perma.cc/7Z66-PK87] (last visited Dec. 21, 2018) (noting enumerated statutes are the most effective in combating anti-gay bullying).

[278] Kull, R.M., Kosciw, J.G., & Greytak, E.A, *From Statehouse to Schoolhouse: Anti-Bullying Policy Efforts in U.S. States and School Districts*. GLSEN (2015) 5–6, https://www.glsen.org/sites/default/files/GLSEN%20-%20From%20Statehouse%20to%20Schoolhouse%202015_0.pdf [https://perma.cc/AU8T-R7AJ].

[279] *Id.*

[280] *See supra* note 278.

[281] Kull, *supra* note 279, at 76 ("Although LGBTQ students who attended schools with any type of anti-bullying policy did report less anti-LGBTQ language than those without a policy, students in schools with comprehensive policies were the least likely to hear such language, followed by those in schools with partially enumerated policies, schools with generic policies, and schools with no policies . . . . Overall, LGBTQ students in schools with any type of anti-bullying policy reported lower levels of victimization related to their sexual orientation and gender expression compared to those in schools without a policy. However, there were differences in victimization between students in schools with policies that enumerated and students in schools that did not. Specifically, students in schools with policies that enumerated both sexual orientation and/or gender identity/expression ('comprehensive policies') experienced the lowest levels of victimization.").

response to the bullying.[282] Mark Hatzenbuehler and Katherine Keyes—surveying 31,852 eleventh grade public school students in Oregon—concluded that "[i]nclusive anti-bullying policies were significantly associated with a reduced risk for suicide attempts among lesbian and gay youths," and "[i]n contrast, anti-bullying policies that did not include sexual orientation were not associated with lower suicide attempts among lesbian and gay youths."[283]

But, while it is undisputed that state laws requiring schools to adopt comprehensive, enumerated, and inclusive anti-bullying policies are better than state laws requiring less; it is also undisputed that, in order for any law to be effective, people must follow it and that, in order to make people follow the law, it must be enforced. Problematically, in the context of state anti-bullying laws neither is happening. This is because the one thing Title IX gets right—a clear method of enforcement—is absent from the vast majority of state anti-bullying legislation.

1. Without an enforcement mechanism, many school districts are altogether ignoring state mandates to adopt compliant anti-bullying policies

Though required by state law to have an anti-bullying policy (and some states a comprehensive one), the first major problem is that schools are not complying with their states' anti-bullying legislation, and there are no consequences for this noncompliance. Unlike Title IX, funding is not conditioned on compliance with state anti-bullying legislation.[284] Moreover, state anti-bullying legislation does not create a private cause of action to hold school districts liable for noncompliance.[285]

Problematically, without being forced to comply, school districts are choosing to not comply or, worse, not to adopt any policy at all. For example, a 2015 survey found that among states with anti-bullying statutes, more than a quarter of school districts ignored the mandates in their states' anti-bullying statutes and neglected to adopt the required anti-bullying policies.[286] In states where anti-bullying statutes included sexual

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[282] *Id.* at 78 ("Furthermore, we found that the stronger the policy in terms of enumeration, the more likely that LGBTQ students were to report incidents of victimization to school staff. . . . . LGBTQ students in schools with comprehensive policies were also more likely to report staff response to students' reports of victimization as effective.").

[283] Mark L. Hatzenbuehler & Katherine M. Keyes, *Inclusive Anti-bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth*, 53 J. ADOLESCENT HEALTH S21, S23-S24 (2013).

[284] LAWS, POLICIES & REGULATIONS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., https://www.stopbullying.gov/resources/laws [https://perma.cc/H8TV-2SXM]

[285] *See id.*

[286] Kull, *supra* note 279, at 5.

orientation, 38.6 percent of school districts did not provide protection for students based on sexual orientation in their individual school policies.[287] In states were anti-bullying laws included gender identity, 60.3 percent of school districts did not include protections in their policies on the basis of such.[288] In states where anti-bullying laws included a requirement of professional development or training of school staff, 76 percent of school districts did not require professional development in their anti-bullying policies.[289] In states where anti-bullying laws included reporting or accountability requirements, 55.2 percent of school districts did not require the same in their anti-bullying policies.[290] In summary, the survey found that—despite states having anti-bullying legislation that required schools to adopt certain anti-bullying policies—schools were largely ignoring the requirements.

2. *Even if school districts comply with state anti-bullying legislation and adopt anti-bullying policies, school districts are not being held accountable for failing to enforce their own policies*

The second big problem is that, even if a school district does comply with its state anti-bullying statute by adopting an anti-bullying policy in compliance with its state statute, the existence of a school anti-bullying policy alone is useless if school officials do not fear liability for failing to enforce the policy. Currently, no state anti-bullying statute creates an express cause of action for enforcement. In fact, many state anti-bullying statutes expressly state that there is no cause of action for enforcement.[291]

Absent an express cause of action in state anti-bullying legislation, plaintiffs are left with traditional tort causes of action such as negligence or negligent supervision. The problem is that courts have largely held that a school's failure to enforce its own policy is not actionable in tort

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[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *See, e.g.*, N.H. REV. STAT. ANN. § 193-F:9 ("[N]or shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state."). Some statutes foreclose a cause of action. *See, e.g.*, OKLA. STAT. ANN. tit. 70, § 24-100.3(B) (West 2008) ("Nothing in this act shall be construed to impose a specific liability on any school district."); OR. REV. STAT. § 339.364 (2007) ("[This statute] do[es] not create any statutory cause of action."); VT. STAT. ANN. tit. 16, § 165(d) (West 2008) ("[N]othing in this section herein shall create a private right of action."); D.C. CODE § 2-1535.08 (LexisNexis 2011) ("This subchapter does not create a new private right of action or provide a statutory basis for a claim for damages against the District of Columbia or its employees."); MASS. ANN. LAWS ch. 71, § 37O(i) (LexisNexis Supp. 2012) ("Nothing in this section shall supersede or replace existing rights or remedies under any other general or special law, nor shall this section create a private right of action."). *See generally supra* Part IV.A.1.

due to the doctrine of immunity.[292] The doctrine of immunity varies from state to state, but it functions to largely shield school districts and employees from liability for failing to adequately prevent or respond to bullying.[293] Some states grant school districts absolute immunity. For example, in Arkansas, the laws essentially provide for blanket immunity for school districts and their employees.[294] The same is true in Texas, where school districts and school employees are immune from tort liability, except in the cases of injuries from motor vehicles.[295] Other states grant school districts immunity for employees' performance or failure to perform a "discretionary" function or duty but not for their failure to perform a to "ministerial" function or duty.[296] However, courts have held that disciplinary decisions, including implementing/enforcing anti-

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[292] Castillo v. Bd. of Educ. of the City of Chi., 103 N.E.3d 596, 598 (Ill. App. 2018) (school officials immune from tort liability in negligence for violating own anti-bullying policy); A.F. v. Hazelwood Sch. Dist., 491 S.W.3d 628, 635 (Mo. Ct. App. E.D. 2016) (holding school district immune from negligence action when bullied student claimed school district failed to properly discipline and supervise); Doe by Watson v. Russell Cty. Sch. Bd., 1:16CV00045, 2017 WL 1374279, at *1436–38 (W.D. Va. Apr. 13, 2017) (holding sovereign immunity shields school district from liability).

[293] Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234, 245–46 (2010) (assessing public school immunity across the states and concluding that, despite different approaches, states can be said to grant "robust" immunity to school districts and employees through either stated immunity or the "discretionary purpose" exception); Lilah Hume Wolf, *Knowledge Is Power: Assessing the Legal Challenges of Teaching Character in Charter Schools*, 26 STAN. L. & POL'Y REV. 671, 696 (2015) ("Though state policies regarding government liability differ structurally, they generally function to immunize public schools from suit . . . ."); Phillip Buckley, *Barriers to Justice, Limits to Deterrence: Tort Law Theory and State Approaches to Shielding School Districts and Their Employees from Liability for Negligent Supervision*, 48 LOY. U. CHI. L.J. 1015, 1023 (2017); 111 Am. Jur. Trials 123 (2009) ("Where otherwise applicable, the most common and most successful defense against a cause of action against a public school district for injuries suffered by a student victim of bullying by another student is the sovereign immunity of the public school district as a governmental entity.").

[294] *Id.*; ARK. CODE. ANN. § 21-9-301 ("It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.").

[295] Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978) ("The law is well settled in this state that an independent school district is an agency of the state and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort."); S.N.B. v. Pearland Indep. Sch. Dist., 120 F. Supp. 3d 620, 631 (S.D. Tex. 2014) ("Under the Texas Tort Claims Act, which represents the sole waiver of governmental immunity for torts, the only permissible state tort claim that citizens can bring against a school district in Texas is a claim for misuse of a motor vehicle. . . . S.B.'s negligence claim is plainly not about motor vehicles—it is about a failure to protect her from bullying.").

[296] OKLA. STAT. tit. 51, § 155(4)–(6) ("The state or a political subdivision shall not be liable if a loss or claim results from: Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees."); 745 ILCS 10/2-201 ("Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused."); KAN. STAT. ANN. 75-6104 ("A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from . . . . any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved . . . .").

bullying policies, are discretionary[297] and thus protected by immunity so as not to "expose public education, one of the largest and most complex activities of state government, to a debilitating and potentially enormously costly threat of liability for the thousands of disciplinary decisions made every day in the system's schools."[298] For example, complaints that a school official failed to implement an anti-bullying policy will be immune from liability because "implementation requires both discretion and decision-making by school officials, at every level."[299]

Moreover, courts have held that a school's failure to enforce its own anti-bullying policy cannot serve as a basis of a claim that the school district violated due process pursuant to 42 U.S.C. § 1983 because "a state's failure to protect an individual against private violence simply does not constitute a violation of due process."[300] Although there is a "special relationship" exception to this rule, courts hold that a school's relationship with its students does not fall into this exception.[301] Thus, courts have held that "public school officials who enact anti-bullying policies do not violate a student's constitutional due process rights by failing to enforce such policies, no matter how pervasive the bullying, no matter how hateful, and no matter how many lives . . . are lost."[302] As noted by one court, a school district's effective immunity from liability has "the undesirable effect here of allowing a school district to affirmatively enact anti-bullying policies which purport to assume responsibility to react to private violence, that is, violence inflicted by other students, yet absolve the same school district of responsibility for enforcement of such policies."[303]

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[297] Mulvey v. Carl Sandburg High Sch., 2016 IL App (1st) 151615, ¶ 43, 66 N.E.3d 507, 516 ("The distinction between a discretionary act and a ministerial act must be made on a case-by-case basis, and courts have recognized that discretionary acts are those that are unique to a particular public office, whereas ministerial acts are those that a person performs based on a given set of facts, in a prescribed manner, in accordance with a mandate of legal authority, and without reference to the official's discretion as to the propriety of that act.") (citing references omitted).

[298] Weddle, *supra* note 168, at 686; Kathleen Conn, Ph.D., J.D., LL.M., *Two Wrongs Never Make A Right: The Fifth Circuit Abrogates Public Schools' Duty to Protect Students*, 283 ED. L. REP. 1, 18 (2012) (noting that the "duty of supervising students, which requires judgment on the part of school personnel and differs in degree in different circumstances, is a discretionary duty under the law" and, as such, "[g]overnmental entities like public school districts are generally immune from liability for negligence in the performance of discretionary duties.").

[299] *Castillo,* 103 N.E.3d at 600.

[300] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989).

[301] Doe v. Covington Cty. Sch. Bd., 675 F.3d 849, 863 (5th Cir.2012) (holding school district had no constitutional duty to protect the plaintiff—a nine-year-old elementary student—from non-state actors); Stevenson ex rel. Stevenson v. Martin Cty. Bd. of Educ., 3 Fed. Appx. 25, 30–31 (4th Cir. 2001) ("Several circuits have been faced with the issue of whether a school-student relationship is a special relationship triggering the protections of the Due Process Clause. They have held uniformly that no special relationship exists because the student is not in physical custody and, along with parental help, is able to care for his basic human needs.").

[302] *Estate of Brown*, 863 F. Supp. 2d at 638.

[303] *Id.*

B. Solution: state anti-bullying legislation and tort law should be used together to create a culture of change

Pushing for comprehensive state anti-bullying legislation—that includes enumerated provisions, reporting requirements, and required training—is a good step, but alone it is insufficient to cause real change. Indeed, this was the conclusion of Ari Ezra Waldman, who compared the effect of different state anti-bullying laws with the frequency of LGBQ bullying, cyberbullying, and suicidal thoughts across the states, and concluded that the state "anti-bullying laws alone have no significant effect" on the bullying rates of LGBQ youth.[304] Rather, he found that LGBQ students in states "with a broad commitment to LGBTQ equality in general" were "significantly more likely to report lower rates of bullying, cyberbullying, and suicidal thoughts among LGB students" as compared to those in states without such a commitment to equality.[305] It was only in the states with a broad commitment to LGBQ equality that a comprehensive, enumerated anti-bullying law made "a small, but statistically significantly enhanced" effect on LGBQ students feeling safe at school.[306] Thus, in order to enact real change in the area of bullying—and specifically LGBQ bullying—states (as well as the schools and communities within them) must "create cultures and climates that don't encourage and support unacceptable bullying behaviors."[307]

If we accept that (1) state legislation requiring comprehensive, enumerated anti-bullying policies (ones that specifically address anti-gay bullying) alone is insufficient to make schools safer for LGBQ students if such policies are not being enforced and that (2) to maximize effectiveness of any anti-bullying legislation states (and the schools within them) must show a broad commitment to LGBQ equality, how then do states change school climates to be safer for all students?

One currently underutilized way is opening the door of tort law—which can be used to both enforce state anti-bullying legislation and, in the process, change the culture of states and the schools within them. Scholarship has shown that "tort litigation plays an active role in shaping cultural norms and values that extend far beyond deterrence," such that the "radiating effects of torts are potentially vast."[308] Tort law can send the message that "there are certain values that society is not willing to compromise" and, in the case of anti-gay bullying, tort law—through the

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[304] Waldman, *supra* note 272, at 145.

[305] *Id.*

[306] *Id.*

[307] *Id.*; Hart, *supra* note 273, at 1150–51 ("Researchers agree that in order to effect lasting change in this area, schools and communities must 'create cultures and climates that don't encourage and support unacceptable bullying behaviors.'").

[308] Anne Bloom, *The Radiating Effects of Torts*, 62 DEPAUL L. REV. 229, 246 (2013).

consequence of imposing liability and damages—can make school districts hear the message that failing to protect their students is "not consistent with societal values."[309] Given that one of the main functions of tort law is to deter and prevent harm by influencing the way people behave, it begs the question of why it is not being regularly used to change the behavior of school districts—i.e., school faculty and staff—and thereby change the climate of schools.[310]

The second way, apart from tort law, is that states should include a clear sanction for noncompliance within the state's anti-bullying statute—similar to Title IX's loss of federal funding condition. By actually "attaching unpleasant consequences to [schools'] behavior[,] [it] will reduce the tendency of [schools] to engage in that behavior."[311]

Thus, this Article pushes states to add Title IX-like enforcement mechanisms to their anti-bullying statutes and, unlike Title IX, actually use those enforcement mechanisms to make schools fear liability. That is, the enforcement mechanisms should be used to hold schools accountable for failing to adequately respond to bullying and, ultimately, for failing to create cultures that are safe for all students, regardless of sex, gender, or sexual orientation. To do this, states should take the following steps.

1. Amend state anti-bullying laws to include express consequences for a school's failure to comply

Step one is for states to add an enforcement mechanism to fix the fatal flaw of the majority of state anti-bullying legislation: requiring school districts to adopt anti-bullying policies, but then doing nothing to hold school districts accountable for that requirement.[312] Moreover, because of the doctrine of immunity—which absolutely protects schools

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[309] Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 208 (2010).

[310] Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997); Buckley, *supra* note 294, at 1018; Ritchie v. Rupe, 44 S.W.3d 856, 889 (Tex. 2014) ("The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims."); Shuman, *supra* note 17, at 115 ("Deterrence delineates tort law. Tort law seeks to reduce injury by deterring unsafe behavior and that goal informs tort standards for behavior."); Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705, 1733 (1996) ("Certainly the threat of tort liability is commonly considered to have a substantial effect on behavior.").

[311] *See* Franklin E. Zimring & Gordon J. Hawkings, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 3 (1973).

[312] Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. Ill. L. Rev. 175, 211–12 (2015) ("Indeed, a common thread running through all state anti-bullying statutes in the educational context is that they currently do not provide for an express private cause of action.")

from liability in some states[313] and largely protects schools from liability in others[314]— school districts have no consequences for failing to enact anti-bullying policies that comply with the law or enforce the same and, as such, there is "little legal incentive to embrace significant reform."[315] Thus, the first necessary step is that states—whatever their statutes' contents—should amend them to address consequences for noncompliance—much like Title IX does. Georgia is one of the few states with such a provision, providing: "Any school system which is not in compliance with the requirements of subsection (b) of this Code section shall be ineligible to receive state funding."[316] Other states should adopt a similar provision as a bipartisan amendment to their current law. This will ensure that school districts in every state are held accountable if they fail to adopt an anti-bullying policy in compliance with the state's statute. Importantly, fund termination, would like Title IX, be a "sanction of last resort" if voluntary compliance does not work.[317] However, such sanctions must exist because "deterrence is perceptual" and a school's failure to follow the law of adopting an anti-bullying policy must be faced with a "significant risk" of consequence.[318]

With this change, advocates are correct in pushing for states to adopt anti-bullying legislation that requires school districts to implement not just any anti-bullying policy, but a comprehensive, enumerated, and inclusive one. As discussed *supra*, these comprehensive policies have the effect of not only reducing victimization but also increasing the likeliness of a school having an effective response to the bullying.[319]

2. *Open schools to tort liability by conditioning schools' immunity on enforcing their own anti-bullying policies*

In order to create a change of climate, step two requires that bullying victims be able to hold a school district accountable for the school's failure to enforce its own anti-bullying policy.[320] Given that state anti-

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[313] *See, e.g.*, ARK. CODE ANN. § 21-9-301 (West 2011).

[314] *See, e.g.*, 745 ILCS 10/2-201.

[315] Daniel B. Weddle, *When Will Schools Take Bullying Seriously?*, 39 OCT. TRIAL 18, 18 (2003).

[316] GA. CODE ANN. § 20-2-751.4.

[317] Melissa E. Scott, *No Pregnancy and No Parenthood: The Likely Legitimacy of VMI's Parenting Policy*, 76 TEMP. L. REV. 411, 418 (2003).

[318] Linda C. Fentiman, *A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 160 (2012).

[319] Kull, *supra* note 279, at 78.

[320] Weddle, *supra* note 168, at 654 ("[S]chool climate that does not include strong supervision on the one hand and a consistent condemnation of bullying on the other, creates an atmosphere where bullying becomes an accepted part of the social culture in which it exists. Where rules are not clear and are not consistently enforced and where teachers and administrators fail to act when misconduct occurs, discipline problems are the worst and victimization is highest. In such situations, students "enact their own codes of behavior" because teachers and administrators fail to control the school climate.").

bullying statutes do not provide for a private cause of action, bullying victims—who want to hold schools accountable—are being forced to rely on Title IX and, as such, *Davis* is shielding schools from liability and from having to address their dangerous climates that give rise to bullying.[321]

Due to the failures of Title IX to motivate schools to change their behavior, we must open the door for tort law to be used to hold school districts liable for failing to enforce their own anti-bullying policies.[322] Given that there are important rationales for immunity, doing away with immunity altogether is not the answer. Rather, immunity serves the important functions of protecting state funds and allowing educators to teach without fear of liability for each of the difficult decisions they make on a daily basis when educating youth.[323] However, the flipside is that "research has made clear that children are being brutalized on a daily basis in schools across the country; insulating school officials from liability for failing to intervene effectively leaves those who are tormented under their care from any significant recourse against those who were in the best position to protect them."[324]

In states with absolute immunity, a good solution is the one enacted by the South Dakota legislature, which provides that a school district will be immune from suit "unless there has been substantial noncompliance with the school district's policy resulting in injury to a protected person."[325] Thus, a school district will be motivated to enforce and comply with its own anti-bullying policy with the "carrot" of immunity. This will result in a school district being motivated to carefully implement its policies, train its employees on its policies, and ensure that they are substantially complied with at all times. That is, school districts will be motivated to be not only reactive to known incidents of bullying, but also to be proactive in creating a safe school climate that prevents bullying in the first place. This will do away with the "undesirable effect of immunity," which currently allows "a school district to affirmatively enact anti-bullying policies which purport to assume responsibility to react to private violence, that is, violence inflicted by other students, yet absolve the same school district of responsibility for enforcement of such policies . .

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[321] Bloom, *supra* note 183, at 127 ("State anti-bullying laws must reach beyond the high bar set by *Davis* for Title IX claims, which, even when the plaintiff succeeds, fail to address the underlying issues of bullying prevention and the need to change the social and educational environment in schools.").

[322] *Id.* ("However, in order for the anti-bullying statutes to be effective, the legislators must be explicit in their intent to create a cause of action with appropriate remedies for bullying victims. Simply requiring that school districts have a written anti-bullying policy is clearly not enough. School districts must be accountable for maintaining a safe and healthy learning environment at all grade levels, for all students.").

[323] Weddle, *supra* note 168, at 686.

[324] *Id.* at 687.

[325] S.D. CODIFIED LAWS § 13-32-17 (2012).

. . ."[326]

In states with qualified immunity (i.e., immunity for discretionary decisions only),[327] courts should follow the lead of the Mississippi Supreme Court. In applying the Mississippi Tort Claim Act, [328] which limits immunity for governmental entities with respect to only the performance of or failure to perform "discretionary" functions (as opposed to ministerial functions), the Mississippi Supreme Court held that, even when a school's anti-bullying policy gives the school discretion in how to respond to specific instances of bullying, the school's implementation of its anti-bullying policies is not discretionary such that a school district can be held liable for its negligence in failing to prevent bullying or failing to implement its bullying policies.[329]

As explained by the court: "The test for determining whether discretionary-function immunity attaches is not whether a political subdivision has discretion in deciding *how* to perform its duties; the test is whether a political subdivision has discretion in deciding *whether* to perform its duties."[330] Thus, although necessarily a school's anti-bullying policies will often give discretion to school employees as to how to best discipline specific bullying incidents, this does not render the enforcement of the anti-bullying policy itself discretionary.[331]

The result reached by the Mississippi Supreme Court is the correct one: schools should not have discretion in deciding whether or not to protect children. Put another way, a school's decision to enforce its own anti-bullying policy should not be discretionary: it should be mandatory. Accordingly, courts in states with qualified immunity should follow the

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[326] *Estate of Brown*, 863 F. Supp. 2d at 638.

[327] Weddle, *supra* note 168, at 684.

[328] MISS. CODE ANN. § 11-46-9(1)(d) (Rev. 2012) ("A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.").

[329] Smith ex rel. Smith v. Leake County. Sch. Dist., 195 So. 3d 771, 779 (Miss. 2016) ("And while Sections 37-11-67 and 37-11-69 give Leake Central discretion as to how to prevent bullying, these statutes do not provide discretion as to whether to prevent bullying. Nor do these statutes override the ministerial statutory duty found in Section 37-9-69 to provide a safe school environment."). Similarly, with respect to school officials' defense of qualified immunity, the Kentucky Supreme Court, has held that while the content of a school's anti-bullying policy is discretionary, the enforcement of a school's anti-bullying policy is not. Patton v. Bickford, 529 S.W.3d 717, 725-28 (Ky. 2016). The court explained that although it "could be argued that determining whether bullying is occurring requires judgment and, is therefore, discretionary," "the need to use common sense and ordinary judgment to avoid negligence d[oes] not convert the task [of supervision] to a discretionary duty." *Id.*

[330] *Smith*, 195 So. 3d at 779 (emphasis in original); *see also* Moore v. Houston Cty. Bd. of Educ., 358 S.W.3d 612, 618 (Tenn. Ct. App. 2011) (holding school district not immune from tort liability arising from failure to prevent attack on student by another student because a school's response to bullying claims is not discretionary).

[331] *See id.*

reasoning of the Mississippi Supreme Court. Moreover, in states with qualified immunity, it is especially important that we continue to push these states to adopt anti-bullying legislation that is enumerated and comprehensive. This is because "as statutes and school district policies become more specific about what procedures must be followed either to prevent or respond to bullying, the less likely it is that an educator's actions are discretionary and the less likely that the educator is immune from suit."[332]

Importantly, if states make these changes, schools will not be automatically liable. Rather, a plaintiff-student suing a school for peer harassment will still face the other tough hurdles that exist in tort causes of action, such as issues of foreseeability and superseding cause.[333] However, with the barrier of immunity removed, schools will have—for once—a real fear liability, which is what is required to change behavior and, ultimately, change the climate for the better of all students, including LGBQ students.

CONCLUSION

This Article shows that there is still much work to be done to make schools actually "get better" for LGBQ students and that relying on Title IX and current state anti-bullying statutes as a solution is not working because schools do not currently fear liability under either. In order to make schools change their climate to be safe for all students, including the scores of students bullied on the basis of their sexual orientation, schools must be made afraid of what will happen to them if they don't. That is, we must apply the underlying principle of deterrence found in tort law to coerce schools to make their climates safe for all students. It is not enough that we push states to adopt comprehensive anti-bullying statutes that include LGBQ students, states must now open the door for these students to actually force schools to follow them. Simply put, if we want school climates to get better for all students, regardless of their sexual orientation, states must do what Title IX has failed to: hold schools accountable for their failure to create inclusive, safe environments for all students to learn.

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[332] Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in A Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2743 (2013).

[333] Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 187–89 (2009).