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## Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students

**ABSTRACT.** LGBT students are bullied at dramatically higher rates than other students. School bullying generally, and the targeting of LGBT students in particular, has recently garnered national attention as a serious problem that needs to be solved. Just as society is increasingly recognizing the destructive effects of school bullying and accepting the LGBT community, federal courts and agencies are increasingly holding school districts accountable under Title IX when schools fail to protect LGBT students from gender-based bullying.

This Feature discusses the emerging importance of Title IX litigation and enforcement as a tool to stop peer-on-peer harassment of LGBT students in elementary and secondary schools. Federal courts and agencies consistently recognize that bullied LGBT students may bring sex discrimination claims under Title IX based on a theory of gender stereotyping. Some even view anti-LGBT animus as *per se* sex discrimination. I argue that Title IX's effectiveness in addressing the problem is limited by overly narrow judicial and agency views of what constitutes actionable sex discrimination. Federal courts and agencies often focus on stereotypes about overt masculinity and femininity and fail to consider stereotypes about the appropriate roles of girls and boys and the relationships between them. They also offer conflicting views on whether bullying based on a student's actual or perceived LGBT status constitutes *per se* sex discrimination. If federal courts and agencies consistently considered the full spectrum of gender stereotypes and recognized that bullying based on anti-LGBT animus is also sex discrimination, Title IX would better protect LGBT students from harassment.

This Feature also discusses the need for legislation that expressly prohibits discrimination based on actual or perceived sexual orientation and gender identity. I argue that this express enumeration is needed to ensure both that schools clearly understand their duty to prevent a hostile educational environment and that LGBT students clearly understand their right to an equal education.

Even if Congress amended Title IX or passed new legislation to enumerate LGBT protections—and federal courts and agencies interpreted Title IX as broadly as I advocate—LGBT bullying would not disappear. Title IX cannot carry the weight of this problem on its own. Other reforms are needed, including school policies with enumerated protections for LGBT students, mandatory professional development for school staff, anti-bullying training and education programs for students, and district accountability for reporting incidents of LGBT bullying. This is a complex problem that requires a multipronged solution.



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## INTRODUCTION

When Seth Walsh “came out” as gay in sixth grade, his life changed dramatically.<sup>1</sup> His classmates became openly hostile and bullied him relentlessly.<sup>2</sup> They routinely called him derogatory names, such as “faggot,” “pussy,” “pansy,” and “sissy,” and sometimes told him to “burn in hell” or “kill himself.”<sup>3</sup> The harassment escalated throughout middle school and eventually became physically and sexually violent.<sup>4</sup> Walsh’s peers pushed him into lockers, obstructed his path as he tried to walk by, hit food out of his hands, and threw food, water bottles, pencils, and erasers at him.<sup>5</sup> They also grabbed Walsh “from behind while suggesting that he would be sexually gratified by the contact,”<sup>6</sup> and one student “attempted to shove a pencil up the seat of [Walsh’s] pants.”<sup>7</sup> Some of the most hostile incidents occurred in the boys’ locker room, where classmates pulled down his pants and a male peer threatened to rape him.<sup>8</sup> Walsh and his mother repeatedly reported the bullying to school officials, but to no avail.<sup>9</sup> Walsh’s peers were permitted to bully him with impunity. Even some teachers joined in the disparagement.<sup>10</sup> Shortly after being “threatened, taunted, followed, and physically assaulted” at a local park by four students, Walsh committed suicide.<sup>11</sup> He was thirteen.<sup>12</sup>

Walsh’s experience is all too common for students who identify as (or are perceived to be) lesbian, gay, bisexual, or transgender (LGBT). LGBT students

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1. Walsh v. Tehachapi Unified Sch. Dist., 827 F. Supp. 2d 1107, 1112 (E.D. Cal. 2011).

2. *Id.* at 1112-13.

3. *Id.* at 1112.

4. *Id.* at 1112-13.

5. *Id.* at 1112.

6. Letter of Findings from Office for Civil Rights, U.S. Dep’t of Educ., to Tehachapi Unified Sch. Dist. 5-6 (June 29, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031-a.pdf> [<https://perma.cc/SLU7-Q5TM>].

7. 827 F. Supp. 2d at 1112.

8. Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., *supra* note 6, at 6.

9. 827 F. Supp. 2d at 1112-13.

10. For example, one teacher told a student that some teachers had bet on when Walsh would “come out,” another teacher told a student she wanted to ask Walsh and his boyfriend what was “wrong” with them, and yet another called Walsh “fruity” in front of the class. *Id.* at 1112.

11. Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., *supra* note 6, at 11-12; *see also* 827 F. Supp. 2d at 1113 (describing the same order of events).

12. 827 F. Supp. 2d at 1112.

are bullied at dramatically higher rates than other students.<sup>13</sup> They are twice as likely as non-LGBT students to be verbally harassed or physically assaulted at school.<sup>14</sup> A recent survey conducted by the Gay, Lesbian & Straight Education Network (GLSEN) found that “[s]chools nationwide are hostile environments for a distressing number of LGBT students, the overwhelming majority of whom routinely hear anti-LGBT language and experience victimization and discrimination at school.”<sup>15</sup> Of the 7,898 LGBT students GLSEN surveyed about their experience in the past year of school, 74.1% were called names or threatened because of their sexual orientation and 55.2% because of their gender expression; 36.2% were pushed or shoved because of their sexual orientation and 22.7% because of their gender expression; and 16.5% were punched, kicked, or injured with a weapon because of their sexual orientation and 11.4% because of their gender expression.<sup>16</sup> Moreover, school staff did nothing in response to 61.6% of students who reported an incident.<sup>17</sup> As a result of routine bullying, many LGBT students miss school, get lower grades, and are less likely to pursue post-secondary education than their peers; they also suffer higher levels of depression and lower levels of self-esteem.<sup>18</sup>

In recent years, school bullying in general, and the targeting of LGBT students in particular, has garnered national attention. In 2011, the Obama Administration held the first White House Conference on Bullying Prevention,<sup>19</sup> following media reports on several LGBT students who committed suicide after being bullied at school.<sup>20</sup> The U.S. Department of Education’s Office for Civil Rights (OCR) issued guidelines in 2010 clarifying schools’ obligations to address bullying that violates any of the federal anti-

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13. *Growing Up LGBT in America: HRC Youth Survey Report Key Findings*, HUM. RTS. CAMPAIGN 16 (2012), [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America\\_Report.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf) [<http://perma.cc/9CYR-BSWY>].

14. *Id.*

15. Joseph G. Kosciw et al., *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation’s Schools*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, at xvi (2014), [http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report\\_o.pdf](http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_o.pdf) [<http://perma.cc/28FR-U4S8>].

16. *Id.* at xvi-xvii.

17. *Id.* at xvii.

18. *Id.* at xviii.

19. Jesse Lee, *President Obama & the First Lady at the White House Conference on Bullying Prevention*, WHITE HOUSE (Mar. 10, 2011, 1:05 PM), <https://www.whitehouse.gov/blog/2011/03/10/president-obama-first-lady-white-house-conference-bullying-prevention> [<https://perma.cc/US82-KYGF>].

20. See, e.g., Jesse McKinley, *Suicides Put Light on Pressures of Gay Teenagers*, N.Y. TIMES (Oct. 3, 2010), <http://www.nytimes.com/2010/10/04/us/04suicide.html> [<http://perma.cc/HU97-P3RZ>].

discrimination statutes<sup>21</sup>—including “gender-based” harassment of LGBT students<sup>22</sup> that violates Title IX of the Education Amendments of 1972.<sup>23</sup> OCR has also investigated and reached resolution agreements with school districts that failed to respond appropriately to gender-based bullying of LGBT students.<sup>24</sup> These actions reflect cultural shifts in societal views of both school bullying and the LGBT community.<sup>25</sup> Bullying is now recognized as a serious problem that needs to be addressed, not a normal rite of passage to be endured.<sup>26</sup> And the LGBT community is receiving increasing public acceptance.<sup>27</sup>

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21. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<http://perma.cc/2NDD-FVEW>] [hereinafter *Bullying DCL*].
  22. *Id.* at 7-8. “Gender-based” harassment or bullying is a form of sex discrimination where a student is harassed for failing to conform to sex stereotypes. *Id.*; see also Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T EDUC., at v (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<http://perma.cc/HX9Z-UZU4>] (explaining that gender-based harassment may be covered by Title IX, though this type of harassment is not covered by the Guidance).
  23. Under Title IX, “[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. . . .” 20 U.S.C. § 1681(a) (2012).
  24. See, e.g., Compliance Resolution Letter from Debbie Osgood, Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist. (Mar. 15, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-a.pdf> [<http://perma.cc/EY6M-X6N2>]; Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., *supra* note 6.
  25. These cultural shifts are also reflected in state antibullying laws and school district policies. In 2000, only three states had anti-bullying statutes, and only one explicitly covered anti-LGBT harassment. See Ryan M. Kull et al., *From Statehouse to Schoolhouse: Anti-Bullying Policy Efforts in U.S. States and School Districts*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 43-44 (2015), [http://www.glsen.org/sites/default/files/GLSEN%20-%20From%20Statehouse%20to%20Schoolhouse%202015\\_o.pdf](http://www.glsen.org/sites/default/files/GLSEN%20-%20From%20Statehouse%20to%20Schoolhouse%202015_o.pdf) [<https://perma.cc/BAT9-3L8Y>]. By the end of 2008, thirty-seven states had adopted anti-bullying statutes, five of which expressly prohibited bullying based on sexual orientation or gender expression. *Id.* at 43. By the end of 2014, forty-nine states had passed anti-bullying statutes, eighteen of which expressly protect LGBT students. *Id.*; see also Victoria Stuart-Cassel et al., *Analysis of State Bullying Laws & Policies*, U.S. DEP’T. EDUC. app. B (2011), <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> [<https://perma.cc/5N5X-8N7M>]. School district policies prohibiting harassment and bullying have also increased in the past two decades. See Kosciw et al., *supra* note 15, at 114 fig.4.11 (showing an increase in the prevalence of school bullying, harassment, and assault policies from 2003 to 2013).
  26. See Lee, *supra* note 19; see also *supra* note 25 and accompanying text.
  27. See *supra* note 25 and accompanying text. Polling data show a steady rise in the American public’s acceptance of same-sex marriage and LGBT individuals’ entitlement to general civil rights and open participation in public arenas. See, e.g., *Changing Attitudes on Gay Marriage*,

These cultural shifts are also reflected in federal court decisions following the Supreme Court's ruling in *Davis v. Monroe County Board of Education*, which allowed damages actions under Title IX against school districts that respond inadequately to student-on-student sexual harassment.<sup>28</sup> Within the last two decades, many federal courts have permitted LGBT students to sue school districts for sex discrimination under Title IX for failing to protect them from gender-based bullying by other students.<sup>29</sup>

This Feature addresses the emerging importance of Title IX litigation and enforcement as a tool to stop peer-on-peer bullying of LGBT students in elementary and secondary (commonly referred to as "K-12") schools; it also explores Title IX's limitations in this area. Although Title IX jurisprudence post-*Davis* shows promise for LGBT students whose school districts fail to protect them from bullying,<sup>30</sup> action beyond the current scope of Title IX litigation and enforcement is needed to prevent and address the problem.

Part I provides a brief overview of the types of sex discrimination that Title IX prohibits and explains how the Supreme Court's decision in *Davis* opened the door to Title IX claims by LGBT students. Part II discusses the evolution of Title IX jurisprudence on the harassment of K-12 LGBT students. It first addresses how this evolution occurred, examining the influence of employment discrimination precedent under Title VII of the Civil Rights Act of 1964.<sup>31</sup> This Part also discusses key Title IX cases filed by LGBT or perceived-LGBT students and federal enforcement actions, showing the roles that gender stereotyping and anti-LGBT animus play in these cases. This Part concludes by explaining the important role that Title IX litigation and enforcement play in curbing the harassment of LGBT students.

Part III addresses the limits on Title IX's effectiveness and the reforms needed to stop the bullying of K-12 LGBT students. It argues that Title IX's effectiveness in providing LGBT students with equal access to educational opportunities is limited by two key deficiencies: (1) courts are interpreting the

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PEW RES. CTR. (July 29, 2015), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage> [<https://perma.cc/K6FX-TH8K>]; see also *Same-Sex Marriage & Gay Rights: A Shift in Americans' Attitudes*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFF. RES. (Mar. 2015), [http://www.apnorc.org/PDFs/SameSexStudy/LGBT%20issues\\_D5\\_FINAL.pdf](http://www.apnorc.org/PDFs/SameSexStudy/LGBT%20issues_D5_FINAL.pdf) [<https://perma.cc/9DPE-GXFZ>].

28. 526 U.S. 629, 650 (1999).

29. See *infra* Part II; cases cited *infra* notes 44-45. *Nabozny v. Podlesny* was the first successful federal lawsuit alleging that school officials' failure to protect a gay student from other students' bullying constituted discrimination based on gender and sexual orientation, though it did not allege Title IX claims. 92 F.3d 446, 454-58 (7th Cir. 1996) (permitting Fourteenth Amendment equal protection claims based on gender and sexual orientation).

30. See *infra* Part II; cases cited *infra* notes 44-45.

31. 42 U.S.C. §§ 2000e-17 (2012).

statute's prohibition against sex discrimination too narrowly, and (2) the statute does not expressly prohibit discrimination on the basis of sexual orientation or gender identity. Specifically, this Part argues that courts should interpret Title IX to cover all harassment of LGBT students because this harassment is always based on gender stereotypes. In addition, harassment of students based on their sexual orientation or gender identity is per se sex discrimination. Furthermore, this Part makes the case that Congress should amend Title IX (or pass new, separate federal legislation) to prohibit discrimination in education based on sexual orientation and gender identity, in order to ensure that LGBT students have equal access to educational opportunities. Part III concludes by explaining why these legal reforms to Title IX are nevertheless insufficient. To effectively reduce victimization and improve the educational climate for K-12 LGBT students, schools should also implement anti-bullying policies and training and education programs that specifically address anti-LGBT bullying.

#### I. OVERVIEW OF SEX DISCRIMINATION PROHIBITED BY TITLE IX

Title IX's prohibition against sex discrimination in education is broad. Under Title IX, "[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>32</sup> Title IX covers a host of conduct that creates a hostile educational environment based on sex, including unequal admission, employment and athletic opportunities, sexual harassment, gender-based harassment, and sexual violence.<sup>33</sup> Congress passed Title IX in part to remedy

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32. 20 U.S.C. § 1681(a) (2012).

33. See, e.g., Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 477, 480-82 (2007) (discussing the role of employment discrimination against women in the passage of Title IX and how Title IX was eventually interpreted as applying to intercollegiate sports); Karen Blumenthal, *The Truth About Title IX*, DAILY BEAST (June 22, 2012, 4:35 PM), <http://www.thedailybeast.com/articles/2012/06/22/the-truth-about-title-ix.html> [<http://perma.cc/T9FQ-LGCX>] (discussing the role of admissions quotas on women in the passage of Title IX); Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/46WS-A4WQ>] [hereinafter *Sexual Violence DCL*] (discussing how sexual violence is a form of sex discrimination prohibited by Title IX); *Bullying DCL*, *supra* note 21, at 6-8 (discussing how sexual harassment and gender-based harassment are forms of sex discrimination prohibited by Title IX).



gender stereotypes that were interfering with educational opportunities for girls and women.<sup>34</sup>

More than two decades after Title IX's passage, the Supreme Court's decision in *Davis* paved the way for LGBT students to file Title IX lawsuits based on peer harassment. The plaintiff in *Davis* was a fifth-grade student in Georgia who filed a Title IX suit based on school officials' alleged failure to take action in response to complaints about a male classmate who was sexually harassing her.<sup>35</sup> The Court held that students subjected to peer sexual harassment may sue their school districts for damages when school officials "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."<sup>36</sup>

Although *Davis* involved male-on-female sexual harassment, the Court did not limit its holding to these circumstances. By defining actionable peer sexual harassment broadly,<sup>37</sup> *Davis* opened the door for LGBT students to file Title IX suits when schools fail to respond adequately to peer harassment based on gender stereotypes or perceived LGBT status.<sup>38</sup>

LGBT students are frequently bullied for failing to conform to their peers' stereotypes about how boys and girls should look and act.<sup>39</sup> They are also bullied because of their perceived LGBT status.<sup>40</sup> These forms of harassment can create a "hostile environment"<sup>41</sup> that deprives LGBT students of equal educational opportunities to which all students are entitled, regardless of sex. Post-*Davis*, Title IX jurisprudence has evolved to include harassment based on gender stereotypes, but the case law is divided on whether Title IX covers harassment based solely on perceived sexual orientation.<sup>42</sup>

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34. See 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (noting the need for a strong measure to end stereotypes); see also Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1264-68 (1979) (discussing the elimination of sex stereotyping as a policy underlying Title IX).

35. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633-34 (1999).

36. *Id.* at 650.

37. *Id.* at 652.

38. See, e.g., *Sexual Violence DCL*, *supra* note 33, at 1-3; *Bullying DCL*, *supra* note 21, at 7-8; Office for Civil Rights, *supra* note 22, at i-ii, v, 2-3, 5-7.

39. Kosciw et al., *supra* note 15, at xvi-xvii.

40. *Id.*

41. "Hostile environment" harassment refers to harassment that rises to the level of denying or limiting "a student's ability to participate in or benefit from [a] school's program." Office for Civil Rights, *supra* note 22, at 5.

42. See cases cited *infra* notes 44-45.

## II. GENDER STEREOTYPING AND ANTI-LGBT ANIMUS UNDER TITLE IX

Since *Davis*, there has been a significant and growing line of Title IX cases involving harassment of K-12 students based on gender stereotypes and perceived LGBT status. Based on twenty-one cases identified as addressing whether LGBT (or perceived LGBT) students had cognizable Title IX claims for peer harassment, courts have delineated two rationales for finding that the harassment was discrimination “on the basis of sex”<sup>43</sup> covered by Title IX. One rationale, accepted in all fifteen cases that addressed it, is that the students are harassed for failing to conform to gender stereotypes.<sup>44</sup> The second rationale, on which the eight courts to address it are evenly split, is that sexual orientation harassment is sex discrimination per se.<sup>45</sup>

43. 20 U.S.C. § 1681(a) (2012).

44. *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864-65 (8th Cir. 2011); *Eilenfeldt ex rel. J.M. v. United C.U.S.D. No. 304 Bd. of Educ.*, 84 F. Supp. 3d 834, 841 (C.D. Ill. 2015); *N.K. v. St. Mary’s Springs Acad. of Fond du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1034 (E.D. Wis. 2013); *D.V. v. Pennsauken Sch. Dist.*, No. 12-7646 (JEL/JS), 2013 WL 4039022, at \*10 (D.N.J. Aug. 7, 2013); *Corral v. UNO Charter Sch. Network, Inc.*, No. 10-CV-03379, 2013 WL 1855824, at \*5-6 (N.D. Ill. May 1, 2013); *Hoffman v. Saginaw Pub. Schs.*, No. 12-10354, 2012 WL 2450805, at \*12-13 (E.D. Mich. June 27, 2012); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1115 (E.D. Cal. 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011); *Turpin ex rel. J.F.T. v. Good*, No. 1:07-cv-1205-LJM-WGH, 2010 WL 2560421, at \*3 (S.D. Ind. June 24, 2010); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006); *Doe v. Se. Greene Sch. Dist.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790, at \*11-12 (W.D. Pa. Mar. 24, 2006); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1304 (D. Kan. 2005); *Snelling v. Fall Mountain Reg’l Sch. Dist.*, No. 99-448-JD, 2001 WL 276975, at \*4 (D.N.H. Mar. 21, 2001); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000); see also *Patterson v. Hudson Area Schs.*, 551 F. Supp. 3d 438, 452, 453 & n.3 (E.D. Mich. 2007) (implicitly accepting the gender-stereotyping rationale by analogizing to a case that expressly did so), *rev’d on other grounds*, 551 F.3d 438 (6th Cir. 2009).

45. Four courts have accepted this rationale. See *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 WL 591190, at \*16-17 (S.D. Tex. Feb. 21, 2012); *Callahan ex rel. Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1027 (E.D. Cal. 2009); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000). Four courts have rejected it. See *Shuler ex rel. M.D. v. Sch. Bd. of Richmond*, No. 3:13CV329-HEH, 2013 WL 2404842, at \*3 (E.D. Va. May 30, 2013); *Corral*, 2013 WL 1855824, at \*5-6; *Turpin*, 2010 WL 2560421, at \*3; *Montgomery*, 109 F. Supp. 2d at 1090. If all courts recognized that harassment of LGBT students is per se sex discrimination, Title IX would address the problem more effectively, bullied LGBT students would have cognizable Title IX claims regardless of whether they were bullied for failing to conform to stereotypes about masculinity or femininity, and courts would not dismiss Title IX claims for being based on “sexual orientation” rather than “sex” discrimination. See *infra* Section III.A.

How did these two rationales evolve? And what do they portend for bullied LGBT students? Title VII precedent on sex discrimination in the workplace has had a significant influence on Title IX.<sup>46</sup> Courts and the Equal Employment Opportunity Commission (EEOC) have increasingly recognized that LGBT employees suffering discrimination based on gender stereotypes or LGBT status have cognizable sex discrimination claims under Title VII.<sup>47</sup> And bullied LGBT students who have filed Title IX claims are benefitting from this favorable Title VII precedent.<sup>48</sup>

#### A. *The Influence of Title VII*

When interpreting Title IX's prohibition against sex discrimination in education, courts often rely on Title VII precedent on sex discrimination in employment.<sup>49</sup> Two Title VII decisions have played a particularly significant role in Title IX peer harassment cases filed by LGBT students: *Oncale v. Sundowner Offshore Services, Inc.*, which held that same-sex sexual harassment is actionable under Title VII,<sup>50</sup> and *Price Waterhouse v. Hopkins*, which held that harassment based on an individual's nonconformity to gender stereotypes is a form of sex discrimination under Title VII.<sup>51</sup>

After *Davis*, lower courts have relied on the Supreme Court's decisions in *Price Waterhouse* and *Oncale* to hold that harassment based on gender stereotyping<sup>52</sup> or perceived sexual orientation is a form of sex discrimination under Title IX. For example, in *Montgomery v. Independent School District*,<sup>53</sup> where a student alleged that he was harassed by his male peers because they thought he was gay and did not act in a masculine manner, the district court relied on *Price Waterhouse* and *Oncale* in concluding that the plaintiff had stated

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46. See *infra* Section II.A.

47. See *infra* Sections II.A, III.A.

48. See *infra* Section II.A.

49. See, e.g., *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (holding that the same rule for awarding money damages should apply whether a teacher sexually harasses a student or a supervisor sexually harasses a subordinate); see also *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012) (finding that the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII").

50. 523 U.S. 75, 82 (1998). In *Davis*, the Court relied on *Oncale* to determine whether "gender-oriented conduct" constitutes actionable sexual harassment under Title IX. *Davis ex rel. LaShonda D. v. Monroe Bd. of Educ.*, 526 U.S. 629, 651 (1999).

51. 490 U.S. 228, 239-40, 251-52 (1989).

52. Courts appear to use "gender stereotyping" and "sex stereotyping" interchangeably. See cases cited *supra* note 44.

53. 109 F. Supp. 2d 1081 (D. Minn. 2000).

a viable Title IX claim based on gender stereotyping.<sup>54</sup> In *Ray v. Antioch Unified School District*,<sup>55</sup> where a student alleged that he was verbally and physically harassed by his male peers because they thought he was gay, the court relied on *Oncale* in holding that the plaintiff had stated an actionable Title IX claim based on his perceived homosexuality.<sup>56</sup>

Since *Price Waterhouse* and *Oncale*, lower courts and the EEOC have been grappling with whether LGBT employees have cognizable sex discrimination claims under Title VII when sexual-orientation or gender-identity discrimination is also at issue; these bodies now appear to agree that such claims are actionable as a form of gender stereotyping<sup>57</sup> and are beginning to conclude that the claims are also actionable as sex discrimination per se.<sup>58</sup> As explained in Section II.B.1, courts considering Title IX claims filed by LGBT students similarly agree that the claims are actionable under a gender stereotyping theory, but are divided on whether anti-LGBT animus is sex discrimination per se.

Like the courts, OCR has relied on Title VII precedent when interpreting LGBT students' rights under Title IX. OCR's definition of harassment derives from Title VII precedent on gender stereotyping<sup>59</sup> and states:

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54. *Id.* at 1091-93; *see also* *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) (citing *Price Waterhouse* in holding that a sex stereotyping claim is cognizable under Title IX); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (relying on *Oncale* to find that a same-sex harassment claim based on sex stereotyping is actionable under Title IX); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299, 1303-04 (D. Kan. 2005) (same).
  55. 107 F. Supp. 2d 1165 (N.D. Cal. 2000).
  56. *Id.* at 1170-71; *see also* *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 WL 591190, at \*16-17 (S.D. Tex. Feb. 21, 2012) (relying on *Oncale* to find that a same-sex harassment claim based on perceived homosexuality is actionable under Title IX); *Callahan ex rel. Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1026-27 (E.D. Cal. 2009) (same).
  57. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (finding sexual orientation discrimination actionable based on gender stereotyping); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (finding gender identity discrimination actionable based on sex stereotyping).
  58. *See, e.g.*, *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (holding that discrimination based on gender identity or expression is per se sex discrimination); *Baldwin v. Foyx*, Appeal No. 0120133080, 2015 WL 4397641, at \*10 (E.E.O.C. July 15, 2015) (holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex"); *Macy v. Holder*, Appeal No. 0120120821, at 14 (E.E.O.C. Apr. 20, 2012), <https://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf> [<https://perma.cc/2TKA-MGQV>] (holding that discrimination based on gender identity or expression is per se sex discrimination).
  59. *See* Office for Civil Rights *supra* note 22, at v-vi.

[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.<sup>60</sup>

OCR explained in its 2010 guidance on bullying and harassment that discrimination based on gender stereotyping includes harassment “for failing to conform to stereotypical notions of masculinity and femininity,”<sup>61</sup> and covers “all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.”<sup>62</sup> OCR has not taken the position that harassment based on perceived sexual orientation is sex discrimination *per se* under Title IX, but in a Statement of Interest in a private lawsuit in federal court, the U.S. Department of Justice (DOJ) recently argued in support of a transgender student's Title IX claim that harassment based on gender identity or expression is sex discrimination *per se*.<sup>63</sup> As explained in Section II.B.2, federal agencies have been interpreting the scope of LGBT students' Title IX rights more broadly in the last several years.

*B. Harassment of LGBT Students Based on Gender Stereotypes and Anti-LGBT Animus*

Under Title IX, LGBT students, like all other students, have the right to an education free from sex discrimination.<sup>64</sup> Harassment based on sexual orientation or gender identity does not immunize school districts from liability under Title IX—even though these traits are not expressly mentioned in the statute.<sup>65</sup> Both civil litigation and federal administrative action confirm this.

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60. *Id.* at 3 (footnote omitted).

61. *Bullying DCL*, *supra* note 21, at 7-8.

62. *Id.* at 8.

63. See Statement of Interest of the United States at 8-12, *Tooley v. Van Buren Pub. Schs.*, Case No. 2:14-cv-13466-AC-DRG (E.D. Mich. Feb. 24, 2015).

64. See Office for Civil Rights, *supra* note 22, at 3 (“Although Title IX does not prohibit discrimination on the basis of sexual orientation, 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 under the circumstances described in this guidance.” (footnote omitted)).

65. See Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 5-6 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/S6YV-L2KW>] (“Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation.”)

1. *Civil Litigation*

Federal courts have delineated two main rationales in finding that peer harassment of LGBT students is actionable sex discrimination under Title IX: the widely accepted gender stereotyping rationale and the currently controversial per se sex discrimination rationale.<sup>66</sup>

Under the gender stereotyping rationale, courts interpret what appears to be sexual orientation discrimination—such as anti-gay epithets—as actually based on sexist stereotypes about masculinity and femininity. For example, in *Riccio*, plaintiff Stefanie Andree alleged that students called her derogatory names—including “bitch,” “dyke,” “lesbian,” “gay,” and “lesbian lover[]”—and threw objects at her.<sup>67</sup> The defendant school board sought to dismiss Andree’s Title IX claim on summary judgment, arguing that “the thrust of the slurs were of a sexual orientation nature and not gender specific” and “Title IX does not provide a remedy for discrimination based on sexual orientation.”<sup>68</sup> The court rejected this argument, holding that “Andree, a female student, targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual, has established a genuine issue of fact as to whether this harassment amounts to gender-based discrimination, actionable under Title IX.”<sup>69</sup> In reaching this decision, the court relied in part on the following OCR guidance on sexual harassment<sup>70</sup>:

[G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or

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Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations. . . . A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.”); *see also Bullying DCL, supra* note 21, at 8 (“Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including . . . LGBT . . . students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX.”).

66. *See supra* notes 44-45 and accompanying text.

67. *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 222-23 (D. Conn. 2006).

68. *Id.* at 225.

69. *Id.* at 226; *see also Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011) (concluding that the plaintiff stated a Title IX claim for nonconformity to “sexist stereotypes” where plaintiff alleged he was called homophobic and sexist epithets and “was mocked with effeminate gestures”).

70. *Riccio*, 467 F. Supp. 2d at 226 (citing Office for Civil Rights, *supra* note 22, at v).

limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity. . . . We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX . . . even though the hostile environment may also include taunts based on sexual orientation.<sup>71</sup>

Under the *per se* sex discrimination rationale, courts treat sexual orientation discrimination claims as straightforward sex discrimination claims under Title IX. For example, in *Ray v. Antioch Unified School District*, plaintiff Daniel Ray alleged that he was subjected to verbal harassment, threats, and a serious assault based on his peers' belief that he was gay.<sup>72</sup> The defendant school district moved to dismiss Ray's Title IX claim, arguing that Title IX does not prohibit discrimination based on sexual orientation.<sup>73</sup> The court denied the school district's motion and allowed Ray to proceed with his Title IX claim, stating that "it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff's sexuality, i.e. that Plaintiff was harassed *on the basis of sex*."<sup>74</sup> The court further explained its reason for viewing Ray's claim as *per se* sex discrimination:

[T]he Court finds no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object, and the instance in which a male student is insulted and abused due to his harasser's perception that he is a homosexual, and therefore a subject of prey. In both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality, and is not distinguishable to this Court.<sup>75</sup>

Far more courts have addressed Title IX harassment claims filed by gay and lesbian students than those filed by transgender students.<sup>76</sup> This is because

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71. Office for Civil Rights, *supra* note 22, at v.

72. 107 F. Supp. 2d 1165, 1167 (N.D. Cal. 2000).

73. *Id.*

74. *Id.* at 1170.

75. *Id.*; see also Videckis v. Pepperdine Univ., No. CV 15-00298 DDP (JCx), 2015 WL 8916764, at \*5, \*7 (C.D. Cal. Dec. 15, 2015) (treating claims of sexual orientation discrimination as covered by Title IX under both gender stereotype and sex discrimination theories).

76. See *supra* notes 44-45 and accompanying text. A transgender person has a gender identity (that is, one's internal sense of gender) that is different from the person's assigned sex at birth (that is, the gender designated on the person's birth certificate). See *What*

Title IX bullying cases filed by transgender students are in a nascent stage.<sup>77</sup> However, based on Title VII precedent involving transgender employees<sup>78</sup> and arguments raised in pending Title IX cases,<sup>79</sup> there is good reason to believe that courts will find transgender students have actionable Title IX claims under both gender stereotype and sex discrimination theories.

Given the uniform acceptance of the gender stereotype theory and the growing acceptance of the per se sex discrimination theory,<sup>80</sup> Title IX litigation has become a vital tool for helping to address LGBT bullying. Moreover, Title IX's effectiveness in this area has been bolstered through recent actions by OCR and DOJ.

## 2. Federal Agency Action

In the Obama Administration, OCR and DOJ have been taking strong steps to combat LGBT bullying. OCR has issued guidance supporting the application of Title IX to bullied LGBT students. In addition, OCR and DOJ have been actively investigating and resolving Title IX administrative complaints by LGBT students, as well as intervening or filing supportive briefs in civil lawsuits filed by LGBT students. These agencies' actions show that OCR and DOJ accept the gender stereotype rationale for Title IX claims filed by LGBT students, but limit the per se sex discrimination rationale to claims filed by transgender students. Unlike some courts, these agencies have not treated the harassment of gay and lesbian students as per se sex discrimination.

Since 2010, OCR has issued several guidance documents to explain how Title IX applies to gender-based and sexual harassment of LGBT students. In 2010, OCR issued a Dear Colleague Letter (DCL) explaining how the federal anti-discrimination statutes, including Title IX, apply to bullying.<sup>81</sup> The DCL includes an example of how a school's failure to recognize the bullying of a gay student as gender-based harassment would violate Title IX.<sup>82</sup> In the example, a

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*Does Transgender Mean?*, BELONGTO, <http://www.belongto.org/group.aspx?contentid=2918> [<http://perma.cc/Z3AG-Q8M3>].

77. See, e.g., Complaint and Jury Request, *Tooley v. Van Buren Pub. Schs.*, No. 2:14-cv-13466-AC-DRG (E.D. Mich. Sept. 5, 2014); Statement of Interest of the United States, *supra* note 63. In contrast, there is ample Title VII precedent on discrimination against transgender employees. See *supra* notes 57-58 and accompanying text.

78. See *supra* notes 57-58 and accompanying text.

79. See Statement of Interest of the United States, *supra* note 63, at 8-17.

80. See *supra* notes 44-45, 75 and accompanying text.

81. *Bullying DCL*, *supra* note 21.

82. *Id.* at 7-8.



gay high school student perceived as effeminate and nontraditional in both his personal grooming and choice of extracurricular activities was taunted with “anti-gay slurs and sexual comments,” and “physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear.”<sup>83</sup> The school in the example violated Title IX because it failed to recognize the bullying as a form of prohibited sex discrimination, and thus did not take effective action to stop the harassment.<sup>84</sup>

In 2011, OCR issued a DCL that provided additional guidance on Title IX’s application to sexual violence,<sup>85</sup> and later issued “Questions and Answers on Title IX and Sexual Violence” (Q&A) explaining, among other things, schools’ obligations to investigate and resolve allegations of sexual violence against LGBT students.<sup>86</sup> In the Q&A, OCR affirms that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity,”<sup>87</sup> and makes clear that schools are obligated to remedy sexual violence regardless of whether it is “accompanied by anti-gay comments or . . . partly based on a student’s actual or perceived sexual orientation.”<sup>88</sup>

In 2015, OCR issued a “Title IX Resource Guide” that explains the application of Title IX to various issues, including sex-based harassment.<sup>89</sup> This guidance document similarly affirms that a school is obligated to “investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment.”<sup>90</sup>

OCR and DOJ have also taken significant steps to enforce Title IX when schools have failed to take appropriate action to stop gender-based and sexual harassment of LGBT students. For example, OCR investigated the Title IX complaint filed by Seth Walsh’s mother against California’s Tehachapi School

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83. *Id.* at 7.

84. *Id.* at 7-8.

85. *Sexual Violence DCL*, *supra* note 33.

86. Office for Civil Rights, *supra* note 65, at 5-6.

87. *Id.* at 5.

88. *Id.* at 6.

89. Office for Civil Rights, *Title IX Resource Guide*, U.S. DEP’T EDUC. 15-17 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [<http://perma.cc/GN4J-MEZE>].

90. *Id.* at 16.

District.<sup>91</sup> Walsh committed suicide after enduring years of unrelenting bullying and sexual harassment by his school peers that escalated after he came out as gay.<sup>92</sup> After investigating the complaint, OCR and DOJ<sup>93</sup> concluded that Walsh had been subjected to “persistent, pervasive, and often severe sex-based harassment that resulted in a hostile educational environment of which the [d]istrict had notice,” and that the district violated Title IX by failing “to take steps sufficient to stop the harassment, to prevent its recurrence, or to eliminate the hostile environment.”<sup>94</sup> In reaching this conclusion, OCR and DOJ confirmed that Walsh had suffered sex-based harassment because the harassment was “sexual in nature” and “gender-based, motivated by [Walsh’s] failure to act as some of his peers believed a boy should act.”<sup>95</sup> They also noted that the use of anti-gay epithets against Walsh often “stemmed from commonly held attitudes and perceptions about gender and masculinity from which also flowed the sexual and other gender-based conduct . . . .”<sup>96</sup>

OCR and DOJ also investigated Minnesota’s Anoka-Hennepin School District to address allegations of peer harassment of multiple students for nonconformance with traditional gender stereotypes.<sup>97</sup> The students reported that they “were constantly harassed (some almost every day for years) because of their failure to conform to gender stereotypes. Female students reported being called ‘manly,’ ‘guy,’ or ‘he-she’; male students reported being called ‘girl,’ and ‘gay boy,’ and being told, ‘you’re a guy, act like it.’”<sup>98</sup> Some students reported being “threatened and subjected to physical assaults because of their nonconformity to gender stereotypes.”<sup>99</sup> While DOJ and OCR were investigating the matter, six students filed a private lawsuit against the school district based on the same allegations, and both federal agencies intervened against the district.<sup>100</sup> After “extensive negotiations,” the parties entered into a consent decree that required the school district to make significant changes to

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91. See Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., *supra* note 6. Walsh’s mother also filed a private lawsuit seeking monetary damages. See *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107 (2011).

92. See *supra* notes 1-5 and accompanying text.

93. DOJ joined OCR in the resolution of the complaint following OCR’s investigation. Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., *supra* note 6, at 1.

94. *Id.* at 19.

95. *Id.* at 14.

96. *Id.* at 15.

97. Compliance Resolution Letter from Debbie Osgood to Dennis Carlson, *supra* note 24, at 1-3.

98. *Id.* at 2-3.

99. *Id.* at 3.

100. *Id.* at 3.

its policies, practices, and procedures<sup>101</sup> and pay \$270,000 in damages to the six plaintiffs.<sup>102</sup>

DOJ and OCR have also sought to intervene or submit amicus briefs in other cases filed by LGBT or perceived-LGBT students against school districts that inadequately addressed gender-based harassment by the plaintiffs' peers.<sup>103</sup> Recently, the United States has taken promising action to protect the rights of bullied transgender students and make clear that these students have claims for gender stereotyping and per se sex discrimination under Title IX.<sup>104</sup> For example, in *Tooley v. Van Buren Public Schools*,<sup>105</sup> the United States filed a Statement of Interest in support of a fourteen-year-old transgender boy harassed by his peers and school officials based on his nonconformity to sex stereotypes, his gender identity, and his transgender status.<sup>106</sup> It did so to clarify the legal standards "governing sex discrimination claims under Title IX and the Equal Protection Clause."<sup>107</sup> In that brief, DOJ and OCR argued that transgender students may assert a claim under Title IX based on sex stereotyping, as well as a straightforward sex discrimination claim based on their gender identity or transgender status.<sup>108</sup>

### C. *The Impact of Title IX on LGBT Students*

Civil litigation and administrative enforcement show that Title IX has developed into a vital tool for addressing the bullying experienced by LGBT students. In combination, public and private litigation against school districts that were the subject of bullying victims' complaints have resulted in

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101. *Id.* at 3-4; see also Consent Decree at 8-46, *Doe v. Anoka-Hennepin Sch. Dist.* No. 11, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 5, 2012) (describing the measures that the school would adopt pursuant to the agreement).

102. Consent Decree, *supra* note 101, at 49 (requiring payment by the district's insurance carrier).

103. See, e.g., Stipulation and Settlement Agreement, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943 (DNH/DEP) (N.D.N.Y. Mar. 29, 2010) (supporting a student alleging harassment because of his nonconformance with masculine stereotypes and his sexual orientation); United States' Memorandum as Amicus Curiae in Response to Defendants' Motion to Dismiss/Motion for Summary Judgment, *Pratt v. Indian River Cent. Sch. Dist. Bd. of Educ.*, No. 7:09-cv-411 (GTS/GHL) (N.D.N.Y. Aug. 13, 2010) (same).

104. See Statement of Interest of the United States, *supra* note 63, at 1-2.

105. No. 2:14-cv-13466-AC-DRG (E.D. Mich. filed Sept. 5, 2014).

106. Statement of Interest of the United States, *supra* note 63, at 1-2.

107. *Id.* at 3; see also *id.* at 2 (asserting a federal interest in "ensuring . . . that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause").

108. *Id.* at 1-2, 7 ("[T]he relevant suspect classification in this case is *sex*, which courts have held includes gender, gender identity, transgender status, and nonconformity to sex stereotypes."); see also *id.* at 8-17.

agreements to make sweeping reforms,<sup>109</sup> held the districts accountable by forcing them to compensate victims for the serious physical, psychological, and emotional toll of bullying,<sup>110</sup> and created favorable precedent that will help future victims and deter schools from future violations.<sup>111</sup>

Although significant financial awards and settlements in civil litigation (often when coupled with bad publicity for a school district) can deter schools from turning a blind eye to harassment of LGBT students and lead to broader change,<sup>112</sup> lawsuits generally have a greater impact when they also seek

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109. See, e.g., Consent Decree, *supra* note 101; Stipulation and Settlement Agreement, *supra* note 103; Letter of Findings from Office for Civil Rights to Tehachapi Unified Sch. Dist., *supra* note 6; Compliance Resolution Letter from Debbie Osgood to Dennis Carlson, *supra* note 24; *ACLU/SC Settles Lawsuit Over Orange County High School That Tolerated Homophobia and Sexism*, ACLU (Sept. 9, 2009), [https://www.aclu.org/news/aclusc-settles-lawsuit-over-orange-county-high-school-tolerated-homophobia](https://www.aclu.org/news/aclusc-settles-lawsuit-over-orange-county-high-school-tolerated-homophobia-and-sexism?redirect=lgbt-rights_womens-rights/aclusc-settles-lawsuit-over-orange-county-high-school-tolerated-homophobia) [<http://perma.cc/FLT3-YCLZ>] (announcing the settlement in *Ketchum v. Newport-Mesa Unified Sc. Dist.*, No. 30-2009-00120182-CU-CR-CJC (Orange Cty. Super. Ct. 2009)); *Groundbreaking Settlement Is First To Recognize Constitutional Right of Gay and Lesbian Students To Be Out at School and Protected from Harassment*, LAMBDA LEGAL (Aug. 28, 2002), [http://www.lambdalegal.org/news/ca\\_20020828\\_groundbreaking-legal-settlement-first-to-recognize](http://www.lambdalegal.org/news/ca_20020828_groundbreaking-legal-settlement-first-to-recognize) [<http://perma.cc/6JEL-M54M>] [hereinafter *Henkle Settlement*] (announcing the settlement in *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001)); *Lambda Legal Clients and Indian River Central School District Settle Antigay Harassment Lawsuit*, LAMBDA LEGAL (Aug. 8, 2013), [http://www.lambdalegal.org/news/ny\\_20130808\\_pratt\\_indian\\_river\\_settlement](http://www.lambdalegal.org/news/ny_20130808_pratt_indian_river_settlement) [<http://perma.cc/3NT5-YMV8>] (announcing settlement reforms achieved in *Pratt v. Indian River Cent. Sch. Dist.*, No. 7:09-cv-411 (GTS/GHL) (N.D.N.Y. Aug. 13, 2010)); *SPLC Reaches Settlement with Mississippi School District To Stop Anti-LGBT Bullying*, S. POVERTY L. CTR. (Feb. 24, 2015), <https://www.splcenter.org/news/2015/02/25/splc-reaches-settlement-mississippi-school-district-stop-anti-lgbt-bullying> [<http://perma.cc/3JLM-9U8G>] (announcing the settlement in *D.H. v. Moss Point Sch. Dist.*, No. 1:13-cv-466-H50-RHW (S.D. Miss. Dec. 17, 2013)); *Voluntary Resolution Agreement, No. 09-11-1031*, TEHACHAPI UNIFIED SCH. DIST. (June 30, 2011), <http://www.justice.gov/sites/default/files/crt/legacy/2013/01/17/tehachapiagreement.pdf> [<http://perma.cc/Q94V-8DMS>] [hereinafter *Tehachapi Resolution Agreement*]; *Case Summaries*, U.S. DEP'T JUST., <http://www.justice.gov/crt/case-summaries#lovins> [<http://perma.cc/8ACN-EE5Q>] (announcing the settlement in *Lovins v. Pleasant Hill Pub. Sc. Dist.*, No. 99-cv-00550-FJG (W.D. Mo. June 4, 1999)).

110. See, e.g., Consent Decree, *supra* note 101, at 49 (two hundred seventy thousand dollars); Stipulation and Settlement Agreement, *supra* note 103, at 2 (seventy-five thousand dollars); Lauren Foreman, *Seth Walsh Case Settled for \$750,000*, BAKERSFIELD CALIFORNIAN (June 3, 2014), <http://www.bakersfield.com/news/2014/06/04/seth-walsh-case-settled-for-750-000.html> [<http://perma.cc/U8ZX-NCQ5>] (announcing seven hundred fifty thousand dollar settlement in *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107 (E.D. Cal. 2011)); *Henkle Settlement*, *supra* note 109 (four hundred fifty-one thousand dollars).

111. See cases cited *supra* notes 44-45.

112. For example, publicity surrounding the suicide of Seth Walsh and the damages action his family filed led California to pass a law requiring school districts to adopt new antiharassment policies. See Foreman, *supra* note 110.

injunctive relief.<sup>113</sup> This is because injunctive relief, whether by judgment or settlement, allows bullied LGBT students to obtain broad reforms that can change the climate in their schools. For example, these reforms may include new anti-bullying policies; mandatory training and education for all district employees and students; tracking, reporting, and investigations of all anti-LGBT harassment; annual anti-bullying surveys; a properly trained Title IX coordinator; counseling for victims and perpetrators; and oversight by OCR.<sup>114</sup> Civil suits seeking these broad reforms tend to be filed by the United States or civil rights groups,<sup>115</sup> but private attorneys can (and should) seek injunctive relief in Title IX lawsuits.<sup>116</sup>

Administrative enforcement of Title IX, particularly in the Obama Administration, is also leading to systemic change in the ways that schools address and respond to anti-LGBT bullying. OCR's active enforcement of Title IX in response to complaints about LGBT harassment has resulted in resolutions that require school districts to institute the injunctive-type reforms described above.<sup>117</sup>

Though civil litigation and administrative enforcement of Title IX are vital tools that are making a difference in the lives of LGBT students, they cannot remedy LGBT harassment on their own.<sup>118</sup>

### III. LIMITS ON TITLE IX'S EFFECTIVENESS AND NEEDED REFORMS

Title IX's effectiveness in addressing anti-LGBT bullying is limited by two key deficiencies: (1) courts and OCR interpret Title IX's prohibition against

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113. See, e.g., Michael T. Morley, *Enforcing Equality: Statutory Injunction, Equitable Balancing Under eBay, and the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 177, 210 (“[A] court should attempt to provide plaintiffs, to the greatest extent possible, with the specific rights and interests that a statute protects. Whenever possible, a court should aim to directly or specifically undo the effects of a past statutory violation, rather than relegating the plaintiff to a substitute monetary judgment.” (footnote omitted)).

114. See, e.g., Consent Decree, *supra* note 101; S. POVERTY L. CTR., *supra* note 109; see also Summary of Injunctive Relief Terms of Settlement, *Eccleston v. Pine Bush Cent. Sch. Dist.*, No. 12-cv-02303-KMK (S.D.N.Y. June 29, 2015) (settlement of Title VI anti-Semitic harassment claims).

115. See *supra* note 109 and accompanying text.

116. If a bullied LGBT student would not have standing to seek injunctive relief in a civil suit—such as if he graduated or moved out of the school district—another possible option for seeking district-wide reform is to file an OCR complaint and then file a damages action after the OCR process is complete. This was the route that Seth Walsh's family took. See *supra* note 91 and accompanying text.

117. See, e.g., Compliance Resolution Letter from Debbie Osgood to Dennis Carlson, *supra* note 24; *Tehachapi Resolution Agreement*, *supra* note 109.

118. See *supra* Section II.B; *infra* Part III.

sex discrimination too narrowly; and (2) Title IX does not expressly prohibit discrimination on the basis of sexual orientation or gender identity.<sup>119</sup> Furthermore, even if courts, OCR, and Congress corrected these deficiencies, a solution to anti-LGBT bullying requires action beyond Title IX litigation and administrative enforcement. LGBT students are more likely to enjoy equal access to educational opportunities when school policies explicitly prohibit harassment of students based on their actual or perceived sexual orientation and gender identity.<sup>120</sup> In addition, training and education for school staff and students would likely further improve the identification of, prevention of, and response to such harassment.<sup>121</sup>

*A. Courts and OCR Should Interpret Title IX More Broadly*

Title IX would provide more consistent protection to LGBT students if courts and OCR read its prohibition against sex discrimination more broadly. Courts and OCR are interpreting Title IX too narrowly in two main ways. First, they limit application of the gender stereotyping theory to stereotypes about overt masculine or feminine behavior.<sup>122</sup> Second, OCR and some courts fail to treat sexual orientation discrimination as per se sex discrimination.<sup>123</sup> Furthermore, although courts are just beginning to address Title IX claims of transgender students, courts should similarly permit them as per se sex discrimination claims.<sup>124</sup>

*1. LGBT Bullying Involves Stereotypes Beyond Overt Masculinity or Femininity*

It is widely accepted that bullied LGBT students may assert Title IX claims based on a theory of gender stereotyping.<sup>125</sup> But, as explained below, the protections afforded LGBT students under this theory are too narrow because they are currently premised only on gender norms about how boys and girls should look and act,<sup>126</sup> ignoring other gender norms about sexuality and the

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119. See *infra* Sections III.A, III.B.

120. See *infra* Section III.C.

121. See *infra* Section III.C.

122. See cases cited *supra* note 44.

123. See Office for Civil Rights, *supra* note 22, at 3; cases cited *supra* note 45.

124. See *infra* Section III.A.2.

125. See *Bullying DCL*, *supra* note 21, at 7-8; Office for Civil Rights, *supra* note 65, at 5-6; Office for Civil Rights, *supra* note 22, at v; cases cited *supra* note 44.

126. See sources cited *infra* note 140.

appropriate relationships between girls and boys. If courts and OCR considered the full range of relevant gender norms, bullied LGBT students would enjoy more consistent protection under Title IX. It would then be clear that Title IX always applies to the harassment of LGBT students because such harassment necessarily involves a form of gender stereotyping.

In *Price Waterhouse v. Hopkins*, the Supreme Court stated that Congress intended Title VII to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>127</sup> As some courts have explained in Title VII cases, discrimination against LGBT individuals on the basis of gender stereotypes “often involves far more than assumptions about overt masculine or feminine behavior.”<sup>128</sup> As the court explained in *Centola v. Potter*:

[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real men don’t date men.” The gender stereotype at work here is that “real” men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what “real” men do or don’t do.<sup>129</sup>

This reasoning applies equally to gay and lesbian students, many of whom are harassed simply because they are attracted to others of the same sex.

In *Videckis v. Pepperdine University*,<sup>130</sup> a Title IX case filed by two lesbian student-athletes, the district court relied on *Centola* in finding that the sexual orientation discrimination the plaintiffs alleged fit “under the broader umbrella

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127. 490 U.S. 228, 251 (1989) (plurality opinion).

128. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*7 & n.10 (E.E.O.C. July 15, 2015) (citing cases that support this view).

129. 183 F. Supp. 2d 403, 410 (D. Mass. 2002); see also *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (“[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle’s stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”).

130. No. CV 15-00298 DDP, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

of gender stereotype discrimination.”<sup>131</sup> The court reasoned that “[s]tereotypes about lesbianism, and sexuality in general, stem from a person’s views about the proper roles of men and women—and the relationships between them.”<sup>132</sup> The court concluded that the plaintiffs had stated an actionable claim under Title IX based on their perceived failure to conform to these stereotypes.<sup>133</sup>

In short, harassment of LGBT students is necessarily a form of impermissible gender stereotyping because it is based on the premise that same-sex attraction (or gender expression that does not match one’s sex assigned at birth) is an inappropriate expression of one’s gender.

Most courts (and OCR) fail to analyze the stereotypes imposed on LGBT students in this straightforward way.<sup>134</sup> In fact, most courts either interpret gender stereotypes as limited to assumptions about how girls and boys are supposed to look and act, or attempt to distinguish peer harassment based on those stereotypes from harassment based on sexual orientation.<sup>135</sup> The justification for such parsing is that Title IX does not prohibit discrimination on the basis of sexual orientation.<sup>136</sup> As a result, courts typically analyze these claims by distinguishing between sexual orientation discrimination and sex discrimination while noting that “the line between [the two] can be difficult to draw.”<sup>137</sup> I argue that there is no line to draw. As the court in *Videckis* stated, “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”<sup>138</sup> If courts and OCR interpreted Title IX in this manner, then bullied LGBT students would always have a Title IX claim based on gender stereotyping.<sup>139</sup>

If courts and OCR interpreted Title IX’s prohibition against sex discrimination to include the full range of gender stereotypes, Title IX would address LGBT bullying more effectively. LGBT students would not have to

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<sup>131.</sup> *Id.* at \*7.

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

<sup>133.</sup> *Id.*

<sup>134.</sup> See *supra* Section II.B.1.

<sup>135.</sup> See cases cited *supra* note 44.

<sup>136.</sup> See, e.g., *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090–93 (D. Minn. 2000).

<sup>137.</sup> See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009).

<sup>138.</sup> 2015 WL 8916764, at \*6.

<sup>139.</sup> As argued *infra* Section III.A.2, if OCR and courts viewed Title IX in this way, then bullied LGBT students would also have a straightforward sex discrimination claim. See *Videckis*, 2015 WL 8916764, at \*6 (finding that sexual orientation discrimination claims are covered under Title IX as gender stereotype and sex discrimination claims); *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*5, \*7 (E.E.O.C. July 16, 2015) (same, but under Title VII).



parse facts showing harassment based on nonconformity with stereotypes of masculinity and femininity, as distinguished from nonconformity with sex stereotypes about to whom they should be attracted (or with which gender they should identify). The “entire spectrum” of gender stereotypes would constitute sex discrimination under Title IX, consistent with *Price Waterhouse’s* broad description of unlawful gender stereotypes under Title VII.<sup>140</sup>

## 2. *LGBT Bullying Is Per Se Sex Discrimination*

Title IX would also provide more consistent protection to LGBT students if OCR and courts recognized that harassment based on sexual orientation or gender identity is necessarily discrimination “on the basis of sex” under Title IX. Courts are divided on this issue.<sup>141</sup> OCR seems to split the baby, accepting that transgender students have per se sex discrimination claims under Title IX, but limiting gay and lesbian students to gender stereotyping claims.<sup>142</sup> However, as this section explains, there are strong reasons for treating peer harassment of LGBT students as per se sex discrimination covered by Title IX.

The EEOC recently held in *Baldwin v. Foxx* that sexual orientation discrimination is covered under Title VII, explaining that “allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex.”<sup>143</sup> The EEOC concluded that “[a]n employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.”<sup>144</sup> The EEOC further explained that:

“Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically

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140. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion); see also Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 718, 724-25 (2014) (arguing that Title VII’s protections should extend as widely as the spectrum of sex stereotypes does, and that most courts find in favor of plaintiffs who appear gay “in observable ways at work” but reject claims of plaintiffs who do not fit an effeminate stereotype).

141. Thus far, courts have only addressed this issue in the context of sexual orientation claims under Title IX, not gender identity claims. See *supra* note 45 and accompanying text.

142. See *supra* Section II.B.2.

143. 2015 WL 4397641, at \*14.

144. *Id.*

and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite sex. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations.<sup>145</sup>

This reasoning applies equally to Title IX claims filed by LGBT students; in fact, the court in *Videckis* relied on this rationale in concluding that the plaintiff student-athletes targeted by their school for being lesbians stated a “straightforward claim of sex discrimination under Title IX.”<sup>146</sup>

Although courts have not yet ruled on Title IX peer harassment claims by transgender students, they should similarly treat these as sex discrimination claims, based on analogous Title VII precedent.<sup>147</sup> This is precisely what the United States did in *Tooley*, arguing that an individual’s gender identity is an aspect of an individual’s sex, and, therefore, “discrimination on the basis of gender identity is, ‘literally,’ discrimination on the basis of sex . . . .”<sup>148</sup> This argument was based in part on *Schroer v. Billington*, a Title VII case involving a transgender employee who had initially been offered a job after interviewing as male but had her offer revoked after disclosing that she was transitioning to female.<sup>149</sup> The court offered the following analogy to explain why the employer’s conduct constituted per se sex discrimination:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by

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<sup>145</sup>. *Id.* at \*5 (citation omitted).

<sup>146</sup>. *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP, 2015 WL 8916764, at \*8 (C.D. Cal. Dec. 15, 2015) (citing *Baldwin* and explaining that if “Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment”); *see also* cases cited *supra* note 45 (accepting the per se sex discrimination theory).

<sup>147</sup>. *See supra* Section II.A.

<sup>148</sup>. *See* Statement of Interest of the United States, *supra* note 63, at 11-12 (emphasis in original) (citation omitted).

<sup>149</sup>. *Id.* at 9-11 (citing *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008)).

[Title VII]. Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion.<sup>150</sup>

Similarly, discrimination based on changing one’s assigned sex at birth is discrimination on the basis of sex, and focusing on a “label” like transgender to justify denying that person protection under laws prohibiting sex discrimination would be “blind” to the “statutory language itself.”<sup>151</sup> Thus, courts should recognize that harassment of transgender students is actionable sex discrimination under Title IX.<sup>152</sup>

The fact that Congress did not envision the application of Title IX to LGBT students is of no consequence. As the Court stated in *Oncale v. Sundowner Offshore Services, Inc.* when holding that same-sex sexual harassment is covered under Title VII, “statutory prohibitions often go beyond the principal evil [they were enacted to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>153</sup> If courts considered the full spectrum of gender stereotypes when addressing LGBT students’ Title IX claims and/or recognized that harassment of LGBT students is *per se* sex discrimination, Title IX would address peer bullying of LGBT students far more effectively. Indeed, if courts consistently allowed bullied LGBT students to assert Title IX claims based on a failure to conform to gender stereotypes about the “proper” roles of girls and boys and the relationships between them, courts would likely recognize that these students also have a straightforward sex discrimination claim under Title IX. The artifice of parsing between allegations of anti-LGBT animus and sex discrimination—and dismissing cases based on the former—would end.

*B. Congress Should Amend Title IX or Pass New Legislation Prohibiting Discrimination Against LGBT Students*

Though bullied LGBT students would benefit from broader judicial interpretations of Title IX, Congress should take parallel steps to protect LGBT students. It can do this by amending Title IX to include a prohibition against

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150. *Schroer*, 577 F. Supp. 2d at 306.

151. *Id.* at 306-07; *see also* *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*11 (E.E.O.C. Apr. 20, 2012) (concluding that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination violates Title VII,” just as discrimination based on a person’s perceived religion or religious conversion is prohibited under Title VII); Statement of Interest of the United States, *supra* note 63, at 10-11.

152. OCR subscribes to this view. *See* Office for Civil Rights, *supra* note 65, at 5-6.

153. 523 U.S. 75, 79 (1998).

discrimination on the basis of actual or perceived sexual orientation or gender identity, or by passing new legislation that includes this prohibition. If Congress does not amend Title IX as suggested, it could pass one or both of two alternative bills to address the problem: the Student Non-Discrimination Act of 2015<sup>154</sup> and the Safe Schools Improvement Act of 2015.<sup>155</sup>

The Student Non-Discrimination Act is modeled on Title IX, but would explicitly protect LGBT students:

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>156</sup>

The Safe Schools Improvement Act would address bullying and harassment in K-12 public schools by, among other things, requiring local education agencies to adopt policies that expressly prohibit bullying and harassment based on a student's actual or perceived sexual orientation or gender identity, and requiring those agencies and states to collect and report data on incidents of such bullying and harassment.<sup>157</sup>

If Congress passed either bill, LGBT students would have clearer, more secure protection against harassment. Not only would it be clear to schools that discrimination against LGBT students violates federal law and school policies, but these laws could make it easier for bullied LGBT students to obtain redress. For example, under the Student Non-Discrimination Act, bullied LGBT students would no longer have to convince a court that they were subjected to gender-based stereotyping—rather than harassment based on sexual orientation or gender identity—or that there is no real distinction between the

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154. S. 439, 114th Cong. (2015).

155. S. 311, 114th Cong. (2015).

156. S. 439 § 4(a). In addition, unlike Title IX, the Act would expressly authorize a private cause of action for “all appropriate relief, including equitable relief, compensatory damages, and costs of the action.” *Id.* § 6(a).

157. S. 311 §§ 4402-4403. Thus, the Safe Schools Improvement Act would address LGBT bullying by requiring public K-12 schools to adopt policies that expressly prohibit such bullying, whereas the Student Non-Discrimination Act would prohibit such conduct as a matter of federal law and would apply to all federally funded education programs (not just K-12 public schools). *Compare id.*, with S. 439 § 4(a).

two.<sup>158</sup> A congressional enactment would also offer immediate uniformity that is difficult to accomplish through judicial reform.<sup>159</sup>

A law that expressly prohibits discrimination against LGBT students is important, both so schools clearly understand their legal duties and so LGBT students clearly understand their legal protections.<sup>160</sup> The Supreme Court explained the importance of clear anti-discrimination laws in *Romer v. Evans*, when it found an equal protection violation in a Colorado law that singled out sexual orientation as a class not entitled to protection under anti-discrimination laws: “[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.”<sup>161</sup> By explicitly prohibiting discrimination based on actual or perceived sexual orientation or gender identity, Congress would send a strong message to school officials, parents, and students—including LGBT students themselves—that harassment on the basis of sexual orientation or gender identity is not permitted in schools.<sup>162</sup> As some commentators have argued, enumeration may help reduce harassment of LGBT students and make them feel safer in reporting harassment when it occurred.<sup>163</sup> Expressly prohibiting

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158. For cases that addressed this argument, see *supra* Section II.B.

159. Given the current disagreement among the courts on the scope of Title IX’s protections for LGBT students, see *supra* Section II.B, a federal law of the type proposed would eliminate the uncertainty and extend protection to all LGBT students across the country at the same time. Even if the Supreme Court were to resolve the scope of the gender stereotype rationale or the issue of whether bullied LGBT students have per se sex discrimination claims under Title IX, the implementation of its rulings may not be uniform or immediate in the lower courts.

160. The likelihood that Congress would pass legislation of this nature is currently low, which makes the judicial reforms advocated in this Feature all the more important. See, e.g., Taylor Wofford, *Bill To Ban Discrimination Against LGBT People Faces Hurdles*, NEWSWEEK (July 23, 2015), <http://www.newsweek.com/bill-ban-discrimination-against-lgbt-people-faces-hurdles-356861> [<http://perma.cc/9W7Y-3U27>] (quoting Laura Durso, Director of the LGBT Research and Communications Project at the Center for American Progress, who states that “[w]e’re under no illusion about passage [of the Equality Act] in this Congress”).

161. 517 U.S. 620, 628 (1996).

162. If Title IX were amended in this way, it is unclear whether courts would interpret sex discrimination as expansively as advocated in this Feature, but LGBT students who are not “out” or are afraid to “come out” might feel more comfortable asserting a Title IX sex discrimination claim based on gender stereotyping, rather than a sexual orientation or gender identity claim.

163. See, e.g., John G. Culhane, *Bullying, Litigation, and Populations: The Limited Effect of Title IX*, 35 W. NEW ENG. L. REV. 323, 344 (2013); Cristina M. Meneses & Nicole E. Grimm, *Heeding the Cry for Help: Addressing LGBT Bullying as a Public Health Issue Through Law and Policy*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 140, 163-64 (2012). There is empirical evidence to support this argument in the context of school policies with enumerated protections for LGBT students. See Kosciw et al., *supra* note 15, at 76-78; Joseph G. Kosciw et al., *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and*

discrimination against LGBT students would also reflect and reinforce the increasing public acceptance of equal rights for LGBT persons.<sup>164</sup>

*C. School Policy and Training Reforms Are Needed*

To reduce anti-LGBT bullying, we need action beyond Title IX litigation and enforcement. School policies that expressly prohibit harassment based on actual or perceived sexual orientation, gender identity, and gender expression are a vital part of the solution. In addition, training and education programs are needed to ensure that these policies are effectively implemented and enforced.

Empirical data collected by GLSEN on school anti-bullying policies throughout the country consistently show that policies that enumerate protections for LGBT students have a positive effect on school climate, significantly reducing victimization of LGBT students and increasing the effectiveness of a school's response when harassment occurs in districts with such policies.<sup>165</sup> But many schools do not have such policies.<sup>166</sup> Mandatory professional development for educators and district accountability for incident reporting that explicitly includes these protected characteristics should also help.<sup>167</sup> Policies are meaningless if they are not implemented and enforced. Part of improving the school climate for LGBT students involves making sure that everyone within the school environment understands what constitutes anti-LGBT bullying and the consequences for such conduct, and that they are trained to deal with bullying incidents when they occur.<sup>168</sup> Implementing

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*Transgender Youth in Our Nation's Schools*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 68-70 (2012), <http://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf> [<https://perma.cc/M8F8-TU2Z>]; Joseph G. Kosciw et al., *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 75-77 (2010), <http://files.eric.ed.gov/fulltext/ED512338.pdf> [<https://perma.cc/T2LD-3EYN>]; Kull et al., *supra* note 25, at 8, 67-68.

<sup>164</sup>. See *supra* note 27 and accompanying text (showing a steady rise in the American public's acceptance of same-sex marriage and LGBT individuals' entitlement to general civil rights and open participation in public arenas).

<sup>165</sup>. See *supra* note 163 and accompanying text.

<sup>166</sup>. See Kull et al., *supra* note 25, at 27-29; Stuart-Cassel et al., *supra* note 25, at 65-66.

<sup>167</sup>. See, e.g., Emily A. Greytak & Joseph G. Kosciw, *Year One Evaluation of the New York City Department of Education Respect for All Training Program*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK 17-19 (2010), <http://files.eric.ed.gov/fulltext/ED512335.pdf> [<https://perma.cc/WW9M-DTVG>]; see also Kull et al., *supra* note 25, at 8-9.

<sup>168</sup>. See Greytak & Kosciw, *supra* note 167, at 17-19; Kull et al., *supra* note 25, at 8; see also Culhane, *supra* note 163, at 346 ("Part of changing the culture is making sure all within the

LGBT-inclusive policies and training and education programs that specifically address anti-LGBT bullying will likely play a key role in reducing harassment and improving the educational environment for LGBT students.<sup>169</sup>

## CONCLUSION

LGBT students are beginning to benefit from cultural shifts in the national consciousness about school bullying and the targeting of LGBT individuals for unequal treatment. Now that these issues are generally regarded as serious problems, we are seeing more action to solve them. However, LGBT students continue to experience bullying at dramatically higher rates than other students, and Title IX has emerged as an important part of the remedy. Many courts allow bullied LGBT students to assert Title IX claims, and the Obama Administration is taking an active role in protecting LGBT students' Title IX rights to an education free from sex discrimination. Title IX litigation and enforcement is thus more frequently resulting in broad reforms designed to improve the educational climate. As a result, schools are increasingly held accountable for their roles in creating or allowing a hostile educational environment for LGBT students. Although Title IX is a critical piece of the solution, it is not a silver bullet. Even if courts and OCR were to interpret Title IX's prohibition against sex discrimination as broadly as advocated here, LGBT bullying would not disappear. There is no single cure-all for LGBT bullying. This is a problem that requires action in our homes, schools, communities, states, and federal government. As the national initiative on solving campus sexual assault says, "It's On Us" to solve it.<sup>170</sup>

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school environment understand bullying and its consequences, and are trained to deal with incidents when they occur.").

169. See Greytak & Kosciw, *supra* note 168, at 17-19 (finding that a New York City training program implemented to combat bullying of LGBT students was effective in helping school staff address the problem and creating a safer environment for LGBT students); Kull et al., *supra* note 25, at 3, 7-8; see also David P. Farrington & Maria M. Ttofi, *Reducing School Bullying: Evidence-Based Implications for Policy*, 38 CRIME & JUST. 281, 283 (2009) (concluding based on a meta-analysis of 30 school-based anti-bullying programs that these programs reduced bullying by twenty to twenty-three percent).
170. Tanya Somanader, *President Obama Launches the "It's On Us" Campaign To End Sexual Assault on Campus*, WHITE HOUSE (Sept. 19, 2014, 2:40 PM), <https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [<https://perma.cc/WDP9-E89X>].