

# FIGHTING FOR THEIR LIVES: THE LGBTQ STUDENT’S RIGHT TO A HARASSMENT-FREE EDUCATION

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## INTRODUCTION

The debate rages on over gay rights. Should we legalize gay marriage? Will the repeal of “Don’t Ask, Don’t Tell” destroy military morale? The most important fight concerning gay rights, however, is not marriage or the military, but survival. Each day, LGBTQ<sup>1</sup> students are harassed as teachers and administrators

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<sup>1</sup> LGBTQ is the acronym for lesbian, gay, bisexual, transgender, or questioning. It is important to note that many of the students being bullied may be less aware of their differences than their peers, and these stereotypes place them into the LGBTQ category without any affirmative act on their part. Though they remain unsure of their sexuality (or even identify as heterosexual), they experience bullying based on perception.

turn a blind eye or participate themselves. One such student, Seth Walsh, told his mother he was gay when he was in sixth grade,

[b]ut [in September 2010], Seth went into the backyard of his home in the desert town of Tehachapi, Calif., and hanged himself, apparently unable to bear a relentless barrage of taunting, bullying and other abuse at the hands of his peers. After a little more than a week on life support, he died . . . . He was 13.<sup>2</sup>

The more recent cases of Tyler Clementi, Billy Lucas, Raymond Chase, and others have shown the need to reform our laws to protect our students.<sup>3</sup>

Our schools today have become a breeding ground for harassment. “[H]igh school is one of the most intensely and often violently anti-gay sites in our culture and a central institution in the socialization of youth into homophobia,” leading to “academic underachievement, truancy, and dropout . . . among homosexual youth.”<sup>4</sup> The statistics of gay teen harassment are startling:

- The typical high school student hears anti-Gay slurs more than twenty-five times a day.
- 53% of students report hearing homophobic comments made by school staff.

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The terms LGBTQ, gay, and homosexual will be used interchangeably throughout this Comment.

<sup>2</sup> Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9.

<sup>3</sup> *Id.*

<sup>4</sup> Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 219 (2008) (quoting Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 271 (1996); Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.P.R. 151, 164 (1999)) (internal quotations marks omitted); *see also* Ruskola, *supra*, at 274 (arguing that children are discovering their homosexuality at an earlier age, and as such, our laws should support this instead of labeling them as “confused, presumptively heterosexual future adults”).

- 15% of Lesbian, Gay, and Bisexual youth have been injured so badly in a physical attack at school that they have had to seek the services of a doctor or nurse.
- Gay and Lesbian youth represent 30% of all completed teen suicide. Extrapolation shows that this means a successful suicide attempt by a Gay teen in this country every five hours and forty-eight minutes.<sup>5</sup>

Bullying is not limited to actions of students, unfortunately. In October 2010, Clint McCance, the now-former vice president of the Midland School District in Arkansas, went to Facebook to express his anger over a day to wear purple to raise awareness of gay teen bullying.<sup>6</sup> Among McCance's remarks, he wrote, "Seriously they want me to wear purple because five queers committed suicide. The only way [I am wearing] it for them is if they all commit suicide."<sup>7</sup> After others replied to his post, he continued his rant: "I also enjoy the fact that they often give each other AIDS and die."<sup>8</sup> McCance's statements demonstrate the discrimination and abuse that can occur at our schools—all the way from fellow students to elected school board members.

This Comment analyzes current legal protections for LGBTQ students, critiquing their use and pointing out ways to further ensure students' rights. First, regardless of homosexual classification generally, gay or questioning students should be raised to a suspect class based on the model detailed in recent gay rights decisions across the United States providing homosexuals with

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<sup>5</sup> Shannon Gilreath, "Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech, 44 WAKE FOREST L. REV. 557, 576-77 (2009) (citations omitted) (discussing the harm of homophobic speech).

<sup>6</sup> Leonard Pitts, *The Usefulness of Hatred*, BUFFALO NEWS, Nov. 1, 2010, at A9. McCance resigned from his position just days after the story became national news. *Arkansas School Board Member to Resign After Anti-gay Posts*, ST. PAUL PIONEER PRESS, Oct. 29, 2010, at A10.

<sup>7</sup> Pitts, *supra* note 6, at A10.

<sup>8</sup> *Id.*

heightened scrutiny. No court has applied heightened scrutiny to a case concerning a gay student as courts look at homosexuality in general, failing to distinguish students from adults. However, because of the severe discrimination happening in our school systems today, LGBTQ students should be treated as a distinct class. Second, legislation is needed to protect them and ensure that schools face liability for these grave human rights violations. Through Title IX, some students are protected against harassment, but it is difficult for some to develop a cause of action. Several members of Congress have proposed legislation to curb the effects of harassment based on sexual orientation, but Congress has yet to act. Lastly, there is a movement on the international playing field to protect against sexual orientation discrimination, but a parallel movement exists to combat that effort. Through strengthening our statutory protections and raising LGBTQ students to a suspect class, we will begin to combat these devastating statistics and help ensure that our children live to adulthood.

## I. JUDICIAL PROTECTION

The predominant way courts protect minority groups is through the use of heightened scrutiny. This Comment will examine how the Supreme Court has developed this idea throughout its history. Further, this Comment will look at how the Supreme Court has applied scrutiny to homosexuals, generally, as well as recent lower court decisions on the subject. Also, this Comment will evaluate LGBTQ students' needs, specifically, to have heightened scrutiny applied to them as a more specific class (as opposed to the level of scrutiny applied to homosexual adults), allowing them greater protection within our court system. Lastly, some scholars have argued that homosexuals should be protected under heightened scrutiny that applies based on gender discrimination, but this Comment will examine why that approach is simply insufficient.

### *A. History of Judicial Scrutiny*

The concept of judicial scrutiny has been developed through Supreme Court jurisprudence over the last two centuries. “[I]f the constitutional conception of ‘equal protection of the laws’ means

anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>9</sup> The class-based system of judicial scrutiny was first mentioned by the Supreme Court in *United States v. Carolene Products Company*.<sup>10</sup> Since that time, the Court has furthered the idea into a three-tiered system providing different levels of scrutiny for cases brought under the Equal Protection Clause of the Fourteenth Amendment—rational basis,<sup>11</sup> intermediate,<sup>12</sup> and strict.<sup>13</sup>

Application of these levels is limited to the passing of a three-part test. The test requires that a class (1) have a history of discrimination; (2) “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”; and (3) be “a minority or politically powerless.”<sup>14</sup> Aside from this test, the Court has also held that being a “discrete and insular’ minority” gives a

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<sup>9</sup> U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

<sup>10</sup> 304 U.S. 144, 153 n.4 (1938). The system was mentioned in a footnote in Justice Stone’s majority opinion. Stone suggested that there might be situations “which may call for a correspondingly more searching judicial inquiry” if there is “prejudice against discrete and insular minorities.” For a detailed history of judicial scrutiny, particularly concerning homosexuals, see EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* (1999).

<sup>11</sup> See *Romer v. Evans*, 517 U.S. 620, 631-33 (1996) (applying rational basis scrutiny to laws concerning homosexuals); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985) (finding persons with a mental handicap not to be a suspect class, requiring rational basis scrutiny to be applied to statutes that are discriminatory toward them). Other classifications which do not give rise to suspect class are age, wealth, and mental illness. Janine M. Dascenzo & Neal A. May, *Cleaning out the Pentagon’s Closet: An Overview of the Defense Department’s Anti-Gay Policy*, 23 U. TOL. L. REV. 433, 436 (1992).

<sup>12</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 209-10 (1976) (finding intermediate scrutiny for gender, and declaring a statute unconstitutional that barred men from drinking 3.2% beer until age twenty-one, but allowed women over age seventeen to drink that percentage beer). The court has since strengthened this classification. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (holding that a state-sponsored school cannot exclude men from admission).

<sup>13</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995) (holding that “racial classifications of any sort must be subjected to ‘strict scrutiny.’” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986))). National origin, religion, and alienage are also suspect classes. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1407 (2010). Religion is only mentioned as a suspect class in dicta. *Id.* at 1407 n.141.

<sup>14</sup> *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

class suspect status.<sup>15</sup> Fundamental rights are also always protected with strict scrutiny.<sup>16</sup> The Court has specifically declared that the right to an education is not considered to be a fundamental right.<sup>17</sup> If a class of people does not meet the elements of the test, laws that appear to be discriminatory will be evaluated with rational basis scrutiny. A class that meets the elements will be deemed a quasi-suspect or suspect class and laws will be evaluated with intermediate or strict scrutiny.

The level of scrutiny requires courts to examine laws claimed to discriminate under a different standard. “Under rational basis scrutiny, the means need only be ‘rationally related’ to a conceivable and legitimate state end.”<sup>18</sup> The basic idea with this level of scrutiny is that the democratic process should be used to repeal bad legislation when possible.<sup>19</sup> However, if a class is raised to a suspect class, the discriminatory means must be supported by “a compelling state interest.”<sup>20</sup> In the case of a quasi-suspect class, “a statutory classification must be substantially related to an important governmental objective.”<sup>21</sup> The Court uses the heightened levels of scrutiny because “such discrimination is unlikely to be soon rectified by legislative means.”<sup>22</sup> Thus, scrutiny determines how courts will apply discriminatory laws to groups as well as the level of hesitation a legislature or government agent will exercise when conducting their work.

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<sup>15</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (finding illegal aliens to be a suspect class).

<sup>16</sup> *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988).

<sup>17</sup> *Id.*

<sup>18</sup> *Nguyen v. INS* 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

<sup>19</sup> See GERSTMANN, *supra* note 10, at 20 (“The Constitution presumes that even improvident decisions will be rectified by the democratic process.” (quoting *Cleburne*, 473 U.S. at 440)).

<sup>20</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

<sup>21</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>22</sup> GERSTMANN, *supra* note 10, at 21 (quoting *Cleburne*, 473 U.S. at 440). Some scholars have suggested that a new level of scrutiny exists called “rational basis with bite” and that sexual orientation may fit that level. William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1370 (2010). The Court uses this classification “as an ‘interventionist tool’ to strike down laws it feels are unfair or unjust.” Higdon, *supra* note 4, at 232.

Next, this Comment will look specifically at how courts have applied strict scrutiny to homosexuals as a class. This is perhaps the most hotly debated scrutiny topic in American jurisprudence today. Despite a 1986 Supreme Court ruling that homosexuals are not a suspect class, several lower courts have held otherwise.

### *B. Scrutiny of Sexual Orientation*

The Supreme Court held that homosexuals were not a suspect class in *Bowers v. Hardwick*.<sup>23</sup> “[H]omosexual activity is not a fundamental right protected by substantive due process and . . . the proper standard of review under the Fifth Amendment is rational basis review.”<sup>24</sup> The Court did not use the three-part test or the discrete and insular minority test concerning suspect class. Their analysis was entirely based on fundamental rights. As noted *supra*, the right to an education is not fundamental, but the analysis is still flawed because the court did not apply either of the other two tests.

Only one circuit has ruled on suspect class of homosexuals using either of the non-fundamental rights tests.<sup>25</sup> In *High Tech Gays*, the Ninth Circuit evaluated homosexuals under the three-part test.<sup>26</sup> While the court acknowledged a history of discrimination, they noted that “[h]omosexuality is not an immutable characteristic.”<sup>27</sup> It is important to note that the court focused on immutable traits, but did not decide if homosexuality is a “distinguishing” characteristic, which is a part of the element as well. Also, the court held that homosexuals are not politically powerless because “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orien-

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<sup>23</sup> 478 U.S. 186, 196 (1986) (examining whether sodomy was a fundamental right; and finding it not to be, declared homosexuals not to be a suspect class).

<sup>24</sup> *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (summarizing *Bowers*, 478 U.S. 186).

<sup>25</sup> An important appeal is soon to be heard by the Ninth Circuit concerning gay marriage and possibly judicial scrutiny of homosexuals (the trial case, *Perry v. Schwarzenegger* to be discussed *infra*). The Ninth Circuit recently certified a question for the California Supreme Court. *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011).

<sup>26</sup> *High Tech Gays*, 895 F.2d at 573.

<sup>27</sup> *Id.*

tation through the passage of anti-discrimination legislation.”<sup>28</sup> Again, the court looked at political power, but failed to mention whether or not homosexuals are a minority, which is also a part of that element.

In *Romer v. Evans*, the Supreme Court applied rational basis scrutiny to strike down a Colorado amendment that “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons.”<sup>29</sup> The Court held that the law was “inexplicable by anything but animus toward [homosexuals]; it lacks a rational relationship to legitimate state interests,” thus declaring the amendment to be unconstitutional.<sup>30</sup> The *Romer* court never evaluated whether sexual orientation should be a suspect class, perhaps because rational basis scrutiny was sufficient to declare the law unconstitutional. These rulings are the most influential cases concerning gay rights in America and are all in opposition to heightened scrutiny. However, as other courts have pointed out, the analysis is flawed on several counts.

Several lower court decisions from recent years have found homosexuals to be a suspect class. In *In re Marriage Cases*, the California Supreme Court focused on whether homosexuality is an immutable trait.<sup>31</sup> “Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in

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<sup>28</sup> *Id.* at 574. An example the Court mentioned in its ruling was a Wisconsin statute that barred employment discrimination against homosexuals. *Id.* at 574 n.10. However, the same statute forbids discrimination based on, among other criteria, race. WIS. STAT. ANN. § 111.31 (West 2010); accord CAL. CIV. CODE § 51.7 (West 2007), MICH. COMP. LAWS ANN. § 333.20201(2)(a) (West Supp. 2008). If laws preventing such discriminations were sufficient to prevent suspect class status, race would no longer be considered suspect, but that is not the case. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>29</sup> 517 U.S. 620, 624 (1996).

<sup>30</sup> *Id.* at 632.

<sup>31</sup> 183 P.3d 384, 442-44 (Cal. 2008). California courts use a different test for defining a suspect class than established by the United States Supreme Court. Their three-part test requires that the “characteristic must (1) be based upon an ‘immutable trait’; (2) ‘bear[ ] no relation to [a person’s] ability to perform or contribute to society’; and (3) be associated with a ‘stigma of inferiority and second class citizenship,’ manifested by the group’s history of legal and social disabilities.” *Id.* at 442 (citing *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971)).

order to avoid discriminatory treatment.”<sup>32</sup> The California Attorney General argued that California should recognize political powerlessness as an additional element to their current test, but the court declined to do so.<sup>33</sup> This ruling is important because it looks beyond the choice debate and seeks to say that regardless of whether homosexuals made the choice to be gay, it is such an important part of who they are that discriminatory treatment is unjustifiable.

In *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court evaluated in detail whether homosexuals were a suspect class.<sup>34</sup> The court found that homosexuals have a history of discrimination after examining hate crimes, inability to join the military, fear of employment discrimination, and school bullying. Further, the court noted that homosexuality is “immutable or otherwise beyond [a person’s] control.”<sup>35</sup> The court cited many sources which claim homosexuality is an immutable trait, but decided the element by determining that “sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection.”<sup>36</sup> The court also held that gays are politically powerless and a minority.<sup>37</sup> *Kerrigan* is significant in this line of cases because the court explicitly states that homosexuals are a discrete group because of their characteristics, raising the element that was ignored by the Ninth Circuit in *High Tech Gays*.

The Iowa Supreme Court has unanimously held that homosexuals are a suspect class and that same-sex marriage is a constitutionally protected right.<sup>38</sup> The court found that homosexuality is

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<sup>32</sup> *Id.* at 442.

<sup>33</sup> *Id.* at 443.

<sup>34</sup> 957 A.2d 407 (Conn. 2008). In addition to the factors discussed *infra*, the Connecticut court also held that an additional element, whether sexual orientation affects one’s ability to participate in or to contribute to society, fell in favor of declaring homosexuals a suspect class. *Id.* at 434-36.

<sup>35</sup> *Id.* at 436.

<sup>36</sup> *Id.* at 438.

<sup>37</sup> *Id.* at 439-66. The Court went as far as to say that “gay persons clearly lack the political power that African-Americans and women possess today” although both groups are entitled to suspect or quasi-suspect classification. *Id.* at 453.

<sup>38</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

an immutable trait because “[s]exual orientation influences the formation of personal relationships between all people” and “is central to personal identity.”<sup>39</sup> The court also acknowledged that at the time that gender became a suspect class, women were already represented in political office and had legislation that prevented sex discrimination.<sup>40</sup> Thus, while homosexuals have some political power, “gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation.”<sup>41</sup> Therefore, the court applied the three-part suspect class test to determine that homosexuals met each of the elements and were to be given strict scrutiny with respect to discriminatory laws against them. This case is most noteworthy because of its detailed analysis finding political powerlessness, which uses the Supreme Court’s rulings on judicial scrutiny for gender and race to show that the Ninth Circuit’s ruling in *High Tech Gays* was simply incorrect.

The most recent case does not go as far as those mentioned in its analysis *supra*, but is very important as it is currently in the appeal process. In a decision concerning the California Proposition 8 ban on gay marriage, a California federal district court ruled that homosexuals should be deemed a suspect class.<sup>42</sup> California voters had passed Proposition 8, which forbade two people of the same sex from marrying. In his lengthy opinion, Judge Vaughn Walker held, “Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.”<sup>43</sup> Thus, while Judge Walker noted that homosexuals should be considered a suspect class, it was not even necessary to do so because homosexuals are even protected under rational basis scrutiny from discrimination with regard to same-sex marriage.

These recent rulings are consistent with traditional Fourteenth Amendment jurisprudence because, ultimately, the court’s

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<sup>39</sup> *Id.* at 893.

<sup>40</sup> *Id.* at 894.

<sup>41</sup> *Id.* at 895.

<sup>42</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

<sup>43</sup> *Id.* at 997.

goal is to ensure equal protection of all people. In a democracy, the majority wins, but that should not prevent the minority from having equality under the law. The Supreme Court's rulings have worked to safeguard constitutional freedoms for all people—regardless of their race or gender—sexual orientation should be no exception. Gay students, in particular, should receive suspect class status so as to ensure their ability to receive an education without harassment and discrimination.

### C. LGBTQ Students as a Class

While the Supreme Court declined to recognize homosexuals as a suspect class in *Romer* and *Bowers*, several lower courts have sought to apply strict scrutiny as instanced with the Connecticut, California, and Iowa cases discussed *supra*. However, while the courts are fighting over gay marriage, LGBTQ students remain as powerless as ever to prevent the torment they face daily at school. As such, it is necessary to specifically give them suspect class status to ensure that they no longer face discrimination while at school or at least have a way to combat it. This is a completely separate issue from *Bowers*—the issue at hand is not about sexual activity, but about receiving an education and being free from harassment. Children are more vulnerable than adults, and as such, should be treated with a higher level of protection. While our judicial system may not ensure the “popular” gay rights, it should surely work to protect our students from harassment.

The issue of immutable traits, as in all similar cases, presents a tough debate. Many argue that homosexuality is a choice rather than a quality that one cannot change.<sup>44</sup> The Sixth Circuit has held that homosexuals cannot be considered a suspect class “[b]ecause [they] generally are not identifiable ‘on sight’ unless they elect to be so identifiable by conduct.”<sup>45</sup> Conversely, some

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<sup>44</sup> For a discussion of this issue, see Anne Fausto-Sterling, *Frameworks of Desire*, 136 DAEDALUS 47 (Spring 2007); Donald P. Haider-Markel & Mark R. Joslyn, *Beliefs About the Origins of Homosexuality and Support for Gay Rights*, 72 PUB. OPINION Q. 291 (2008).

<sup>45</sup> Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995). By this standard, it is certainly debatable as to whether or not alienage should be a suspect class, as it is not immediately identifiable as to whether one is an

courts have held that sexual orientation is an immutable trait.<sup>46</sup> The element is not simply immutability, but whether homosexuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.”<sup>47</sup> If gay students did not possess traits that distinguished them from their peers, the majority of the bullying would not exist. Much of this activity is done toward students who are not openly homosexual, but instead possess traits that go against traditional gender roles and are stereotypically “gay.” Further, for the students who are openly gay, their traits are also distinguishable, fulfilling this third element.

Whether LGBTQ students are a minority or politically powerless is also easy to justify. As courts have now recognized homosexuals as a minority, it is certainly possible to move from that to finding that gay students would be even less numerable. Further, children have very little political power as they are not allowed to vote<sup>48</sup> and must trust that their parents and elected officials are looking out for their well-being, which is, unfortunately, often not the case.<sup>49</sup> Also, homosexuals, in general, are still relatively powerless.<sup>50</sup>

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alien. However, the Supreme Court’s decision finding alienage to be a suspect class was not based on this three-part test, but rather on a determination of being a discrete and insular minority (discussed *infra*). See *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>46</sup> See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000); *Able v. United States*, 968 F. Supp. 850, 864 (E.D.N.Y. 1997); *Equality Found. of Greater Cincinnati, Inc. v. Cincinnati*, 860 F. Supp. 417, 426 (S.D. Ohio, 1994), *vacated*, *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (“Sexual orientation is set in at a very early age—3 to 5 years—and is not only involuntary, but is unamenable to change.”); *Gay Rights Coal. of Georgetown Univ. L. Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (“[H]omosexuality is as deeply ingrained as heterosexuality.” (quoting ALAN P. BELL, MARTIN S. WEINBERG & SUE K. HAMMERSMITH, *SEXUAL PREFERENCE – ITS DEVELOPMENT IN MEN AND WOMEN* 190 (Ind. Univ. Press 1981))).

<sup>47</sup> *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635 (1986)).

<sup>48</sup> U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied . . .”).

<sup>49</sup> Many children are faced with varying degrees of anger and resentment from their parents after coming out. This prevents many children from getting the support they need. For a summation of surveys done on family response to homosexual youth, see Ritch C. Savin-Williams & Eric M. Dubé, *Parental Reactions to Their Child’s Disclosure of a Gay/Lesbian Identity*, 47 *FAMILY RELATIONS* 7 (1998).

<sup>50</sup> The United States House of Representatives currently has three openly gay members, and the United States Senate has none. See Michelle Smith, *2 Gay Candi-*

Courts consistently consider homosexuals to have a history of discrimination.<sup>51</sup> The *Kerrigan* court held as such partially because “[g]ay and lesbian adolescents are often taunted and humiliated in their school settings.”<sup>52</sup> Several recent suicide cases have exposed harassment of gay students in schools and reinforced the need for school administrators to pay closer attention to the treatment of openly gay or questioning students.<sup>53</sup>

The other test used by the Supreme Court, separate from the three-part test detailed above, is whether homosexuals (the analysis works best with homosexuals, in general, rather than LGBTQ students specifically) can be considered a discrete and insular minority which would give them suspect class status. NYU law professor Kenji Yoshino argues

that when anonymity is discarded, it reveals an LGB community that has been able, through its invisibility, to circulate throughout every social institution. In a world of profound stigma, anonymity and diffuseness constitute a powerful advantage. Yoshino’s argument calls into question whether political powerlessness has any secure meaning as a guidepost for contemporary constitutional analysis.<sup>54</sup>

Thus, it may be possible for a court to circumvent the three-part test to allow homosexuals to become a suspect class and obtain strict scrutiny, but no court has yet to accept this argument.

The premiere case concerning bullying and discrimination of gay students is *Nabozny v. Podlesny*.<sup>55</sup> *Nabozny* was an openly

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*dates Stage Strong Races for Congress in Rhode Island and California U.S. House Now has 3 Openly Gay Members*, SEATTLE TIMES, Sept. 14, 2010, at A4. Only two federal judges are openly gay. Dana Milbank, *For Gay Judge, a Straight Shot to Confirmation*, WASH. POST, July 19, 2011, at A2.

<sup>51</sup> See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

<sup>52</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432-33 (Conn. 2008).

<sup>53</sup> See McKinley, *supra* note 2.

<sup>54</sup> Nan D. Hunter, *Introduction to the Symposium Issue Sexuality and Gender Law: The Difference a Field Makes*, 57 UCLA L. REV. 1129, 1132 (2010).

<sup>55</sup> 92 F.3d 446 (7th Cir. 1996).

gay student who was often harassed because of his sexuality.<sup>56</sup> On one occasion, a fellow student “grabbed Nabozny and pushed him to the floor. [Two students] held Nabozny down and performed a mock rape on [him], exclaiming that [he] should enjoy it. The boys carried out the mock rape as twenty other students looked on and laughed. Nabozny escaped and fled to Podlesny’s office.”<sup>57</sup> Podlesny, the school principal who was aware of Nabozny’s sexuality and prior harassment by other students, “said that ‘boys will be boys’ and told Nabozny that if he was ‘going to be so openly gay,’ he should ‘expect’ such behavior from his fellow students.”<sup>58</sup> Podlesny did not punish the students involved in the mock rape.<sup>59</sup>

The following school year, Nabozny continued to experience harassment from his peers and Podlesny continued to ignore his pleas. After another incident, Podlesny again said that Nabozny should expect such actions—this time to Nabozny and his parents. Podlesny again refused to punish the perpetrators.<sup>60</sup> Toward the end of the school year, Nabozny attempted suicide, spent some time in the hospital, and finished the school year at a Catholic school.<sup>61</sup>

The next year Nabozny was knocked to the ground and urinated on.<sup>62</sup> The new principal did not punish the students, but referred Nabozny to the school guidance counselor who placed him in a special education class with one of the students that previously did the mock rape on him.<sup>63</sup> The problems continued, and the school continued to ignore Nabozny’s pleas. He again attempted suicide, spent time in a hospital, and then ran away from home.<sup>64</sup> His parents convinced him to return by promising that he could go

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<sup>56</sup> *Id.* at 451-52. Nabozny’s classmates “regularly referred to him as ‘faggot,’ and subjected him to various forms of physical abuse, including striking and spitting on him.” *Id.* at 451.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* After meeting with Podlesny, Nabozny ran home. The next day, he met with a counselor to discuss his actions in leaving school and was then forced to return to his regular schedule where he was abused for the rest of the school year. *Id.*

<sup>60</sup> *Id.* at 451-52.

<sup>61</sup> *Id.* at 452.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

to a private school, but when they could not afford it social services required him to return to public school.<sup>65</sup>

The next year he was forced to take the bus where he was constantly called “fag” and “queer” and had steel nuts and bolts thrown at him.<sup>66</sup> One morning, eight students approached him in the hallway and kicked him in the stomach for five to ten minutes while other students laughed.<sup>67</sup> The school’s police officer persuaded Nabozny not to press charges.<sup>68</sup> Nabozny reported the event to the school administrator responsible for discipline, but he “laughed and told Nabozny that [he] deserved such treatment because he is gay.”<sup>69</sup> Nabozny collapsed a week later from internal bleeding from the beating.<sup>70</sup> His parents pleaded with the principal to take action, but nothing was done.<sup>71</sup> Nabozny soon thereafter left the school, moved, and was diagnosed with post-traumatic stress disorder.<sup>72</sup>

Nabozny filed suit against the school district, arguing an equal protection violation based on his gender and sexual orientation.<sup>73</sup> If the court determined that the discrimination was gender-based, the court would apply heightened scrutiny to the school’s actions, whereas if it was based on his sexual orientation, rational basis scrutiny would apply. The court applied rational basis scrutiny, holding that there was no “rational basis for permitting one student to assault another based on the victim’s sexual orientation.”<sup>74</sup>

The court also acknowledged gender discrimination, but since the actions were unconstitutional based on rational basis scrutiny, intermediate scrutiny need not be applied separately.<sup>75</sup> Nabozny presented evidence showing that the school had immediately punished “a male student that struck his girlfriend” and others that

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 446.

<sup>74</sup> *Id.* at 458.

<sup>75</sup> *Id.* at 454-56.

called a pregnant girl a “slut,” though they failed to act throughout his own harassment.<sup>76</sup>

Lastly, the court held that the defendants were not allowed qualified immunity.<sup>77</sup> “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>78</sup> The court held “that reasonable persons in the defendants’ positions in 1988 would have concluded that discrimination against Nabozny based on his sexual orientation [and gender] was unconstitutional.”<sup>79</sup> The Nabozny case was one of the first to hold such a strong position that gay students were constitutionally ensured a proactive response from school administration that occurs on school grounds.

Another important case concerning discrimination of homosexual students is *Flores v. Morgan Hill Unified School District*.<sup>80</sup> The plaintiffs claimed that they were harassed by their fellow students and “allege[d] that teachers and administrators failed to stop name-calling and anti-gay remarks, and that the administrators responded with inadequate disciplinary action to physical abuse.”<sup>81</sup> Citing *Nabozny*, the Ninth Circuit held that the administration’s actions had no rational basis and were unconstitutional based on sexual orientation discrimination.<sup>82</sup> The court also found that the administrators could not receive qualified immunity as they had done only minimal, and not sufficient, action to prevent the abuse.<sup>83</sup>

Thus, *Nabozny* and *Flores* represent great triumphs for harassed LGBTQ students. Although their claims are still subjected to rational basis scrutiny, it is possible in some situations to succeed in a suit if there was no rational basis for the actions. Also,

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<sup>76</sup> *Id.* at 454.

<sup>77</sup> *Id.* at 454, 456, 458.

<sup>78</sup> *Id.* at 455 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>79</sup> *Id.* at 458.

<sup>80</sup> 324 F.3d 1130 (9th Cir. 2003).

<sup>81</sup> *Id.* at 1132.

<sup>82</sup> *Id.* at 1138.

<sup>83</sup> *Id.* at 1137-38.

administrators may not have qualified immunity if they have not sufficiently worked to end the harassment.

It is possible to suggest that both of these courts were applying strict scrutiny in practice but not in name. However, strict scrutiny would not have changed the outcome or provided additional protection in either *Nabozny* or *Flores* because of how extreme the cases were, making it unnecessary for the court to address the level of scrutiny. It is obvious that the students in these cases were harassed so gravely that their ability to attend school was certainly jeopardized, and the school administrators involved showed indifference to it. However, a less severe case where the student is simply subjected to hourly name-calling would almost certainly fail a rational-basis test. Although name-calling is certainly an inevitable act of childhood, being called a “queer” or “fag” can be devastating to a child’s mental health. At a time when children are just beginning to understand their sexuality, this type of torment can negatively impact them for years—or even a lifetime. These less severe cases of name-calling or “light” physical harassment, coupled with little or no response from the administration, would almost certainly fail rational-basis review. The administration could simply argue that this type of bullying occurs all of the time, and if administrators spent their time concerned with such issues, they would be depriving all students of a quality education. Thus, sometimes no response could certainly be considered a rational response because ignoring the problem may be the only way to further the legitimate state interest of providing an education for all students.

As a way to provide higher scrutiny for homosexuals, some courts and scholars have argued that these claims should be brought as gender discrimination claims, thus providing intermediate scrutiny. However, as the next section discusses, this proposition is hardly adequate.

#### *D. Treating Sexual Orientation Discrimination as Gender Discrimination*

There is still the *Nabozny* issue of whether LGTBQ student harassment cases can receive intermediate scrutiny under gender discrimination. Some scholars and courts have suggested that the proper approach for judicial scrutiny is to treat sexual orientation

discrimination cases as gender discrimination, thus subjecting each case to intermediate scrutiny.<sup>84</sup> One scholar, Francisco Valdes, “argues that the result of this triangular conflation is that discrimination based solely on sexual orientation can never exist. Rather, discrimination based on sexual orientation must also be based on either gender or sex. Because both sex and gender discrimination are impermissible under current doctrine, all sexual orientation discrimination must also be prohibited.”<sup>85</sup> The argument is that often times, harassment of LGBTQ students can be viewed as harassment of a child for not fitting certain gender-related stereotypes, thus making it sex discrimination. However, not all agree that this is a solution.

Others argue that this is insufficient to fixing the problem. Theodore A. Schroeder argues that this fix has many flaws.<sup>86</sup> Just as “a statute prohibiting only race discrimination could not be said to give a cause of action to a white woman who was discriminated against because of her sex,” a gay man would be left unprotected by a gender discrimination claim.<sup>87</sup> Schroeder also states, “A theory which does not provide complete coverage only perpetuates the oppression of homosexuals.”<sup>88</sup>

### *E. Ideal Settlements and Relief*

As with most cases in today’s legal climate, most incidents of LGBTQ harassment in schools are settled out-of-court. The few cases that do appear before a judge end with a summary judgment motion, and therefore, most of our case law on gay student harassment is a reversal of a lower court’s grant of the school district’s motion for summary judgment. Thus, while few cases result

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<sup>84</sup> See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446 (1996).

<sup>85</sup> Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U. J. GENDER SOC. POL’Y & L. 333 (1998) (citing Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 25-26 (1995)).

<sup>86</sup> See *id.* at 356-67 (Schroeder’s arguments predominantly discuss Title VII to be discussed *infra*, but are also relevant to Equal Protection inquiries.).

<sup>87</sup> *Id.* at 362.

<sup>88</sup> *Id.* at 356-57.

in a published opinion, several themes exist in a typical conclusion of a case.

Monetary damages are often awarded, though as discussed *infra*, there is no specific statutory allowance for such under Title IX (though it may be granted regardless or with another relevant claim).<sup>89</sup> Some of the more severe cases have resulted in awards such as \$1.1 million<sup>90</sup> and \$962,000.<sup>91</sup>

Many settlements include training for all school district staff—to help them identify harassment on the basis of sexual orientation or gender identity and to respond to it properly.<sup>92</sup> One settlement included a requirement of “a one-time 3 hour program, and 30 minute annual training.”<sup>93</sup> Others include mandatory training for students.<sup>94</sup>

Modification of school policies and handbooks to expressly forbid harassment on the basis of sexual orientation and gender identity is also often built into a settlement.<sup>95</sup>

Some settlements require the district to keep records of complaints, file reports with the Department of Education, or simply require the district to enforce policies already in place.<sup>96</sup>

Thus, heightened judicial scrutiny and ensuring certain terms in a settlement is certainly a step in the right direction for ensuring equality based on sexual orientation, but it is not entirely sufficient. Scrutiny, unlike legislative reform, only provides protection long after the discriminatory act occurs because it takes time to get through the court system. Further, without clear language or a Supreme Court decision on the issue, courts will inconsistently rule on this argument. Statutes are simply another avenue for achieving essentially the same result, but homosexuals

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<sup>89</sup> See *infra* note 102.

<sup>90</sup> *Fifteen Expensive Reasons Why Safe Schools Legislation Is In Your State's Best Interest*, GLSEN (Sept. 1, 2005), <http://www.glsen.org/cgi-bin/iowa/all/news/record/1913.html> (see *supra* notes 80-83 and accompanying text).

<sup>91</sup> *Id.* (see *supra* notes 55-79 and accompanying text).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (referring to the 2002 California case of *Loomis v. Visalia Unified School District*).

<sup>94</sup> *Id.* (such as *Flores* and *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090 (C.D. Cal. 2003)).

<sup>95</sup> *Id.* (including *Flores* and *Massey*).

<sup>96</sup> *Id.*

currently lack such protection. As many other classes of people are statutorily protected from discrimination, it works only to consider homosexuals to be part of a lower, unworthy class by not clearly extending such protection to them through statutory reform.

## II. STATUTORY PROTECTION

Courts often cringe at the thought of extending suspect classification to new groups because of the long-lasting and broad effects that result. However, as a way to provide some fairness for homosexuals, courts have accepted arguments that statutory protections may exist, although the congressional intent does not explicitly suggest such an interpretation.<sup>97</sup> The federal Title IX statute is the predominant source of statutory protection for LGBTQ students, although it certainly has its limitations and failures.

### A. Title IX and Sex Discrimination

Title IX provides, in relevant part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>98</sup> Many victims of sex discrimination under Title IX begin by filing a complaint with the Office for Civil Rights (OCR) at the United States Department of Education. OCR, charged with enforcement of Title IX, will then investigate the case and attempt to work with the school district to solve the prob-

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<sup>97</sup> See, e.g., Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN'S L.J. 159 (1999). Schaffner discusses whether “the absence of an express or implied right of action and the availability of comprehensive remedies under a specific congressional statute may demonstrate congressional intent” to, for example, deny a civil action under Title IX for sexual orientation discrimination. *Id.* at 195.

<sup>98</sup> Equal Opportunity in Education Act, 20 U.S.C. § 1681(a) (2006). Title IX was enacted as part of the Education Amendments Act of 1972. Because of similarities in wording and issues, Title IX cases are often compared to Title VII, which prevents employment discrimination under the Civil Rights Act of 1964. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286-88 (1998) (discussing the similarities and differences of the two pieces of legislation). It is complimentary to Title VI of the Civil Rights Act of 1964, which prevents discrimination in education on the basis of race, color, and national origin. 42 U.S.C § 2000(d) (2006).

lem. Also, a victim can file a claim individually. Organizations such as Lambda Legal and the Americans Civil Liberties Union often assist with such suits. In some circumstances, the United States Department of Justice can get involved in a lawsuit for violation of the statute.

To better understand how Title IX applies to gay students, it is first important to look at its language and interpretation from various courts. While the Supreme Court has never addressed whether sexual orientation falls within the parameters of Title IX's protections, it has evaluated student-on-student and teacher-on-student sex discrimination and the claims that may arise therefrom. As discussed, *infra*, a sex discrimination claim provides a cause of action for gay students.

Early cases applying Title IX concerned sexual harassment of a student by school employees. One of the first Supreme Court cases that addressed civil claims for sex discrimination under Title IX was *Gebser v. Lago Vista Independent School District*.<sup>99</sup> The case concerned a student alleging sexual harassment based on a sexual relationship with one of the district's teachers and inappropriate comments the teacher made in class.<sup>100</sup> Upon learning of the relationship, the district terminated the teacher's employment.<sup>101</sup> The Court held that a Title IX action for private damages can only be brought if "[a school district official] who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."<sup>102</sup> The *Gebser* Court found that actual

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<sup>99</sup> 524 U.S. 274 (1998).

<sup>100</sup> *Id.* at 277-78.

<sup>101</sup> *Id.* at 278.

<sup>102</sup> *Id.* 277. In *Gebser*, the court conducts an in-depth discussion that details the differences in Title VII and Title IX discrimination claims and damage awards. "Title VII, moreover, seeks to 'make persons whole for injuries suffered through past discrimination.' . . . [W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.* at 287 (citations omitted). An amended Title VII specifies an allowance of damages, but Title IX has yet to make such a specific allowance, and the Court argues that this requires a much higher standard for a monetary award. *Id.* at 285-86.

[I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an offi-

notice did not exist.<sup>103</sup> Thus, for a claim to exist, a school administrator must be aware of the discrimination and intentionally overlook it. Since *Gebser*, the Court has expanded Title IX to find that claims may exist in situations where a student is the offender.

In *Davis as Next Friend of LaShonda D. v. Monroe County Board of Education*, the Supreme Court looked at whether harassment of a student by their peers may give rise to a Title IX claim.<sup>104</sup> The Court held that the claim may lie, “but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities” and only if the harassment “is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>105</sup> This is a rather high standard as the school must deliberately ignore the situation and it must be so severe that it is

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cial who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.

*Id.* at 290. Of course, this Comment ignores the possibility of the student suing under tort liability for negligent supervision. “Schools are under a duty to adequately supervise students in their charge and will be held liable for foreseeable injuries approximately related to the absence of adequate supervision.” RICHARD FOSSEY, TODD A. DEMITCHELL & SUZANNE ECKES, SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW 35 (2007) (quoting *David v. City of New York*, 835 N.Y.S.2d 377, 378 (N.Y. App. Div. 2007)). For a discussion of how a negligent supervision case can be brought by gay students, see FOSSEY ET AL., *supra*.

<sup>103</sup> *Gebser*, 524 U.S. at 291. The principal had been notified of inappropriate comments, but had no reason to know a sexual relationship existed. Upon learning of such, the teacher was terminated. *Id.* In Justice Stevens’s dissent, he argued that the district had knowledge because of an agency relationship that existed between the district and the teacher. *Id.* at 298-99. Because the teacher was involved, the district had actual knowledge, Justice Stevens reasoned. However, the majority found that “[w]here a school district’s liability rests on actual notice principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis.” *Id.* at 291.

<sup>104</sup> 526 U.S. 629, 633 (1999). In *Davis*, the student claimed that a fellow student touched her breasts and genitals, and made vulgar statements to her. *Id.* at 633. Over months of harassment, she reported incidents to three different teachers, but no disciplinary action was taken against the offender. *Id.* at 633-35. The Eleventh Circuit dismissed Davis’s complaint, but the Supreme Court found the allegations to amount to a sufficient claim. *Id.* at 654.

<sup>105</sup> *Id.* at 633. The Court emphasized that “[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender.” *Id.* at 652.

the equivalent of locking the doors when the student arrives at the school.

Thus, where the discrimination is direct from an employee of the school district or the district itself, an action for sexual discrimination may be brought. *Davis* revolutionized Title IX jurisprudence by enabling students to bring a claim even when the administration was not directly discriminating, but rather acting with indifference to the student's abuse. Later courts have laid out three *Davis* factors for student-on-student harassment:

- (1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) that the funding recipient had actual knowledge of the sexual harassment, and (3) that the funding recipient was deliberately indifferent to the harassment.<sup>106</sup>

However, even the *Davis* standard is too high. A harassed student has no legal claim until a school administrator is aware of harassment that must be so severe as to virtually force the student out of the school. If only teachers knew of the harassment, there is no claim. If it was just occasional teasing or "light" physical abuse, there is still likely no claim. And further, if the court does not recognize even the most severe of harm to fall within Title IX, there is still no claim.

Another issue courts have been required to decide is when action by the school district is so ineffective as to qualify as deliberate indifference. In *Patterson v. Hudson Area Schools*, the Sixth Circuit held that schools are not required to entirely rid themselves of all peer harassment "to avoid Title IX liability."<sup>107</sup> Nor

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<sup>106</sup> *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631-642 (1999)).

<sup>107</sup> 551 F.3d 438, 446 (6th Cir. 2009) (citing *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000)). In *Patterson*—an appeal of summary judgment in favor of the school district defendant—the student's (D.P.) torment began in middle school with name calling, bullying, and pushing. *Id.* at 439. He was placed in a special program in eighth grade which was successful, but he had to return to the regular classroom the following year. Some students were verbally reprimanded, but most went unpunished. *Id.* at 442-43. In the final incident of harassment, one male student stripped naked, forced D.P. into a corner, jumped on his shoulders, "and rubbed his penis and scrotum on D.P.'s neck and face" while another student blocked the door. *Id.*

should courts “second guess the disciplinary decisions that school administrators make.”<sup>108</sup> Nonetheless,

where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.<sup>109</sup>

In a Kansas case, the court determined that although the district’s actions prevented repeat offenses from the same students, perpetual harassment over four years could lead a jury to find that the district’s actions were ineffective.<sup>110</sup> Therefore, no bright-line rules exist for determining when insufficient action falls below the deliberate indifference requirement, as it is a fact-based question to be decided by the trier of fact.<sup>111</sup>

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The offender was suspended for the remainder of the school year (eight days) and allowed to attend the annual spring sports banquet a week after the incident. *Id.* at 442. The baseball coach told the baseball team, including D.P., not to “joke around with guys who can’t take a man joke.” *Id.* at 443. The school district moved for summary judgment, arguing that they were not indifferent to the harassment. *Id.* at 443. The district court granted summary judgment, but the Sixth Circuit reversed, finding sufficient evidence to support a Title IX claim. *Id.* at 450.

<sup>108</sup> *Id.* at 446 (quoting *Vance*, 231 F.3d at 260).

<sup>109</sup> *Id.* (quoting *Vance*, 231 F.3d at 261).

<sup>110</sup> *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 977 (D. Kan. 2005) (finding plaintiff’s case sufficient to withstand summary judgment).

<sup>111</sup> The New Jersey Supreme Court has outlined factors for the fact finder to consider, including:

the students’ ages, developmental and maturity levels; school culture and atmosphere; rareness or frequency of the conduct; duration of harassment; extent and severity of the conduct; whether violence was involved; history of harassment within the school district, the school, and among individual participants; effectiveness of the school district’s response; whether the school district considered alternative responses; and swiftness of the school district’s reaction.

L.W. *ex rel.* L.G. v. Toms River Reg’l Sch. Bd. of Educ., 915 A.2d 535, 551 (N.J. 2007). In analyzing the district’s response, the fact finder should also consider the Department of Education “regulations, model policies, and other guidance that the agency provides.” *Id.* at 551.

Although the language of Title IX does not apply to sexual orientation specifically, it has been used to justify civil suits brought against school districts. However, this raises the standard even higher than for a regular Title IX claim, and even when all of the elements are met, courts can still strike it down by saying that it is really a sexual orientation claim hiding under the name of sex discrimination.

### *B. Title IX and Sexual Orientation Discrimination*

Some cases have applied Title IX to incidences where the student was homosexual. Should all courts apply such a standard equally, this argument might be part of the solution, but instead, it simply creates more unfairness and uncertainty. In *Montgomery v. Independent School District No. 709*, a student who had been subjected to verbal abuse and physical violence sued his school district, alleging a Title IX violation.<sup>112</sup> Montgomery had been the victim of several beatings as well as one incident in which another student “threw him to the ground and pretended to rape him anally” as others laughed.<sup>113</sup> Due to his harassment, Montgomery missed school on several occasions, avoided the school cafeteria and restrooms, and had to stop riding the school bus.<sup>114</sup>

Montgomery argued that he was harassed not only because he was a homosexual, but also as a male “because he did not meet their stereotyped expectations of masculinity.”<sup>115</sup> He was often called a girl’s name and was made fun of beginning as early as kindergarten.<sup>116</sup> The court analyzed several cases concerning same-sex harassment and determined that the issue is “whether members of one sex are exposed to disadvantageous terms or conditions . . . to which members of the other sex are not exposed.”<sup>117</sup>

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<sup>112</sup> 109 F. Supp. 2d 1081, 1083 (D. Minn. 2001).

<sup>113</sup> *Id.* at 1084-85.

<sup>114</sup> *Id.* at 1085.

<sup>115</sup> *Id.* at 1090.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1091 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (ruling concerning Title VII employment harassment)). While *Oncale* is a Title VII case, “[c]ourts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.” *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

They also referenced an Eighth Circuit case concerning employment discrimination of an employee with facts similar to *Montgomery*.<sup>118</sup> In that case, “[a]lthough the[] acts [were] indicative of harassment based upon sexual orientation or perceived sexual orientation, the court held them sufficient to support a Title VII claim.”<sup>119</sup> Thus, the *Montgomery* court concluded that a Title IX claim may lie where the discrimination was related to sexual orientation, and therefore, the defendant school district’s motion to dismiss was denied.<sup>120</sup>

In a case similar to *Montgomery*, a Kansas district court held that a student who had been subjected to verbal harassment from his peers that “was so severe and pervasive that it ultimately caused him to leave school, thus depriving him of educational opportunities and benefits,” had a Title IX claim.<sup>121</sup> Many teachers were aware of the harassment and some even joined in with nicknames and laughter.<sup>122</sup> The court held that the school’s response was “not reasonably calculated to end the harassment of plaintiff” and it created “a school culture in which many students appeared to have felt at ease making inappropriate comments to plaintiff openly in front of teachers and other students, even during classes.”<sup>123</sup> Thus, both the Kansas and Minnesota district courts held that Title IX claims can be brought when the discrimination was actually based on sexual orientation.

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<sup>118</sup> *Montgomery*, 109 F. Supp. 2d at 1092-93 (citing *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999)). Though Title VII and Title IX have many different provisions and interpretations, the court held that “no logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised here regarding the circumstances under which abusive or offensive conduct amounts to harassment ‘based on sex.’” *Id.* at 1091.

<sup>119</sup> *Id.* at 1092. For a more in-depth discussion of employment discrimination under Title VII, see example, Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII*, 2004 U. ILL. L. REV. 465. Many courts are unwilling to extend protection for sexual orientation discrimination under Title VII but will do so under Title IX. See Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 227-32 (2005).

<sup>120</sup> *Montgomery*, 109 F. Supp. 2d at 1092, 1102.

<sup>121</sup> *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1309 (D. Kan. 2005).

<sup>122</sup> *Id.* at 1310-11.

<sup>123</sup> *Id.* at 1311.

Unlike the two previous cases, in *Schroeder*, a student was harassed because of his advocacy for gay rights.<sup>124</sup> Schroeder became a supporter of gay rights after learning that his older brother was gay.<sup>125</sup> As a result, he experienced harassment in the form of “name-calling, offensive gesturing, and physical threats and violence.”<sup>126</sup> Schroeder alleged that the school district had notice of the discrimination because other administrators had knowledge of the harassment.<sup>127</sup> The court acknowledged that only federal funding recipients, and not individuals, are liable under Title IX.<sup>128</sup> Since “an official who at a minimum [had] authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf [had] actual knowledge of discrimination in the recipient’s programs and [failed] to respond,” the school district was on notice, regardless of whether the notice was personal.<sup>129</sup> As a result of this finding, the school district’s motion for summary judgment was denied.

In a related discrimination case, a California district court analyzed deprivation of access to education of a gay student due to harassment from their peers, finding that claims were admissible even if it was another student doing the activity, provided that the school was not responding with due diligence.<sup>130</sup> “[I]t is not necessary to show physical exclusion to demonstrate that a student has been deprived by the actions of another of an educational opportunity on the basis of sex.”<sup>131</sup> The Court found that it was “possible that [the plaintiff] . . . suffered . . . concrete, negative effects on his ability to receive an education,” and therefore, had a Title IX sex discrimination claim against the school district.<sup>132</sup> This seems

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<sup>124</sup> *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003).

<sup>125</sup> *Id.* at 871.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 879-80.

<sup>128</sup> *Id.* at 879 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641-42 (1999)); accord *NCAA v. Smith*, 525 U.S. 459, 467 n.5 (1999).

<sup>129</sup> *Id.* at 880 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998)).

<sup>130</sup> *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

<sup>131</sup> *Id.* at 1171 (quoting *Davis*, 526 U.S. at 651).

<sup>132</sup> *Id.*

to lower the standard slightly—no longer having to be the equivalent of shutting the school doors.

Recently, the federal government has gotten involved in the push to include sexual orientation discrimination claims under Title IX. In October 2010, the Department of Education released a “Dear Colleague” letter interpreting Title IX to apply to “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.”<sup>133</sup> Also, the Justice Department recently intervened in a lawsuit against a school district because a gay student had been harassed for being effeminate.<sup>134</sup> Though this action by the federal government is promising, it has no certain longevity and can be immediately reversed with a new administration.

Thus, a Title IX claim may be brought for sexual orientation discrimination, but only if the plaintiff is a gender non-conforming student.<sup>135</sup> But, students must fall out of the traditional mold in order to fulfill the requirement. A male student that acts effeminately and is openly gay is much more likely to have a claim than the school quarterback who has a girlfriend. Also, the claim must usually be brought against the school district and can only be successful if they had actual knowledge of the discrimination (although knowledge by a school administrator, rather than personal knowledge of the school board, is sufficient). Moreover, the harassment has to be so severe that it deprives the student of an educational opportunity. However, a Title IX claim is not a perfect fix. Some courts still maintain that a sexual orientation discrimina-

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<sup>133</sup> Letter from Russlynn Ali, Assistant Sec’y for Civil Rights at the United States Dep’t of Educ., to Colleagues (Oct. 26, 2010) (on file with author), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>134</sup> Press Release, U.S. Dep’t of Justice, Justice Department Settles with New York School District to Ensure Students Have Equal Opportunities (Mar. 30, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crt-340.html>. The case, *J.L. v. Mohawk Central School District*, was settled, requiring training, modification of district policies, and payment of damages and attorneys’ fees. *Id.*

<sup>135</sup> *But see, e.g.,* *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (holding that a Title VII claim cannot be brought for discrimination based on sexual orientation). Possible facts that would enable a gender stereotyping argument include a student having many friends of the opposite sex, name calling such as calling a boy “sissy,” mock sexual acts, and harassment for wearing of opposite-sex clothing.

tion claim cannot be brought under Title IX.<sup>136</sup> Further, there are so many elements to bringing such a claim that it provides little incentive for teachers and administrators to enforce the policy. Therefore, it is essential that Congress reforms our laws to ensure the protection of our LGBTQ students. All such attempts to date have been unsuccessful.<sup>137</sup>

### *C. Federal Statutory Reform*

Considering the failures of Title IX to provide a claim based on sexual orientation discrimination, it is essential that Congress modifies Title IX to include sexual orientation.<sup>138</sup> Such a sexual orientation amendment would need to provide, in the least, gay students with a right of private action against a school district when they experience discrimination by the school administration if harassment is so severe that it prevents them from receiving an education.

The most popular legislative proposal addressing gay student discrimination is the Student Non-Discrimination Act of 2011. The proposed legislation states:

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, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>139</sup>

It provides a cause of action “including, but not limited to equitable relief, compensatory damages, cost of the action, and remedial action.”<sup>140</sup> The House bill has received 150 co-sponsors of

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<sup>136</sup> See, e.g., *Wolfe v. Fayetteville Sch. Dist.*, 648 F.3d 860 (8th Cir. 2011) “Wolfe’s argument . . . does not establish any rule suggesting rumors or name-calling falsely labeling someone as a homosexual a[s] per se indications of harassment on the basis of sex.” *Id.* at 7.

<sup>137</sup> See *infra* notes 139-43 and accompanying text.

<sup>138</sup> Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 287 n.145 (1997).

<sup>139</sup> Student Non-discrimination Act of 2011, H.R. 998, 112th Cong. § 4(a) (2011).

<sup>140</sup> *Id.* § 6(a).

the legislation,<sup>141</sup> and the Senate version has 34.<sup>142</sup> Neither bill has been acted on since assignment to committee.<sup>143</sup>

Such a statutory change would provide actual or perceived homosexual students with some legal protection within the context of the educational system. This protection includes a private cause of action for damages from harassment that occurs on school grounds. However, as congressional action has failed, states have sought to provide some protection themselves.

#### *D. State Statutory Protection and Problems*

Several states have enacted legislation that will protect their LGBTQ students from bullying, seeking to pick up where federal protections ended.<sup>144</sup> Many others have attempted to pass such a bill but have not been successful. Still more have sought to provide protection, but the language of the statute is insufficient to truly provide assistance to LGBTQ teens.

New York passed the Dignity For All Students Act in 2010 that allowed for protection of students from harassment on the basis of sexual orientation and gender identity.<sup>145</sup> “The measure also mandates development of policies to prevent and to deal with bias-motivated school violence and hate, training for school staff and administrators, and the introduction of appropriate material into classroom curricula, including discrimination awareness.”<sup>146</sup>

The North Carolina General Assembly worked on school bullying legislation in 2007 that would protect against “acts reasonably perceived as being motivated by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, gender identity or expression, physical appearance, [and]

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<sup>141</sup> *Bill Status and Summary: 112th Congress (2011-2012): H.R.998*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.998>:

<sup>142</sup> *Bill Status and Summary: 112th Congress (2009-2010): S.3390*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03390>.

<sup>143</sup> *Supra* notes 141, 142.

<sup>144</sup> Fourteen states “prohibit[] bullying based on sexual orientation and gender identity.” Dana Rudolph, *LGBT Students: Safer This Year?*, KEEN NEWS SERV. (Aug. 21, 2011), <http://www.keennewservice.com/2011/08/24/lgbt-students-safer-this-year>.

<sup>145</sup> N.Y. EDUC. LAW §§ 10-18 (McKinney 2009) (effective July 1, 2012).

<sup>146</sup> Kilian Melloy, *New York State Passes Anti-Bullying Law*, EDGE (June 23, 2010), <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=107201>.

sexual orientation.”<sup>147</sup> The legislation was adopted by both houses in an amended version that did not specify the above classifications, but the conference committee did not finish work on the legislation, and it has not since been passed.<sup>148</sup>

The Florida anti-bullying law also does not specify sexual orientation.<sup>149</sup> “[T]he initial Florida anti-bullying bill included specific definitions of LGBT victims. However, [the legislator] . . . who spearheaded the bill, insisted the LGBT definition be removed from it so that the bill could be passed more quickly.”<sup>150</sup> Some suggest that “bullying policies should be written well enough that any kind of derogatory attack, anything that attempts to humiliate, attack or harm, should be stopped and punished.”<sup>151</sup> Regardless, the fact that the words “sexual orientation” had to be removed from the bill to ensure its passage shows that even this legislature is hesitant to provide specific protections for gay students.

On the other end of the spectrum, several states and individual school districts have a policy colloquially referred to as “no promo homo” rules.<sup>152</sup> The idea behind it is to remain neutral on homosexuality—by simply ignoring it.<sup>153</sup> In states with the rule, it formally only applies to sex education, but uncertainties have left teachers in fear of mentioning homosexuality in any context.<sup>154</sup> The Tennessee Senate passed a bill in 2011 that would “prohibit[]

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<sup>147</sup> H.B. 1366 (filed edition), N.C. Gen. Assemb., 2007 Sess., available at <http://www.ncleg.net/Sessions/2007/Bills/House/HTML/H1366v1.html>.

<sup>148</sup> H.B. 1366 (fifth edition), N.C. Gen. Assemb., 2007 Sess., available at <http://www.ncleg.net/Sessions/2007/Bills/House/HTML/H1366v5.html>. The legislative history is available at: <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H1366>.

<sup>149</sup> FLA. STAT. § 1006.147 (2010).

<sup>150</sup> Bianca Fortis, *Despite Anti-bullying Law, Many Schools Lack LGBT Protections*, FLA. INDEP., (Oct. 18, 2010, 2:00 PM), <http://floridaindependent.com/10510/despite-anti-bullying-law-many-schools-lack-lgbt-protections>.

<sup>151</sup> *Id.* (quoting Judy Kuczynski, the president of Bully Police. The Bully Police is “a nonprofit organization dedicated to supporting people who are dealing with bullying situations.”).

<sup>152</sup> “Eight states—Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah—have such laws statewide.” See Rudolph, *supra* note 144.

<sup>153</sup> See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Anti-gay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000).

<sup>154</sup> *Id.* at 1360.

the teaching of or furnishing of materials on human sexuality other than heterosexuality in public school grades K-8.”<sup>155</sup> The text of the bill, if strictly interpreted, could require libraries to remove all books that mention homosexuality. “No promo homo” rules are greatly harmful to LGBTQ students as it makes who they are seem even more unacceptable. One Minnesota school district with such a policy has experienced eight student suicides in the past two years, four of which identified as or were suspected of being gay.<sup>156</sup> These rules are detrimental to an LGBTQ student’s development and acceptance—both internally and from their peers.

Generally, neither the federal or state reform gets to the root of the problem—students often do not fear making fun of their fellow students that are gay and may even be encouraged to do so. This intolerance should be dealt with through punishment, as well as tolerance training of both students and faculty.

*E. Necessary Provisions  
of a Sexual Orientation Protection Statute*

As has been examined, *supra*, heightened judicial scrutiny and current statutory “protections” for LGBTQ students are simply insufficient. Our laws need to be strengthened with specific protections on the basis of sexual orientation as well as to provide solutions that work toward the heart of the problem. As previously discussed, Congress and state legislatures have attempted this work but have failed. Even New York’s statute, as will be further examined in this section, leaves out an essential element.

One issue with the current legislation is that it is essential for teachers to have an obligation to proactively stop bullying, as well as not to be a perpetrator of the bullying themselves. Our schools should protect our students, and while teachers and ad-

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<sup>155</sup> Tom Humphry, *Senate OKs Bill to Ban Teaching of Homosexuality*, KNOXNEWS (May 21, 2011), <http://www.knoxnews.com/news/2011/may/21/senate-oks-bill-to-ban-teaching-of-homosexuality/>. The bill, SB0049, was not taken up by the Tennessee House. It is popularly referred to as the “Don’t Say Gay Bill.” *Id.*

<sup>156</sup> Eric Eckholm, *In Suburb, Battle Goes Public On Bullying of Gay Students*, N.Y. TIMES, Sept. 13, 2011, at A1. The policy was adopted in 2009 and requires that staff “shall remain neutral on matters regarding sexual orientation.” *Id.* A lawsuit against the school district is ongoing. *Id.*

ministrators cannot be babysitters of each individual child, they should proactively work to end harassment when they identify or hear of it. School districts should be civilly liable for inaction on behalf of each employee, rather than just administrators, as Title IX occasionally provides for LGBTQ students. Further, qualified immunity should be denied to any employee who blatantly disregards the wellbeing of a student by failing to report or respond to harassment. Also, school district employees should be punished by the school district for their inaction—whether by suspension without pay or termination, depending on the severity of the actual or potential harm.

Additionally, schools should be mandated to punish harassment. Many schools have a zero tolerance policy for fighting which results in police action. However, harassment of gay teens is often overlooked completely—and is not even punished within the school's disciplinary code. Certainly, some deference should be given to school officials to discipline students themselves, but this right should not be unlimited. Schools should be required to treat all acts equally—if they punish one beating by calling the police, then acts of violence against gay students should be treated similarly. Disciplinary codes and enforcement must demonstrate that harassment will not be tolerated within any of our schools. However, punishment should not be limited to physical violence. Just as racial slurs would be punished in a school, so should gay slurs. Each act of harassment—physical or otherwise—should be punished in the same manner as a similar offense that was done to a non-gay student.

Lastly, the root of the problem is intolerance and a lack of understanding. Children are taught from their parents, society, and sometimes school officials that bashing homosexuals is acceptable. Schools should be required to adopt an educational framework that teaches harassment of gay students is not okay. The key is tolerance.<sup>157</sup> But how far does the framework go? Does it address whether homosexuality is socially or Biblically accepta-

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<sup>157</sup> The Southern Poverty Law Center has developed a program known as "Teaching Tolerance" that seeks to do just that. For more information, visit *Teaching Tolerance*, S. POVERTY L. CTR., <http://www.splcenter.org/what-we-do/teaching-tolerance> (last visited Mar. 22, 2012).

ble (in the case of private schools receiving federal funds, especially)? The answer, for now at least, is no. Schools should simply be in the business of telling students that bullying is not okay. Faculty should also participate in tolerance training, and counselors should be aware of how to deal with situations of gay bullying.

The New York statute mentioned previously is a good model for accomplishing most of these points. The law acknowledges that “students’ ability to learn . . . [is] compromised by incidents of discrimination or harassment.”<sup>158</sup> It then prohibits harassment via “conduct, verbal threats, intimidation, or abuse” and discrimination based on sexual orientation.<sup>159</sup> It also requires adoption of “age-appropriate responses” to violations with suspension at a minimum for students who are repeat offenders, as well as the teaching of curriculum on tolerance and respect for others.<sup>160</sup> However, the statute falls short of specifying civil liability against schools, administrators, and faculty for not sufficiently responding to acts of harassment or discrimination. Otherwise, the language of the New York statute is to be heralded as a great example of how to fight discrimination in our schools—not only for gay students, but for all students.

The fact is that LGBTQ students have little or no protection in our school system today. They are dealing with emotional issues of trying to learn who they are at a time when who they are is hated by everyone around them. As a result, they are much more susceptible to being hurt by the harassment that occurs in our school systems. Thus, it is essential that we protect our students by teaching all children that bullying is not tolerable and punishing them when it occurs. To ensure that is done, we must provide for civil claims when our school teachers and administrators turn a blind eye to these abuses. But we must also realize that the problem is not just in the United States, but it also exists internationally.

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<sup>158</sup> N.Y. EDUC. LAW § 10 (McKinney 2009) (goes into effect July 1, 2012).

<sup>159</sup> *Id.* § 11.

<sup>160</sup> *Id.* § 14.

## III. HUMAN RIGHTS LAW

In addition to protections provided by United States case law and statutes, LGBTQ students should also have protection provided by international human rights law. The United States should set an example to the rest of the world concerning equitable rights of homosexuals. Our intolerance of gay students only seeks to encourage discrimination in other parts of the world. While some international law could suggest such protection, it is not so applied. However, a proposed treaty concerning sexual orientation will provide further protections of homosexuals, generally.

The Universal Declaration of Human Rights states that “all human beings are . . . equal in dignity and rights.”<sup>161</sup> Further, the Declaration ensures the right of everyone to “the free and full development of his personality.”<sup>162</sup> LGBTQ students are not treated equally and live in constant fear of the development of who they are as a result of the harassment they know will follow.

The Convention on the Rights of the Child guarantees that each child shall be able to get an education and recognizes “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”<sup>163</sup> The Convention also requires that governments “[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates.”<sup>164</sup> Further, the Convention addresses discipline by adding that “[s]tates Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”<sup>165</sup> Discrimination so severe that leads to suicide or other physical consequences certainly does not

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<sup>161</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>162</sup> *Id.* at art. 22.

<sup>163</sup> Convention on the Rights of the Child, 1577 U.N.T.S. 3, art. 27 (1989) (signed by United States in 1995, but has yet to be ratified).

<sup>164</sup> *Id.* at art. 28(1)(e).

<sup>165</sup> *Id.* at art. 28(2).

encourage regular school attendance, nor is allowing the harassment to happen consistent with human dignity.<sup>166</sup>

The International Covenant on Civil and Political Rights provides that “[a]ll persons are equal before the law . . . without any discrimination . . . [and should be provided] effective protection against discrimination on any ground such as race, colour, sex . . . or other status.”<sup>167</sup> This could certainly be interpreted to provide that LGBTQ students should be protected against discrimination and harassment within the educational environment.

A declaration has been proposed at the United Nations to protect people based on sexual orientation and gender identity. The United Nations Declaration on Sexual Orientation and Gender Identity was proposed in 2008.<sup>168</sup> It seeks to apply human rights equally regardless of sexual orientation, condemns human rights violations including punishment for sexual orientation, and ensures that violations of these human rights “are investigated and perpetrators held accountable and brought to justice.”<sup>169</sup> The declaration, originally supported by sixty-six countries, mostly Latin American and European,<sup>170</sup> “marked the first time a declaration supportive of gay rights was introduced before the General

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<sup>166</sup> This appears to be in line with the “negative effects on his ability to receive an education” reasoning discussed in *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641-42 (1999).

<sup>167</sup> 999 U.N.T.S. 171, art. 26. (Effective as of Mar. 23, 1976.). The document does not mention sexual orientation, and it almost certainly would not have passed if it had, but it does provide for any *other status*, which could certainly include sexual orientation.

<sup>168</sup> Declaration, U.N. General Assembly, Statement on Human Rights, Sexual Orientation and Gender Identity, U.N. Declaration A/63/635 (Dec. 18, 2008) [hereinafter U.N. Declaration], available at <http://www.unhcr.org/refworld/docid/49997ae312.html>. For an in-depth discussion of the history of the declaration (originally known as the Brazil resolution) and disputes that have arisen since its introduction, see Timothy Garvey, *God v. Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of the Brazilian Resolution*, 38 DENV. J. INT'L L. & POL'Y 659 (2010). A new version of the declaration was proposed in 2011 and currently has eighty-five signatories. *Over 80 Nations Support Statement at Human Rights Council on LGBT Rights*, MISSION OF THE U.S.: GENEVA, SWITZ., <http://geneva.usmission.gov/2011/03/22/lgbtrights/> (last visited Jan. 14, 2012).

<sup>169</sup> U.N. Declaration, *supra* note 168.

<sup>170</sup> Neil Macfarquhar, *In a First, Gay Rights Are Pressed at the U.N.*, N.Y. TIMES, Dec. 18, 2008, at A22.

Assembly.”<sup>171</sup> An opposing statement, signed by sixty countries and sponsored by the Organization of the Islamic Conference, “said the effort [to pass the Declaration] threatened to undermine the international framework of human rights by trying to normalize pedophilia.”<sup>172</sup> These two actions clearly demonstrate the sharp divide in our world concerning homosexuality, and the division is an issue of geography, politics, religion, and development.

Obviously, if the enacted treaties discussed *supra* were meant to protect LGBTQ students, the argument would have been successful in restructuring sexual orientation discrimination worldwide. Thus, it is essential that a treaty is passed that will end discrimination on the basis of sexual orientation.

#### CONCLUSION

Many would argue that the necessary framework exists to protect LGBTQ students, but the continued bullying and suicide rates only go to prove that the current law is simply insufficient. In present-day Fourteenth Amendment jurisprudence, discrimination against homosexuals is analyzed under rational basis scrutiny. This level of evaluation is enough to punish discrimination in some courts and in the most severe of cases, but is not applied with consistency to force schools to care for their students regardless of sexual orientation. Some courts have sought to use intermediate scrutiny on the basis of gender discrimination, but this application is also inconsistent. It is necessary to protect LGBTQ students as a suspect class in order to fight discrimination across the United States.

Further, statutory interpretation is also erratic. Some courts have determined that discrimination is punishable under Title IX

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<sup>171</sup> David W. Austin, Paul E. Johnson & Mark E. Wojcik, *Sexual Orientation and Gender Identity*, 44 INT'L LAW. 547, 547 (2010).

<sup>172</sup> See Macfarquhar, *supra* note 170. The United States, China, and the Holy See are other notable countries that refused to sign the original declaration. *Id.* However, the United States signed on soon after President Obama's inauguration. *U.S. Endorses U.N. Gay Rights Text*, DESERT SUN, Mar. 19, 2009, at B1. While the Vatican has not signed on to the document, they issued a statement “that the Holy See ‘opposes all forms of violence and unjust discrimination against homosexual persons, including discriminatory penal legislation which undermines the inherent dignity of the human person.’” See Austin, *supra* note 171.

on the basis of sexual orientation. However, this is not clear and attempts to change this in Congress have been unsuccessful. Other courts have sought to “pretend” that sexual orientation discrimination falls under sex discrimination, but such a holding does not protect every student in every case. Congress must act with new legislation that will amend Title IX, allowing suits to be brought nationwide on the basis of sexual orientation discrimination within our public school system.

While some international human rights law exists that could be used to justify an LGTBQ student’s right to an education without discrimination, the law is unclear at best. Attempts have been made to universally adopt standards of non-discrimination for homosexuals, but these attempts have been blocked by a rather large group of countries, many of which outlaw homosexual activity by statute—some only in text, and a few punishing it by death.

In about the time it takes to read this Comment, the average high school student has heard three gay slurs.<sup>173</sup> Within the next six hours, another gay student will likely have committed suicide.<sup>174</sup> Our public schools have become a breeding ground for homophobic ideas among students, teachers, and administrators. Courts and legislative bodies must act to ensure that our students—regardless of race, sex, religion, sexual orientation, or other class—live to be productive, healthy citizens that can positively contribute to our society.

*Jeffrey Brown*

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<sup>173</sup> See *supra* note 5 (extrapolating that data with the average school day of seven hours).

<sup>174</sup> *Id.*