

**BEYOND TITLE IX:
FEDERAL LEGISLATIVE ANTIDOTES TO THE BULLYING &
HARASSMENT OF ACTUAL OR PERCEIVED LGBT & GENDER NON-
CONFORMING STUDENTS**

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INTRODUCTION

A hostile learning environment denies actual or perceived lesbian, gay, bisexual, and transgender (“LGBT”) and gender non-conforming students an education. Although Title IX of the Educational Amendments of 1972 (“Title IX”) can protect actual or perceived LGBT and gender non-conforming students from harassment, it sometimes fails. This Article argues that Congress should pass the Student Non-Discrimination Act of 2013 and the Safe Schools Improvement Act of 2013 to remedy the legal shortcomings of Title IX and protect actual or perceived LGBT and gender-non-conforming students from the harassment and bullying they endure.

First, this Article will discuss the bullying and harassment experiences of actual or perceived LGBT and gender non-conforming students. Next, this Article will explore the extent to which Title IX protects actual or perceived LGBT and gender non-conforming students from harassment. Afterward, this Article will discuss how Title IX’s shortcomings has left actual or perceived LGBT and gender non-conforming students without federal protection against peer-to-peer harassment. Finally, this Article will explain why Congress should pass the Student Non-Discrimination Act of 2013 and the Safe Schools Improvement Act of 2013 to address the limits of Title IX.

BULLYING & HARASSMENT

At many schools in the United States, actual or perceived LGBT and gender-non-conforming students face heterosexism, homophobia, harassment and assault because of their perceived or actual sexual and gender identities.¹ Nearly eighty-five percent of students hear their peers use the term “gay” in a negative manner at school.² Some seventy percent of students hear terms like “dyke” and “faggot” frequently at school, while over sixty percent of students often hear negative remarks about gender expression.³ Over fifty-five percent of students hear homophobic or negative remarks about gender expression from their own teachers and school staff.⁴

Further, more than sixty percent of students feel unsafe at school because of their sexual orientation, while another forty-three percent feel unsafe because of their gender expression.⁵ Between 2010 and 2011, more than eighty percent of students suffered verbal harassment (threats and name-calling) because of their sexual orientation—nearly sixty-four percent because of their gender expression.⁶ A combined fifty-six percent of students have suffered kicks, punches, and injuries with a weapon because of their sexual orientation—another thirty-nine percent of students have suffered the same because of their gender expression.⁷ Additionally, more than fifty-five percent of LGBT students have experienced harassment via text messages or Facebook postings.⁸ Most disturbing of all, a combined ninety-seven percent of students either

¹ GLSEN, 2011 National School Climate Survey, p. xiv. *See* glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf (accessed Aug. 5, 2013). [Hereinafter School Climate]

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at xv.

do not report the harassment to school staff because: (1) they do not believe school staff will intervene; or (2) if they reported the harassment, school staff did nothing in response.⁹

Harassment and bullying occurs with disturbing frequency at the elementary school level.¹⁰ Nearly half of elementary school students hear comments like “that’s so gay” or “you’re so gay” from other students.¹¹ Four in ten students hear other students comment that “there are things that boys should not do or should not wear because they are boys...”¹² A third of students hear other students remark that “there are things girls should not do or should not wear because they are girls...”¹³ Further, students who do not adhere to traditional gender norms are more likely than other students to say: (1) other students call them names, make fun of or bully them; (2) other students have “spread mean rumors or lies about them”; (3) other students have used the internet to “call them names, make fun of them or post mean things about them”; and (4) that they feel unsafe at school.¹⁴ Additionally, a quarter of elementary school students and teachers even hear other students use terms like “fag” or “lesbo.”¹⁵

Where actual or perceived LGBT and gender non-conforming students endure harassment, they cannot enjoy their right to an education.¹⁶ Students who experience “higher levels of victimization because of their sexual orientation” are three times more likely to miss school than students who experience lower levels of victimization.¹⁷ Similarly, students who experience “higher levels of victimization because of their gender identity” are twice more likely

⁹ *Id.*

¹⁰ GLSEN, “Playgrounds and Prejudice: Elementary School Climate in the United States”, p. xxi. *See* glsen.org/sites/default/files/Playgrounds%20%26%20Prejudice.pdf (accessed Aug. 5, 2013).

¹¹ *Id.* at xvi.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at xviii

¹⁵ *Id.* at xvi.

¹⁶ School Climate, *supra* note 1, p. xv.

¹⁷ *Id.*

to miss school than their counterparts who experience lower levels of victimization.¹⁸ Also, students who experience frequent harassment because of their sexual orientation or gender expression have lower grade point averages than students who experience harassment less often.¹⁹ Further, higher levels of victimization based on a student's sexual orientation or gender expression produces higher levels of depression and lower levels of self-esteem.²⁰

In some cases, bullying and harassment has caused or contributed to the death of actual or perceived LGBT and gender non-conforming youth. For example, eleven-year-old Carl Walker-Hoover committed suicide because his peers would, on a daily basis, call him "girlie," "gay" and "fag."²¹ Similarly, Jadin Bell hung himself because his peers bullied him because he was gay.²² Just as organizations like The Trevor Project and It Gets Better intervene to provide support to actual or perceived LGBT youth who are victims of harassment and bullying, so too must Congress and the U.S. Department of Education.²³ Indeed, an aggressive federal intervention may even save the lives of many actual or perceived LGBT and gender non-conforming youth who suffer harassment and bullying at the hands of their peers.

TITLE IX

The U.S. Department of Education's Office of Civil Rights ("OCR") enforces Title IX of the Education Amendments of 1972 ("Title IX").²⁴ In relevant part, Title IX reads that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ James, Susan. "When Words Can Kill: 'That's So Gay'" ABC News, April 14, 2009. *See* <http://abcnews.go.com/Health/MindMoodNews/story?id=7328091> (accessed Aug. 5, 2013).

²² Daily Mail Reporter. "Oregon teen hangs himself in school yard 'because he was bullied for being gay'" MailOnline.com, January 29, 2013. <http://www.dailymail.co.uk/news/article-2270457/Jadin-Bell-Oregon-teen-bullied-gay-hangs-schoolyard.html> (accessed Aug. 8, 2013).

²³ *See* <http://www.thetrevorproject.org>; *see also* <http://www.itgetsbetter.org>.

²⁴ U.S. Dept. of Educ., Office of Civil Rights, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (accessed Aug. 5, 2013).

the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁵ Also, regulations under Title IX provide that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.”²⁶

Title IX not only prohibits sex discrimination *per se*, but sex-based harassment and discrimination based on sexual stereotypes.²⁷ Under OCR’s harassment guidance, Title IX recognizes two kinds of sexual harassment—*quid pro quo* harassment and hostile environment harassment.²⁸ The former occurs when a “teacher or other employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct.”²⁹ The latter occurs “when conduct is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.”³⁰ Although Title IX does not protect discrimination based on a student’s sexual orientation, OCR’s harassment guidance confirms that “sexual harassment directed at *gay or lesbian students* that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX...”³¹ (emphasis added). Further, Title IX prohibits verbal, nonverbal, physical aggression, intimidation, or hostility based on sex-based stereotypes, but only where it denies or limits a student’s ability to participate in or benefit from an educational

²⁵ 20 U.S.C. § 1681(a).

²⁶ 34 C.F.R. § 106.31 (a).

²⁷ U.S. Dept. of Educ., Office of Civil Rights, “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” p. 3. *See* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref2 (accessed Aug. 7, 2013) [hereinafter OCR Guidance].

²⁸ *Id.* at 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 3.

program.³² Under OCR’s guidance, even when a student does not complain about harassment, school districts have an affirmative obligation to “end harassment, eliminate any hostile environment, and prevent its recurrence.”³³

Title IX imposes liability upon state educational entities that “know or reasonably should know” of possible student-on-student harassment, but fail to investigate and take both remedial and preventive actions to address the harassment.³⁴ In a subtle nod to OCR’s longstanding guidance, the U.S. Supreme Court held in *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629 (1999), that a state educational entity may face Title IX liability for student-on-student harassment, where: (1) the entity is deliberately indifferent to the harassment; (2) the entity “has actual knowledge” of the harassment; and (3) the harassment is so severe, pervasive, and objectively offensive that it deprives “the victims of access to the educational opportunities or benefits provided by the [entity].”

Since *Davis*, courts have confirmed that Title IX recognizes claims by LGBT and gender-nonconforming students. See *Schroeder v. Maumee Bd. of Educ.*, 296 F.Supp.2d 869, 879–880 (N.D. Ohio 2003) (denying board of education summary judgment on the plaintiff’s Title IX claim where it failed to discipline plaintiff’s harassers for calling him “fag” and “queer” “and for other sexual harassment such as pushing plaintiff’s face into the bus window” and saying “Kiss it, you little fag. Kiss it.”); *Riccio v. New Haven Bd. of Educ.*, 467 F.Supp.2d 219, 226 (D.Conn. 2006) (“a female student, subjected to pejorative, female homosexual names by other female students, can bring a claim of sexual harassment under Title IX.”); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) (denying school district’s motion to

³² *Id.*

³³ U.S. Dept. of Educ., Office of Civil Rights, “Dear Colleague Letter, Dear Colleague Letter: Harassment and Bullying (October 26, 2010)”, p. 2. See <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.html> (accessed Aug. 6, 2013).

³⁴ *Id.*

dismiss under Title IX where the court reasoned that the plaintiff alleged “‘aspects of [his] expressive gestures and manner of speaking were of a nature stereotypically associated with females[,]’ and, based on the nonconformity, or perceived nonconformity, [he] was repeatedly called names like ‘pussy,’ ‘sissy,’ and ‘girl,’ and was mocked with effeminate gestures.”); *Mathis v. Wayne Cnty. Bd. of Educ.*, 782 F. Supp. 2d 542, 546-51 (M.D. Tenn. 2011) (denying summary judgment to school board under Title IX where the court relied on the plaintiff’s evidence that students taunted him with names like “gay” and “faggot,” sodomized him with a marker and pencil, and where the court emphasized that one school official “‘looked the other way’ rather than facing the problem”).

Although each of these cases suggest that Title IX can protect actual or perceived LGBT and non-gender conforming students from student-on-student harassment, sometimes the statute falls short of this protection.

TITLE IX’S SHORTCOMINGS

Because Title IX does not outright protect a student from sexual orientation and gender identity discrimination, it intervenes only after actual or perceived LGBT and gender non-conforming students suffer the most egregious of student-on-student sexual harassment and not a moment before. Per OCR’s harassment guidance:

If a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.³⁵

³⁵ OCR Guidance, *supra* note 3, p. 3.

Indeed, Title IX does not intervene until actual or perceived LGBT and gender non-conforming students demonstrate that an educational entity has subjected them to a sexually hostile environment—a pattern or practice of “sustained” and “nontrivial” harassment.³⁶ When OCR evaluates whether an educational entity maintains a sexually hostile environment, it considers eight factors: (1) the degree to which the conduct affected one or more students’ education; (2) the type, frequency, and duration of the conduct; (3) the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; (4) the number of individuals involved; (5) the age and sex of the alleged harasser and the subject or subjects of the harassment; (6) the size of the school, location of the incidents, and context in which they occurred; (7) other incidents at the school; and (8) incidents of gender-based, but nonsexual harassment.³⁷ While OCR considers these factors from an objective and subjective perspective, actual or perceived LGBT and gender non-conforming students face a difficult and complex road to Title IX protection.³⁸

Courts rely on a portion of *Davis*’ holding to limit Title IX’s reach to actual or perceived LGBT and gender non-conforming students. In *Davis*, the Supreme Court explained that when courts assess gender-based peer-to-peer harassment:

[c]ourts ... must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults ... in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, ... damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.³⁹

³⁶ *Id.* at 5-6.

³⁷ *Id.* at 6.

³⁸ *Id.* at 5.

³⁹ *Davis*, 526 U.S. at 651–52.

Routinely, courts cite this portion of *Davis* to dispose of Title IX claims. *See Leverage v. Preston Bd. of Educ.*, 552 F. Supp. 2d 248, 255 (D. Conn. 2008) (citing *Davis* to grant board of education’s motion for summary judgment under Title IX where the court explained that “no reasonable jury could conclude that other students’ conduct was so severe, pervasive, and objectively offensive” to effectively deny a nine-year-old plaintiff equal access to school where students subjected him “to thrown food and homophobic teasing” after he told another male student “Do you love me? I love you.”); *See Patterson v. Hudson Area Schools*, 724 F. Supp. 2d 682, 691-93 (E.D. Mich. 2010) (citing *Davis* to grant school district’s motion for judgment as a matter of law under Title IX where students assaulted the plaintiff and called him “gay,” “faggot” and “queer” and where the court reasoned that “the harassment directed at Plaintiff was typical of middle school and high school behavior.”); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 243 (W.D.N.Y. 2012) (citing *Davis* to grant school district’s motion to dismiss under Title IX where the court reasoned that terms such as “gay,” “homo,” “faggot” and “bitch,” did not suggest the plaintiff suffered harassment because of his gender).

Because *Davis* blurs the lines between unlawful harassment under Title IX and “simple teasing and name calling,” courts along with actual or perceived LGBT and gender non-conforming students may need to look toward new federal legislative initiatives for guidance.

STUDENT NON-DISCRIMINATION ACT & SAFE SCHOOLS IMPROVEMENT ACT

On February 28, 2013, Sen. Robert “Bob” Casey Jr. (D-PA) introduced the Safe Schools Improvement Act of 2013 (“SSIA”)—“a bill to amend the Elementary and Secondary Education Act of 1965 to address and take action to prevent bullying and harassment of students.”⁴⁰ The SSIA would require states and their local educational agencies to establish policies that both

⁴⁰ S. 403--113th Congress: Safe Schools Improvement Act of 2013. (2013). *See* <http://www.govtrack.us/congress/bills/113/s403> (accessed August 8, 2013).

prevent and prohibit the bullying and harassment of students based in part on their sexual orientation and gender identity.⁴¹ Congruent with Title IX and *Davis*, the SSIA would target harassment that is “sufficiently severe, persistent, or pervasive to: (1) limit students’ ability to participate in, or benefit from school programs; or (2) create a hostile or abusive educational environment that adversely affects their education.”⁴² Under the SSIA, local educational agencies would have to provide: (1) parents, students, and educators annual notice of the conduct their discipline policies prohibited; (2) parents and students with the grievance procedures that targeted the conduct; and (3) “the public with annual data on the incidence and frequency” of prohibited conduct at the school and local educational agency level.⁴³ The SSIA has thirty-six cosponsors.⁴⁴

On June 4, 2013, Sen. Alan “Al” Franken (D-MN) introduced the Student Non-Discrimination Act of 2013 (“SNDA”)—“[a] bill to end discrimination based on actual or perceived sexual orientation or gender identity in public schools, and for other purposes.”⁴⁵ The SNDA would protect public school students (and their associates) from discrimination on the basis of their actual or perceived sexual orientation and gender identity.⁴⁶ Under the SNDA, harassment would constitute discrimination, and federal agencies could withdraw educational assistance from any recipient who retaliated against a person because he or she opposed discrimination.⁴⁷ The SNDA would allow an aggrieved party to initiate a private suit and recover attorney’s fees.⁴⁸ Further, the SNDA would authorize the U.S. Attorney General to bring

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ S. 1088--113th Congress: Student Non-Discrimination Act of 2013. (2013). *See* <http://www.govtrack.us/congress/bills/113/s1088> (accessed August 8, 2013)

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

civil actions against any party who violates the Act, and would remove sovereign immunity from any state that receives federal educational assistance.⁴⁹ The SNDA has thirty-six cosponsors.

Congress should pass the SSIA and the SNDA because, unlike Title IX, both bills would outright protect students on the basis of their actual or perceived sexual orientation and gender identity. Actual or perceived LGBT and gender non-conforming litigants would not need to tie their grievances to a singular sex-based legal framework. Litigants would not have to use sex discrimination as a proxy for the very sexual orientation and gender identity harassment they endure. Further, harassment non-violative of Title IX would become actionable under the SNDA. Educational entities would not only face liability when they fail to protect students who endure harassment because of his or her sexual orientation and gender identity, but also when they fail to protect a student who suffers retaliation because he or she opposes discrimination. Unlike Title IX, the SSIA would ensure that educational entities take proactive measures to prevent and prohibit student-on-student harassment. This would decrease the risk of litigation. More importantly, the SSIA and SNDA would intervene long before actual or perceived LGBT and gender non-conforming students suffer harassment so severe and pervasive that their schools become hostile learning environments.

CONCLUSION

Because Title IX does not prohibit discrimination on the basis of a student's sexual orientation and gender identity, it allows OCR to find discrimination when students target a gay student for sexual advances, but not find the same when those same students heckle a gay student with epithets about his sexual orientation. Further, Title IX's exclusion of sexual orientation and gender identity allows one federal court to dismiss epithets such as "gay," "faggot," and "queer"

⁴⁹ *Id.*

as “typical” school behavior, and another to hold that terms like “gay,” “homo,” “faggot” and “bitch” do not suggest a plaintiff has suffered harassment because of his gender. When Title IX intervenes to protect actual or perceived LGBT and gender non-conforming students from harassment, it does so only after a student’s school climate has become so unsafe that it turns into a hostile learning environment. Some students do not survive the harassment, and cannot witness their learning environments reach actionable maturity under Title IX.

The SNDA and SSIA would outright protect students from harassment on the basis of their sexual orientation and gender identity. The SSIA would require state educational entities to take proactive measures to remedy and prevent student-on-student harassment and bullying. Meanwhile, the SNDA would: (1) prohibit retaliation against any person who opposes discrimination under the Act; (2) allow federal agencies to withhold federal funding from educational entities that violate the Act; (3) allow actual or perceived LGBT and gender non-conforming students to bring private suits and recover attorney’s fees against entities that do not comply with the Act; and (4) endow the U.S. Attorney General with the authority to enforce the Act through civil proceedings. Because the SNDA and SSIA protect actual or perceived LGBT and gender non-conforming students where Title IX does not, Congress should pass both bills into law.