

# PUT THE TOWN ON NOTICE: SCHOOL DISTRICT LIABILITY AND LGBT BULLYING NOTIFICATION LAWS

---

Yariv Pierce\*

*Congress could mitigate the problem of lesbian, gay, bisexual, and transgender (LGBT) student bullying by requiring that teachers and school officials report all bullying incidents to their school district administrators. Many school districts are not aware of the prevalence of LGBT bullying and the extent to which each school protects, or fails to protect, its LGBT students compared to other harassed students. LGBT students often encounter difficulty demonstrating that their school district has a policy or custom of deliberate indifference toward their equal treatment when a school does not equally protect an LGBT student from peer-to-peer bullying because of the student's LGBT status. This Note proposes a federal notification law requiring teachers and school officials to report incidents of bullying to school district administrators. This requirement would enable LGBT students and their allies to pressure school districts for equal protection and to litigate if unequal treatment persists. A notification law would provide a basis for such action because it would create direct evidence that the school district was aware of the problem—an essential element in an equal protection cause of action.*

INTRODUCTION .....	304
I. LGBT STUDENT BULLYING: PROBLEMS AT SCHOOL AND ATTEMPTS AT REDRESS .....	308
A. <i>The Problem of LGBT Student Bullying</i> .....	309
B. <i>Attempts at Redress: State Governments</i> .....	312
C. <i>Attempts at Redress: Federal Government</i> .....	314
II. SCHOOL DISTRICT LIABILITY AND THE EQUAL PROTECTION CLAUSE .....	316
A. <i>Monell Liability</i> .....	317
B. <i>Title VII and Title IX Impact on Equal Protection for LGBT Students</i> .....	319
C. <i>Judicial Precedent on School District Liability Under § 1983</i> .....	321
1. <i>Lessons from Students' Legal Victories</i> .....	322
2. <i>Lessons from Students' Legal Defeats</i> .....	324

---

\* J.D. Candidate, May 2013, University of Michigan Law School; M.A., 2009, Georgetown University; B.A., 2006, Williams College. I would like to thank Professor Steve Sanders for his thorough and thoughtful advice. Many other individuals' care and insight improved this work: Kelsey Breck, Vivian Chang, Juliana Clay, John Patrick Clayton, Joshua Dockus, Nani Gilkerson, Pete Glenn-Applegate, Christopher Hayes, Phillip Hurst, Joanna Lampe, Justin Lavner, Eric Markowsky, Nicholas Matteson, Benjamin Piper, Katie Poulos, Nina Ruvinsky, and Patrick Thronson. Special thanks to my parents, Robin and Fred Pierce. Lastly, thank you to Aston Gonzalez, who read more drafts than anyone should ever read.

D.	<i>Monetary Damages: Settlement Agreements and Jury Awards</i> .....	326
1.	Settlement Agreements .....	327
2.	Jury Awards.....	328
III.	PROBLEMS ESTABLISHING SCHOOL DISTRICT LIABILITY FOR LGBT BULLYING .....	330
A.	<i>The Problem with Bullying Laws that Do Not Increase School Board Awareness of Students' Equal Protection Violations</i> .....	330
B.	<i>The Unclear Threshold for a Municipal Custom of Deliberate Indifference Toward Students' Equal Protection</i> .....	332
C.	<i>The Pleading Standard Problem in § 1983 Litigation</i> .	334
IV.	PROPOSED LEGISLATIVE REFORM AND MONELL LIABILITY.....	336
A.	<i>Reporting Requirement</i> .....	336
B.	<i>Congressional Authority to Enact LGBT Bullying Notification Laws</i> .....	338
C.	<i>School District Liability Adds Value to Bullying Notification Laws</i> .....	340
D.	<i>Suggested Provisions for Notification Law</i> .....	342
E.	<i>Federalism Concerns</i> .....	345
	CONCLUSION .....	346

## INTRODUCTION

School bullying may be a common part of growing up, but lesbian, gay, bisexual, and transgender (LGBT) students experience bullying at a disproportionately higher rate than their non-LGBT peers.<sup>1</sup> Unfortunately, many school officials turn a blind eye to certain victims of harassment.<sup>2</sup> Current law is limited in its ability to provide recourse for these students. School administrators and

1. Compare SUSAN M. SWEARER, RISK FACTORS FOR AND OUTCOMES OF BULLYING AND VICTIMIZATION 4 (2011), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1131&context=edpsychpapers> ("Research conducted with 7,261 students (ages 13 to 21) in 2009 found that 84.6% of LGBT students reported being verbally harassed, 40.1% reported being physically harassed and 18.8% reported being physically assaulted at school in the past year because of their sexual orientation[.]"), with NATIONAL SCHOOL SAFETY CENTER, REVIEW OF SCHOOL SAFETY RESEARCH 2 (2005), available at <http://www.schoolsafety.us/media-resources/school-crime-and-violence-statistics> ("In 2005, 28 percent of students 12 to 18 years old reported being bullied at school during the six months prior to the survey.").

2. Cf. *Nabozny v. Podlesny*, 92 F.3d 446, 460–61 (7th Cir. 1996) (holding that the student provided sufficient evidence to demonstrate that the school district violated the student's right to equal protection because the school district treated the LGBT student differently from other bullied students).

teachers are not automatically liable for harassment or violence between students,<sup>3</sup> and many government employees who are responsible for the safety of the student body have qualified immunity, which shields them from liability for their action or inaction in response to students' abuse at the hands of their peers.<sup>4</sup> Moreover, a school district administration may not become aware of LGBT student bullying or have the opportunity to alleviate the problem without a required process for notifying oversight authorities.<sup>5</sup>

LGBT-related bullying may affect heterosexual students as well. In *Schroeder v. Maumee Board of Education*, a student was perceived as gay because he defended his gay brother.<sup>6</sup> This student suffered three years of physical assault and verbal abuse.<sup>7</sup> The court held that the school board was not liable because no one had put the school board members or the superintendent on notice of the abuse, and therefore the school district had not been given the opportunity to address the harassment.<sup>8</sup> This lack of knowledge is a problem for administrators who want to facilitate student safety and for students' attorneys who need to demonstrate in litigation that school officials were deliberately indifferent to LGBT students' welfare.<sup>9</sup> Congress should resolve this problem by establishing mechanisms to ensure that a school's highest authorities are aware of discrimination in their schools.

This Note proposes that Congress adopt a bullying notification law to help establish school district liability for equal protection violations.<sup>10</sup> The law would require teachers and school administrators

---

3. Cf. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 189–90 (1989) (holding that the State has no affirmative legal duty to protect students from violence).

4. Cf. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (establishing that a government official may receive qualified immunity for an objectively reasonable action, even if that action is allegedly unlawful). Teachers and school administrators are government employees. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 75–76, 80 (1979) (teachers); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 730 (3d Cir. 1989) (school supervisors).

5. *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1118 (E.D. Cal. 2011) (holding that a cognizable claim did not exist because plaintiff did not allege that defendants were aware of specific incidents of harassment); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 975 (E.D. Mich. 2006) (concluding that a jury could infer the school district's deliberate indifference because the school received monthly notifications of continued harassment); *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL, 2006 WL 851118, at \*4, \*9 (N.D. Idaho Mar. 29, 2006) (stating that school officials had no Title IX liability, in part, because they lacked knowledge of the harassment); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 871, 875–76 (N.D. Ohio 2003) (rejecting school board liability for harassment because the school board administrators were not aware of the abuse).

6. 296 F. Supp. 2d at 870–71.

7. See *id.*

8. *Id.* at 875–76 (granting defendant's motion for summary judgment).

9. See *id.*

10. Although state legislatures may also adopt bullying notification laws, and some have done so, this Note focuses on a proposed federal law requiring school district notification.

to report incidents of peer-to-peer bullying to their school district or town council. The purpose of such a bullying notification law is twofold. First, the reporting requirement would compel local governments to increase their awareness and oversight of bullying in their schools. Second, if local governments do not take sufficient remedial action, a record of bullying reports may make it easier for students to demonstrate that the town has a policy or custom of allowing bullying to occur. If such a policy or custom treats student bullying differently based on the victim's membership in a particular class of people, then those students may raise a § 1983<sup>11</sup> claim for the violation of their equal protection right.<sup>12</sup>

The federal judiciary has decided ten cases clarifying the summary judgment standard for school district liability in § 1983 equal protection claims for failure to protect students from LGBT bullying.<sup>13</sup>

---

11. 42 U.S.C. § 1983 (2006). For the origins and role of § 1983 in constitutional tort litigation, see *infra* Part II.A.

12. U.S. CONST. amend. XIV § 1.

13. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135, 1138 (9th Cir. 2003) (denying school district administrators' summary judgment motion because the LGBT and LGBT-perceived students "presented sufficient evidence to raise an inference of deliberate indifference"); *Nabozny v. Podlesny*, 92 F.3d 446, 457, 460–61 (7th Cir. 1996) (holding that the student provided sufficient evidence to demonstrate that the school district violated the student's right to equal protection because the school district treated the LGBT student differently from other bullied students); *Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at \*12 (S.D. Tex. Feb. 21, 2012) (holding that a mother did not plead sufficient facts to demonstrate that the school district deprived her son of equal protection after her son committed suicide following extensive LGBT bullying at school); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1116–17 (E.D. Cal. 2011) (dismissing the equal protection claim against a superintendent and allowing the equal protection claim against a principal based on the extent of facts plausibly demonstrating discrimination against a member of an identifiable class); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953–54 (S.D. Ind. 2007) (denying summary judgment to a school district in an equal protection claim because of evidence that the school district "departed from its established practices in dealing with" harassment based on a student's sexual orientation); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 975 (E.D. Mich. 2006) (granting summary judgment to a school district in LGBT student's equal protection claim because plaintiff failed to meet his burden of demonstrating treatment different from similarly situated individuals); *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL, 2006 WL 851118, at \*4, \*8 (N.D. Idaho Mar. 29, 2006) (holding that a school district was not liable for equal protection violation when harassment involved picture of a female student kissing another female because the student was not a lesbian, her peers were aware that she was not a lesbian, and there was no evidence that school district perceived her to be a lesbian); *Shaposhnikov v. Pacifica Sch. Dist.*, No. C 04-01288 SI, 2006 WL 931731, at \*8 (N.D. Cal. Apr. 11, 2006) (granting the school district's summary judgment motion, disregarding the equal protection claim, and dismissing the Title IX peer-to-peer harassment claim because the student continued to excel academically and there were only "minor" instances of physical violence); *Moore v. Marion Cmty. Sch. Bd. of Educ.*, No. 1:04-CV-483, 2006 WL 2051687, at \*9 (N.D. Ind. Jul. 19, 2006) (concluding that Title IX precluded a student's § 1983 equal protection claim) (holding later abrogated by the Supreme Court in *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258–59 (2009) (rejecting the argument that Title IX precludes a § 1983 equal protection action)); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871, 875–76 (N.D. Ohio 2003)

The summary judgment standard<sup>14</sup> is an important hurdle for LGBT bullying plaintiffs who must rebut the common defense that school districts were not aware of any discriminatory verbal or physical bullying.<sup>15</sup> Notification laws would help these students by ensuring that school districts are made aware of bullying and by providing records that corroborate students' claims that school authorities were aware of the harassment.<sup>16</sup>

To establish the types of harassment that require notification, this Note provides a working definition of bullying and explains how the courts have held school districts liable for certain types of peer-to-peer harassment when the district administrators do not adequately protect their students. Legislatures have defined bullying in many ways. In this Note, bullying means any severe or pervasive electronic, written, verbal, or physical act by one student toward another student that is based on an actual or perceived trait of the victim, and causes the victim to reasonably fear for her person, property, or mental health.<sup>17</sup> This definition is an amalgamation of several state statutes and pending federal bills that address LGBT bullying.<sup>18</sup>

---

(dismissing an equal protection claim against a school board because no member of the school board or the superintendent was informed that a student was repeatedly called a "fag," had his head hit into a urinal, and experienced other harassment).

14. Litigants file summary judgment motions to determine whether there is enough evidence for the court to decide the case as a matter of law or whether the parties should continue to present facts. *See* FED. R. CIV. P. 56(a).

15. *Cf. Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 145–46 (2d Cir. 1999) (granting motion for summary judgment because the plaintiff failed to produce evidence that the defendants exhibited deliberate indifference to the student's harassment).

16. *See Flores*, 324 F.3d at 1135 (allowing the case to proceed because the plaintiffs presented sufficient evidence to raise an inference of deliberate indifference); *see also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 610–11 (2004) (discussing the value of student criminal record notification laws for campus safety).

17. This definition is based on an Iowa statute, which is similar to the federal bill and other state statutes quoted *infra* note 18. *See also* IOWA CODE ANN. § 280.28 (2011) (defining bullying as "any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that meets one or more of the following conditions," including an act that "places the student in reasonable fear of harm to the student's person or property" or has a "substantially detrimental effect on the student's physical or mental health").

18. *See, e.g.*, Student Non-Discrimination Act of 2011, S. 555, 112th Cong. § 3 (2011) (defining harassment as "conduct that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from a program or activity of a public school . . . [,] to create a hostile or abusive educational environment . . . [,] and [including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility]"); MD. CODE ANN., EDUC. § 7-424.1 (West 2008) (defining bullying as actions that create a "hostile educational environment" that interferes with "a student's physical or psychological well-being"); N.J. STAT. ANN. § 18A:37-14 (West Supp. 2012) (including in its definition of bullying acts that

This Note will demonstrate how a notification law requiring teachers and school administrators to report LGBT bullying to the school district can facilitate the use of existing law to improve LGBT students' welfare. The value of such liability is based on the normative assumption that LGBT student welfare is equally important to other students' welfare.<sup>19</sup> Notification laws are an effective mechanism for influencing behavior and can facilitate LGBT students' equal treatment and equal rights.<sup>20</sup>

Part I of this Note demonstrates the problem of peer-to-peer bullying of LGBT students and students who are perceived to be LGBT. Part II describes the current legal framework within which attorneys must work to bring suit against school districts for equal protection violations. Part III explains why LGBT students encounter particular difficulty when suing school districts for failing to treat them equally with other bullied students. Part IV argues for a federal legislative reform that would ensure that school districts are made aware of any LGBT bullying that occurs in their schools. By requiring documentation of peer-to-peer bullying, the proposed bullying notification law would enable students and their advocates to prove that a school district has a practice of violating LGBT students' right to equal protection.

## I. LGBT STUDENT BULLYING: PROBLEMS AT SCHOOL AND ATTEMPTS AT REDRESS

Bullying is a serious problem for LGBT youth. This section presents statistics on LGBT student harassment and describes the problematic relationships between some LGBT youth and their teachers and administrators. It then outlines the common features

---

place "a student in reasonable fear of physical or emotional harm to his person or damages to his property"); OR. REV. STAT. § 339.351 (2011) (defining bullying as actions that create a "hostile educational environment" that interferes with "a student's physical or psychological well-being"); WASH. REV. CODE § 28A.300.285 (2010) (defining bullying as "any intentional, electronic, written, verbal or physical act" when the act "physically harms," "substantially interfere[s] with a student's education," or is "so severe, persistent or pervasive that it creates an intimidating or threatening educational environment").

19. See Sanford Levinson, *What Do Lawyers Know (And What Do They Do with Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 452 (1985) ("I have no arguments for the objectivity of moral judgments except moral arguments, no argument for the objectivity of interpretive judgments except interpretive arguments.") (quoting Ronald Dworkin); Karl N. Llewellyn, *Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 441, 448 (1930) ("The measure of a 'rule,' the measure of a right, becomes what can be done about the situation.").

20. Cf. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 168 (2011) (discussing the effect of notification laws on human behavior in the sex offender registry context).

of bullying legislation in the twelve states that have applied such laws to LGBT students. Lastly, it describes the efforts of the current presidential administration to ameliorate the problem of LGBT bullying, and the two LGBT bullying bills introduced by members of Congress.

### A. *The Problem of LGBT Student Bullying*

LGBT youth frequently encounter a discouraging and often dangerous school environment without sufficient legal protection. According to a 2009 study, 84.6 percent of LGBT students have been verbally harassed, 40.1 percent have been physically harassed, and 18.8 percent have been physically assaulted because of their LGBT status.<sup>21</sup> These students are uniquely vulnerable to harassment because nonconformity with heterosexual norms is a cause of student bullying.<sup>22</sup> School bullies commonly focus on LGBT and LGBT-perceived students because bullies target norm violators who appear too feminine or too masculine.<sup>23</sup>

The traumatic bullying experienced by many LGBT youth has debilitating psychological ramifications. Between 2006 and 2008, 20 percent of lesbian and gay youth reported that they had attempted suicide,<sup>24</sup> while only 4 percent of heterosexual youth reported having done the same.<sup>25</sup> Bullying may also lead to increasingly violent actions by the bully if schools do not address harassment before such behavior becomes severe or pervasive.<sup>26</sup>

Different aspects of harassment, including frequency and severity, delineate the line between bullying and mere teasing.<sup>27</sup> While

---

21. 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 AND STRAIGHT EDUCATION NETWORK 26–27 (2010), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1675-2.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf).

22. See Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in our Nation's Schools*, 86 IND. L.J. 827, 836 (2011).

23. See *id.* at 842–43; see also Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 L. & SEXUALITY 271, 276 (2003) (stating that the Boy Scouts of America's "gay exclusion litigation . . . [made it] easier for the average citizen to notice how masculinity is constructed around the exclusion of sissies and the heteronorming of role models").

24. Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 PEDIATRICS 896, 899 (2011).

25. *Id.*

26. *Id.*; see also Daniel O'Donnell, *LGBT New York Legislation*, 4 ALB. GOV'T L. REV. 625, 639 (2011).

27. Higdon, *supra* note 22, at 834–35.

this Note defines bullying as any severe or pervasive electronic, written, verbal, or physical act by one student toward another student based on an actual or perceived trait that causes the student to reasonably fear for his or her person, property or mental health,<sup>28</sup> states use different terms to target similar abuse. For example, South Carolina prohibits bullying that causes a “substantial disruption,”<sup>29</sup> while North Carolina prohibits bullying that causes a “hostile environment.”<sup>30</sup> This Note uses the terms “severe” and “pervasive” because the Supreme Court has held that a school district can be liable for damages for peer-to-peer harassment when the school district acts with “deliberate indifference” to acts that are “severe, pervasive, and objectively offensive.”<sup>31</sup>

LGBT students’ peers are not solely responsible for peer-to-peer bullying. In areas where LGBT bullying is most pervasive, local school officials may be unresponsive because of the perception that it is futile to penalize LGBT harassment or the belief that LGBT students deserve abuse.<sup>32</sup> The existence of state-funded education programs that demean gay and lesbian students confirms that some adults facilitate peer-to-peer LGBT discrimination.<sup>33</sup> Administrators have commented that gay-related slurs are so frequent that such harassment is simply a part of childhood culture.<sup>34</sup> Some teachers perceive LGBT bullying as a normal part of childhood that does not warrant a response.<sup>35</sup> Moreover, teachers and guidance counselors themselves may harbor prejudice toward taunted students.<sup>36</sup> Gay and lesbian students may also be reluctant to report being bullied

---

28. This definition is based on an Iowa statute, IOWA CODE ANN. § 280.28 (2011), which is representative of other states’ statutes.

29. S.C. CODE ANN. § 59-63-120(1)(b) (Supp. 2011) (defining substantial disruption as the benchmark of bullying).

30. N.C. GEN. STAT. ANN. § 115C-407.15(a)(2) (West 2011) (defining a hostile environment as the benchmark of bullying).

31. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999).

32. See Higdon, *supra* note 22, at 836, 844 (citing ELIZABETH J. MEYER, GENDER, BULLYING, AND HARASSMENT: STRATEGIES TO END SEXISM AND HOMOPHOBIA IN SCHOOLS 23 (2009)); see also *Nabozny v. Podlesny*, 92 F.3d 446, 452 (7th Cir. 1996) (detailing the futility of one student’s decision to report repeated incidents of bullying to school officials).

33. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1359–60 (2000) (discussing public school education programs that advocated against acceptance of the LGBT community).

34. See Higdon, *supra* note 22, at 844.

35. See *id.*

36. See, e.g., Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 138–91 (2010) (discussing common societal intuitions and prejudices against LGBT individuals); Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays’ Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 187–88 (2004).

for fear that reporting would be an admission that they are LGBT individuals.<sup>37</sup> Such reluctance is unique to members of the LGBT community because reporting bullying based on discernible characteristics such as race, class, religion, physical appearance, and social circle generally does not include the additional fear of confirming oneself as a member of that group.<sup>38</sup> Even if a student does not report being bullied, teachers may witness bullying in classrooms, hallways, and on school grounds that they can and should report.<sup>39</sup>

Policymakers and academics have responded to the problem with a wide range of solutions and suggestions. Some have chosen to criminalize student bullying and administrators' failure to stop peer-to-peer bullying.<sup>40</sup> Others, preferring a soft power, extralegal response, have chosen to facilitate education that teaches students to stand up for each other.<sup>41</sup> There are also statutes that fall somewhere in the middle of the spectrum.<sup>42</sup> These laws try to improve the enforcement mechanisms for peer-to-peer bullying provisions that already exist.<sup>43</sup> A federal bullying notification law would improve the effectiveness of existing state bullying statutes.

---

37. See R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58, 100 (2011).

38. But see William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997) (discussing the similarity between religious and sexual orientation identity).

39. Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 159 (2009) (describing a situation where students and teachers who witnessed instances of bullying did not intervene).

40. Susan W. Brenner & Megan Rehberg, "Kiddie Crime"? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 79–82 (2009); Scott Farbish, Note, *Sending the Principal to the Warden's Office: Holding School Officials Criminally Liable for Failing to Report Cyberbullying*, 18 CARDOZO J.L. & GENDER 109, 127 (2010).

41. See Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 438 (2012).

42. Lisa C. Connolly, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 259 (2012).

43. See *id.* at 260.

### B. Attempts at Redress: State Governments

Bullying laws exist in forty-nine states,<sup>44</sup> though only twelve states prohibit bullying based on LGBT status.<sup>45</sup> These twelve states represent a slow increase in legislative protections for LGBT youth.<sup>46</sup> These statutes provide varying levels of protection, which range from requirements that local towns develop their own policies<sup>47</sup> to requirements that towns have a method of reporting incidents to school officials who would collect and maintain bullying data.<sup>48</sup> There appears to be three general levels of state protection. Illinois, New Mexico, New York, and Vermont prohibit LGBT bullying without designating specific policies and remedies.<sup>49</sup> North Carolina and Washington designate a school official who is responsible for receiving reports of bullying bias.<sup>50</sup> California, Iowa, Maryland, New Hampshire, New Jersey, and Oregon have enacted the most robust statutes, which include data collection or direct reporting requirements.<sup>51</sup>

Three states are representative of the three levels of legislative reform. The Illinois statute merely requires towns to develop their own policies;<sup>52</sup> North Carolina proactively requires its teachers to

44. Montana does not have a bullying law but the other states provide varying levels of bullying protections. *See, e.g.*, SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES (2012), available at [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf); *Policies & Laws*, STOPBULLYING.GOV, [www.stopbullying.gov/laws](http://www.stopbullying.gov/laws) (last visited Aug. 14, 2012); *see also* BULLY POLICE USA, <http://www.bullypolice.org/> (last visited Aug. 14, 2012).

45. *See* CAL. EDUC. CODE § 234.1 (West Supp. 2012); 105 ILL. COMP. STAT. ANN. § 5/27-23.7 (West Supp. 2012); IOWA CODE ANN. § 280.28 (2011); MD. CODE ANN., EDUC. § 7-424.1 (West 2008); N.H. REV. STAT. ANN. § 193-F:2 (2008 & Supp. 2011); N.J. STAT. ANN. § 18A:37-14 (West Supp. 2012); NY EDUC. LAW §§ 11-12 (McKinney Supp. 2012); N.C. GEN. STAT. § 115C-407.15 (2011); OR. REV. STAT. § 339.351 (2011); VT. STAT. ANN. tit. 16, §§ 11, 165 (2004 & Supp. 2011); WASH. REV. CODE. § 28A.300.285 (2010); N.M. CODE R. §§ 6.12.7.1-8 (2006); *see also* Jason A. Wallace, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 751 (2011) (collecting certain statutes).

46. *See* Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 839 (noting that six states and the District of Columbia already had such legislation by 2003).

47. N.M. CODE R. §§ 6.12.7.1-8 (2006).

48. IOWA CODE ANN. § 280.28 (2011).

49. *See* 105 ILL. COMP. STAT. ANN. § 5/27-23.7 (West Supp. 2012); N.Y. EDUC. LAW §§ 11-12 (McKinney Supp. 2012); VT. STAT. ANN. tit. 16, §§ 11, 165 (2004 & Supp. 2011); N.M. CODE R. §§ 6.12.7.1-8 (2006).

50. N.C. GEN. STAT. § 115C-407.15(d) (2011); WASH. REV. CODE § 28A.300.285 (2010).

51. CAL. EDUC. CODE § 234.1 (West Supp. 2012); IOWA CODE ANN. § 280.28 (2011); MD. CODE ANN., EDUC., § 7-424.1 (West 2008); N.H. REV. STAT. ANN. § 193-F:4 (2008 & Supp. 2011); N.J. STAT. ANN. § 18A:37-15(6) (West Supp. 2012); OR. REV. STAT. § 339.356 (2011).

52. In Illinois, the statute protects students from bullying based on their LGBT status, but the protection is a top-down directive limited to requiring towns to develop their own approach to LGBT bullying prevention. 105 ILL. COMP. STAT. ANN. § 5/27-23.7 (West Supp.

inform the principal about bullying;<sup>53</sup> New Hampshire specifies many protections but leaves its students at a loss if they want to enforce violations of the bullying law.<sup>54</sup> Like the New Hampshire statute, the New Jersey bullying law has many protective measures but misses a key step in providing school district liability for the benefit of LGBT litigants.<sup>55</sup> In New Jersey, the principal must investigate certain bullying incidents and report the investigation results to the superintendent, who in turn reports the findings to the Board of Education. There is no statutory requirement, however, that this information be disseminated to the public for potential litigants to recognize when a discriminatory custom exists and rely on that information for litigation.<sup>56</sup>

On July 1, 2012, Oregon's new bullying law was enacted, following the New Jersey statute in compelling school employees to report

---

2012). The law provides limited protection because it only requires that each school district write an anti-bullying policy to be updated every two years. *Id.* There is no requirement that people report incidents to the school district administrators. *Id.* Lastly, the only oversight mechanism is a vague requirement that the State Board of Education must monitor the school district's implementation of the policies. *Id.*

53. The North Carolina LGBT bullying statute incorporates a bottom-up approach, in that it requires teachers to report incidents to another school official. N.C. GEN. STAT. § 115C-407.15(d) (2011). However, there is no requirement that the governing municipal board receive any notification. The statute declares: "A school employee who has witnessed or has reliable information that a student or school employee has been subject to any act of bullying or harassing behavior shall report the incident to the appropriate school official." *Id.* A student may benefit from a notification to an appropriate school official, but any such official could have the same immunity defenses as teachers to a claim for liability, such that notification would not enhance the student's legal recourses.

54. New Hampshire has implemented a more progressive bullying law. N.H. REV. STAT. ANN. § 193-F:1-5 (2008 & Supp. 2011). The New Hampshire statute includes a top-down directive to local officials to develop a bullying policy and specifies how bullying should be defined. *Id.* § 193-F:4. The law also requires that parents be notified of the incident within 48 hours, unless a waiver is required in the best interest of one of the students. *Id.* §§ 193-F:4(h)–(i). The statute also includes a bottom-up requirement that a principal report all relevant incidents to a superintendent or a superintendent's designee. *Id.* § 193-F:4(l). Unlike similar state laws, the law requires the school district to submit an annual report to the Department of Education on its incidents of bullying. *Id.* § 193-F:6.

Although the New Hampshire law appears to be a victory for supporters of LGBT bullying legislation, the legislature significantly reduced the law's impact by limiting its enforcement mechanisms. First, the legislation included a provision reiterating the immunity of school administrators and the school district. *Id.* § 193-F:7. Second, in case the immunity provision does not cover an unforeseen lawsuit, an additional provision establishes that nothing in the legislation was intended to create a private right of action to enforce the legislation. *Id.* § 193-F:9. The lack of enforcement mechanisms is ubiquitous across states' bullying legislation and is consistent with current legal precedent concerning the extent to which municipalities can be held liable for their impotence or indifference when confronted with the challenges faced by their LGBT youth. See Wallace, *supra* note 45, at 750–51.

55. See N.J. STAT. ANN. §§ 18A:37-15(6)(b)–(c) (West Supp. 2012).

56. See *id.*

acts of LGBT bullying to a designated person at each school.<sup>57</sup> The Oregon law also includes the school district in the process of determining who receives the reports of harassment<sup>58</sup> and requires that a school district official be responsible for implementing antidiscrimination policies.<sup>59</sup> This law, while a good step forward, is not wholly sufficient for establishing school district awareness and liability because the statute allows the school district to designate a non-school district official to receive the reports of bullying.<sup>60</sup> The New Jersey and Oregon statutes should serve as initial, though imperfect, models for a federal notification requirement.

### C. Attempts at Redress: Federal Government

The importance of addressing the LGBT bullying problem at the local level is heightened by the fact that federal law has yet to protect students from harassment based on their LGBT status.<sup>61</sup> In September 2011, the United States Commission on Civil Rights published a report that found that “federal civil rights laws do not protect students from peer-to-peer harassment that is solely on the basis of sexual orientation.”<sup>62</sup> Moreover, the Department of Education (DOE) does not keep records of harassment based on LGBT status, although it does keep records for harassment based on gender, race, religion, and disability complaints from individuals who voluntarily file a discrimination complaint with the DOE Office for Civil Rights.<sup>63</sup> Recently, however, the Executive Branch began to use its authority under Title IX to protect LGBT students, and members of Congress have proposed bills that, if passed, would provide protection for LGBT students.

Although Title IX could be used to combat some LGBT bullying, there remains a practical gap between the gender discrimination targeted by Title IX and the range of discrimination affecting the LGBT community. Title IX gives the Executive authority to combat

---

57. S.B. 240, 76th Leg. Assembly (Or. 2011) (to be codified at OR. REV. STAT. § 339.356); N.J. STAT. ANN. § 18A:37-15 (West Supp. 2012).

58. S.B. 240, 76th Leg. Assembly (Or. 2011) (to be codified at OR. REV. STAT. §§ 339.356(2)(f)(A)–(B), (2)(g)).

59. *Id.* (to be codified at § 339.356(2)(n)).

60. *Id.* (to be codified at § 339.362(2)(a)).

61. See UNITED STATES COMMISSION ON CIVIL RIGHTS, PEER-TO-PEER VIOLENCE AND BULLYING: EXAMINING THE FEDERAL RESPONSE 88 (2011), available at [www.usccr.gov/pubs/2011/statutory.pdf](http://www.usccr.gov/pubs/2011/statutory.pdf).

62. *Id.*

63. *Id.* at 33–35; see also Office of Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, DEPARTMENT OF EDUCATION, <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited May 27, 2012).

gender-based bullying and to pressure school districts to protect students by requiring that federal agencies financing education establish rules prohibiting certain types of discrimination.<sup>64</sup> One Department of Justice Civil Rights Division official proposed that the federal government should protect LGBT students from bullying because “today’s bullies become tomorrow’s hate crime defendants, and we’re doing all that we can to ensure that school districts take reports of bullying and harassment seriously.”<sup>65</sup> Two months later, the Department of Justice reiterated that it is important to hold school districts liable for LGBT discrimination under Title IX’s prohibition of harassment based on gender stereotypes.<sup>66</sup> However, the DOE and other agencies do not treat all LGBT discrimination as gender-based discrimination.<sup>67</sup>

Two bills currently pending in Congress address LGBT bullying: the Student Non-Discrimination Act of 2011 (SNDA) and the Safe Schools Improvement Act of 2011 (SSIA).<sup>68</sup> The SNDA protects both LGBT and LGBT-perceived students from harassment that is “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in [a school program] . . . or to create a hostile or abusive educational environment . . . including acts of verbal, non-verbal, or physical aggression . . . .”<sup>69</sup> The SNDA would be enforced through a federal agency determination, with Executive approval, to restrict educational funding to programs that violate non-discrimination laws.<sup>70</sup> If the agency determines that its funds are going to such programs, it may refuse to continue funding the program, and must report to Congress its decision to restrict funding.<sup>71</sup>

The SSIA aims to prevent bullying based on a number of characteristics, including sexual orientation and gender identity.<sup>72</sup> The

---

64. 20 U.S.C. §§ 1681, 1682 (West 2012).

65. Matt Nosanchuk, Senior Counselor to Assistant Attorney General for the Civil Rights Division, Keynote Address at the Central District of Illinois Hate Crimes Summit 6 (Jan. 10, 2012), <http://www.justice.gov/crt/about/crm/documents/speechpeoria.pdf>; see also Matt Nosanchuk, *On the Road in Peoria: Combating Hate, One Community at a Time*, WHITE HOUSE (Feb. 6, 2012 3:39 PM EST), <http://www.whitehouse.gov/blog/2012/02/06/road-peoria-combating-hate-one-community-time>.

66. Erica Demarest, *Justice Department’s LGBT Liaison Talks Bullying, Hate Crimes*, WINDY CITY TIMES (Mar. 14, 2012), <http://www.windycitymediagroup.com/lgbt/Justice-Departments-LGBT-liaison-talks-bullying-hate-crimes/36686.html>.

67. Piacenti, *supra* note 37, at 63–67.

68. Student Non-Discrimination Act of 2011, S. 555, 112th Cong. (2011); Safe Schools Improvement Act of 2011, S. 506, 112th Cong. (2011).

69. S. 555, §§ 2(b)(2), 3(a)(3).

70. *Id.* §§ 4–5.

71. *Id.*

72. S. 506, § 2(5).

SSIA would require states to publicly and biennially report on “incident reports by school officials, anonymous student surveys, and anonymous teacher, administrator, . . . and other school personnel surveys reported to the State on a school-by-school basis . . . .”<sup>73</sup> The SSIA would also require each school to annually report to parents and students the “numbers and nature of bullying and harassment incidents.”<sup>74</sup> Although these efforts would educate parents about what each school’s officials know, this requirement would not necessarily increase each school district administration’s awareness of the extent of bullying in its halls if the district administrators do not receive these reports. Moreover, the SSIA’s delegation of the reporting requirement to local school officials insulates school district administrations from the obligation to become aware of the bullying in the schools that they supervise. Although these efforts respond to both the problem of bullying in schools and the national interest in teaching children to respect each other’s differences,<sup>75</sup> without a federal law that includes a notification requirement, LGBT students may not use the courts as effectively to protect their right to equal protection.

## II. SCHOOL DISTRICT LIABILITY AND THE EQUAL PROTECTION CLAUSE

This section lays out the legal arguments necessary to successfully litigate against school districts that do not treat LGBT-bullied students equally with other bullied students. The section begins by describing the legal framework under which attorneys can sue school districts for equal protection violations. It then explains how Title VII and Title IX have influenced the equal protection analysis. Specifically, it examines how the courts expanded the traditional standard for an equal protection violation—the discriminatory purpose standard—to include deliberate indifference. Subsequently, this section evaluates the ten federal opinions that have addressed this type of action and provides lessons from these rulings about how to establish liability. Lastly, this section discusses jury verdicts and settlement agreements in LGBT harassment cases to demonstrate why such litigation can be lucrative for both LGBT students and attorneys.

---

73. *Id.* at § 3. Note that this report would be made directly to the State, rather than to the school district.

74. *Id.*

75. See Thomas E. Perez, *Clarence Clyde Ferguson, Jr. Annual Lecture: Civil Rights in 2011 and Beyond*, 54 HOWARD L.J. 425, 432–34 (2011).

## A. Monell Liability

Three legal provisions render school districts liable for violating students' right to equal protection: the Equal Protection Clause, 42 U.S.C. § 1983, and municipal liability as established in *Monell v. Department of Social Services*.<sup>76</sup> After the states ratified the Fourteenth Amendment, the federal government enacted the Ku Klux Klan Act, which includes language now codified as § 1983, to create a private right to enforce the Equal Protection Clause.<sup>77</sup> This statute allows citizens to sue any "person" who acts under the color of state authority to deprive citizens of their rights under the Constitution.<sup>78</sup> In *Monell*, the Supreme Court held that § 1983 liability extends to "municipalities and other local government units."<sup>79</sup> Because school districts are local government units, LGBT students can sue towns or school boards under § 1983 for depriving them of the constitutional right to equal protection.<sup>80</sup>

Under current law, however, towns or school boards can escape liability for the inaction of its teachers and administrators who ignore peer-to-peer LGBT bullying. The Supreme Court held in *Monell* that municipal liability may exist if a town has a policy or custom of discrimination that leads to a constitutional tort.<sup>81</sup> However, it also precluded municipal liability under *respondeat superior*, which would hold a town liable for the actions of its employees.<sup>82</sup> Thus, a court can find a town liable for a policy or custom of discrimination based only on the actions of an administrator with authority to set a policy or establish a custom,<sup>83</sup> but not based on the actions of employees whose conduct is unauthorized.<sup>84</sup> Typically, a "policy" is something expressed by the municipality or a municipal

---

76. U.S. CONST. amend. XIV § 1; 42 U.S.C. § 1983 (2006); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 658–59 (1978).

77. See Civil Rights Act of 1871, ch. 31, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1981, 1981A, 1983, 1988); Steven Stein Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. REV. 693, 694 (1993).

78. See § 1983.

79. See *Monell*, 436 U.S. at 690.

80. See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007).

81. See *Monell*, 436 U.S. at 690. A "constitutional tort" involves "the use of compensatory damages to vindicate constitutional violations." See, e.g., John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 100 (1989).

82. See *Monell*, 436 U.S. at 690.

83. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986) (holding that the town could be liable for the action of a County Prosecutor if that County Prosecutor was given the power to decide what are the town's policies or customs).

84. See *St. Louis v. Praprotnik*, 485 U.S. 112, 112–13 (1988) (plurality opinion).

policymaker, while a “custom” is something that is not expressed but is sufficiently pervasive to have the effect of a policy.<sup>85</sup>

Students who experience discriminatory policies or customs and wish to bring equal protection claims against towns or school districts may face a host of social and legal barriers. As an initial matter, students might be reluctant to report harassment to teachers, school officials, or school district administrators.<sup>86</sup> LGBT students might be particularly reluctant to draw attention to their sexual orientation if they live in an area where residents view their sexual orientation or gender identity as shameful.<sup>87</sup> Even students and families who are willing to sue might not have sufficient knowledge about other students’ bullying experiences to claim that the school district treats some victims of bullying differently from others.<sup>88</sup> Because school districts and their employees do not have a general duty under federal law to protect students from one another’s abuse, they will only be found liable when students can show that school districts responded differently to LGBT bullying than to non-LGBT bullying.<sup>89</sup> Finally, even when students can show that LGBT bullied students were treated differently than non-LGBT bullied students, the students still may not be able to overcome school administrators’ immunity defenses,<sup>90</sup> or be able to prove that the school districts were aware of the bullying.<sup>91</sup>

When students bring equal protection claims under § 1983, courts may determine, first, whether a student, or a class of students, was treated differently from other similarly situated students;<sup>92</sup> second, what level of scrutiny the court should apply to the

---

85. See *Pembaur*, 475 U.S. at 481–82 n.10; Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 76–77 (1998).

86. See James D. Unnever & Dewey G. Cornell, *Middle School Victims of Bullying: Who Reports Being Bullied?*, 30 AGGRESSIVE BEHAVIOR 373, 373 (2004), available at <http://cehs15.unl.edu/edps/brnet/files/2007/05/whoreportsbullying.pdf>.

87. Cf. Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 432–33 (2009).

88. See *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 975 (E.D. Mich. 2006) (denying the plaintiff’s § 1983 claim because the plaintiff failed to produce evidence that other similarly situated individuals existed or were treated differently).

89. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 193–94 (1989).

90. See *Anderson v. Creighton*, 483 U.S. 635, 635–36 (1987) (establishing qualified immunity for certain government actions).

91. See *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1124 (E.D. Cal. 2011); *Martin*, 419 F. Supp. 2d at 973–75; *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 875–76 (N.D. Ohio 2003).

92. See *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000).

government policy;<sup>93</sup> and, third, whether the government has a justified interest in treating that student or that class of students differently.<sup>94</sup> To violate the Equal Protection Clause, a policy must have a discriminatory intent, not merely a disparate impact.<sup>95</sup>

Students who are bullied because of their LGBT or LGBT-perceived status can use § 1983, *Monell*, and the Equal Protection Clause to satisfy the three steps in the equal protection analysis. LGBT students qualify as a class of persons who may be treated differently.<sup>96</sup> Although the precise standard of review remains unclear,<sup>97</sup> even applying the most deferential level of scrutiny—rational basis review—an LGBT student can still succeed by demonstrating that the school administration does not have a rational basis for treating LGBT bullying differently from other bullying.<sup>98</sup>

### *B. Title VII and Title IX Impact on Equal Protection for LGBT Students*

The standard for school district liability in an equal protection claim for LGBT bullying is not limited to discriminatory purpose;<sup>99</sup> liability also extends to deliberate indifference—a lower threshold than is normally applied to equal protection claims.<sup>100</sup> Although the term deliberate indifference originated in Eighth Amendment cases and was not developed for Equal Protection purposes,<sup>101</sup> the

93. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

94. *See* *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964).

95. *See* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272–73 (1979); *Washington v. Davis*, 426 U.S. 229, 240, 242 (1976).

96. *See* *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Romer v. Evans*, 517 U.S. 620, 634–36 (1996); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134–35 (9th Cir. 2003). Transgender students may face different legal issues when asserting their status as a class of persons similarly situated but treated differently. *See* *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658–59 (S.D. Tex. 2008) (collecting and distinguishing cases).

97. *See* *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2266 (2002) (discussing *Romer*, 517 U.S. 620).

98. *See* *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (1990).

99. *See* *Flores*, 324 F.3d at 1135 (noting that the plaintiffs must show either that the defendants intentionally discriminated or acted with deliberate indifference); *see also* *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140 (2d Cir. 1999); *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

100. *See* *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Feeney*, 442 U.S. at 272 (both cases noting that the standard for equal protection cases is discriminatory purpose); *see also* Robert Nelson, Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 334–35 (1986).

101. *See* U.S. CONST. amend. XIII; *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104 (1977).

Supreme Court has used the term deliberate indifference when assessing sex-based discrimination under Title IX.<sup>102</sup> The lower courts subsequently incorporated the deliberate indifference standard into school district liability for LGBT bullying.<sup>103</sup>

To understand how LGBT bullying cases are litigated, it is first necessary to understand how Title VII<sup>104</sup> and Title IX<sup>105</sup> jurisprudence has influenced lower courts' treatment of school district liability for LGBT bullying. Title VII of the Civil Rights Act of 1964 prohibits employer discrimination "because of" an employee's sex.<sup>106</sup> Title IX of the Education Amendments of 1972 prohibits discrimination "on the basis of sex" in schools that receive federal funding.<sup>107</sup> The Title VII term "because of . . . sex"<sup>108</sup> and the Title IX term "on the basis of sex"<sup>109</sup> are inextricably linked by statutory and common law.<sup>110</sup> Title VII defines both terms using the same language,<sup>111</sup> which has led courts to use the two terms synonymously.<sup>112</sup> The similarity between these terms has caused courts to look to both Title VII and Title IX cases for guidance when deciding what type of sex-based discrimination is prohibited and determining the threshold of harassment that triggers each statute.<sup>113</sup>

The Supreme Court has established four conditions that must be satisfied for school districts to be held liable for sex-based harassment under Title IX.<sup>114</sup> First, the school district must have "actual knowledge" of the sexual harassment.<sup>115</sup> Second, the school district

102. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

103. *See Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003).

104. 42 U.S.C. § 2000e-2 (2006).

105. 20 U.S.C. § 1681 (2006).

106. *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

107. 20 U.S.C. § 1681(a) (2006); *see also* Barbara Havelková, Commentary, *Competences of the Union and Sex Equality: A Comparative Look at the EU and the US*, 107 MICH. L. REV. FIRST IMPRESSIONS 139, 139 (2009), <http://www.michiganlawreview.org/firstimpressions/vol107/havelkova.pdf>.

108. 42 U.S.C. § 2000e-2(a)(1) (2006).

109. 20 U.S.C. § 1681(a) (2006).

110. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (using the Title VII reasoning in *Oncale v. Sundowner Offshore Servs., Inc.* to determine what action is prohibited in a Title IX case); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) ("It is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.")

111. 42 U.S.C. § 2000e(k) (2006) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to [specific conditions.]").

112. *See Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011).

113. *See Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 651 (1999); *Metro. Sch. Dist. Perry Twp.*, 128 F.3d at 1023.

114. *See Davis*, 526 U.S. at 650.

115. *Id.*

must be “deliberately indifferent” to the sexual harassment.<sup>116</sup> Third, the harassment must be “severe, pervasive, and objectively offensive.”<sup>117</sup> Fourth, the harassment must deprive a student of educational opportunities.<sup>118</sup> It is inapposite, however, to export the fourth prong from its Title IX context to a constitutional analysis of an equal protection violation, because the right to equal protection under the law is a general right not limited by whether a person can persevere when confronted with unequal treatment.<sup>119</sup>

Despite how beneficial Title VII and Title IX have been for establishing judicial precedent regarding liability for LGBT bullying, students cannot rely on these doctrines alone. The rationale supporting Title VII and Title IX does not completely apply to student-to-student LGBT harassment. In the Title VII claim presented in *Oncala v. Sundowner Offshore Oil Services, Inc.*, the Supreme Court held that Title VII protects employees from same-sex harassment.<sup>120</sup> The Supreme Court limited this protection to situations involving an individual’s desire or hatred of another based on that person’s sex.<sup>121</sup> Therefore, even if a student satisfies the four elements of school district liability for in-school harassment, the Title VII rationale would not protect an LGBT student from harassment based on LGBT status.<sup>122</sup> Instead, the student must demonstrate that the harassment was based on the student’s sex, not sexual orientation.

### C. Judicial Precedent on School District Liability Under § 1983

The federal judiciary has decided ten cases that address the summary judgment standard for a § 1983 equal protection claim that a town or school district did not protect a student from LGBT bullying.<sup>123</sup> In the three cases where the students successfully defeated

---

116. *Id.*

117. *Id.*

118. *Id.*

119. Predicating Title IX violations on a deprivation of educational opportunities makes sense because Title IX can only be enforced against schools that receive federal funding. The purpose of federal funding is to provide students with access to education. Consequently, it would be inappropriate for a school to receive federal funding and then deprive a student of the purpose of that funding. The Equal Protection Clause, however, applies to all citizens regardless of access to education. Therefore, the fourth prong of the Title IX assessment is inapplicable in the context of an equal protection violation.

120. 523 U.S. 75, 79–80 (1998); see also Yvonne Zylan, *Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment*, 39 U. MICH. J.L. REFORM 391, 393 n.9 (2006).

121. Zylan, *supra* note 120, at 393 n.9.

122. See *id.*

123. See *supra* note 13 (collecting cases).

the school districts' summary judgment motion, the students were able to show prolonged, extreme harassment with minimal response from the school district.<sup>124</sup> In two cases, the students lost because they did not plead sufficient facts on the merits.<sup>125</sup> In four cases, the students lost because they did not plead any facts alleging the school district's knowledge of LGBT bullying.<sup>126</sup> In one case, the student lost because the Court held that Title IX precludes a § 1983 claim for a student's equal protection violation.<sup>127</sup> These ten cases provide lessons about what fact patterns are sufficiently severe or pervasive for future litigants to successfully sue school districts that did not protect them from LGBT bullying. These cases also provide insight into the potential value of a federal bullying notification law.

### 1. Lessons from Students' Legal Victories

The cases where plaintiffs defeated school districts' summary judgment motions share some common factual characteristics. These cases involved continuous name-calling with anti-LGBT slurs, often a student-to-student physical attack, and two or more years of harassment with a minimal response from the school districts. These common factors gave rise to the courts' determination that a jury could find a school district liable for deliberate indifference to the LGBT bullying.

In 1996, *Nabozny v. Podlesny* became the first case in which a federal court vindicated a student's equal protection right in a § 1983 suit against a school district that failed to protect a student from

---

124. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132–33, 1138 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446, 451–53, 460 (7th Cir. 1996); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953–54 (S.D. Ind. 2007).

125. *Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at \*12 (S.D. Tex. Feb. 21, 2012); *Shaposhnikov v. Pacifica Sch. Dist.*, No. C 04-01288 SL, 2006 WL 931731, at \*1, \*9 (N.D. Cal. Apr. 11, 2006).

126. *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1118 (E.D. Cal. 2011); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL, 2006 WL 851118, at \*4, \*8 (D. Idaho Mar. 29, 2006); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871, 875–76 (N.D. Ohio 2003).

127. *Moore v. Marion Cmty. Sch. Bd. of Educ.*, No. 1:04-CV-483, 2006 WL 2051687 at \*7, \*10 (N.D. Ind. July 19, 2006). The Supreme Court subsequently rejected the argument that Title IX precludes a § 1983 equal protection action in *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258–59 (2009).

discrimination based on LGBT status.<sup>128</sup> Jamie Nabozny was subjected to verbal harassment and physical abuse throughout his middle school and high school career.<sup>129</sup> His peers mistreated him because of his sexual orientation.<sup>130</sup> Nabozny's verbal harassment included references to him as a "faggot."<sup>131</sup> His physical abuse included: striking him, spitting on him, pushing him to the ground, holding him down to perform a mock rape on him in front of his classmates, hitting him in the leg while he was using the urinal and causing him to fall into the urinal, urinating on him, throwing metal nuts and bolts at him while he was on the school bus, and repeatedly kicking him in the stomach for over five minutes.<sup>132</sup> This harassment lasted six years.<sup>133</sup>

Although school officials took some minimal steps to protect Nabozny from abuse, such as placing two bullies in detention, they failed to take adequate steps to protect him from future harm and even belittled his predicament.<sup>134</sup> One school official remarked in response to the mock rape incident that "boys will be boys" and that, as a gay male, he should "expect" such treatment from his peers.<sup>135</sup> Another school official responded to the story of Nabozny enduring five minutes of kicking by laughing and saying that gay people deserve such treatment.<sup>136</sup>

This case triggered equal protection analysis only because, at the time, there was a state statute that protected public school students from discrimination based on sex and sexual orientation.<sup>137</sup> Because of this law, Nabozny's school enacted a policy of protecting students from peer-to-peer sexual harassment.<sup>138</sup> The Seventh Circuit highlighted this policy and stated that the Equal Protection Clause required the school to enact the policy equally and without

---

128. 92 F.3d at 449.

129. *Nabozny v. Podlesny*, 92 F.3d 446, 450–53 (7th Cir. 1996).

130. *Id.*

131. *Id.* at 451.

132. *Id.* at 451–53.

133. *Id.*

134. *Id.* at 451.

135. *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996).

136. *Id.* at 452.

137. *Id.* at 453; Wisc. Stat. § 118.13(1) (2009–10) (“[N]o person may be denied . . . participation in . . . any curricular [or] extracurricular . . . activity . . . because of the person’s sex . . . [or] sexual orientation.”).

138. *Nabozny*, 92 F.3d at 453.

“invidious discrimination.”<sup>139</sup> *Nabozny*’s holding that an existing policy must be enacted indiscriminately is binding precedent within the Seventh Circuit and has been relied on in other jurisdictions.<sup>140</sup>

In *Flores v. Morgan Hill Unified School District*, several students sued the school district for LGBT bullying that occurred over a seven-year period.<sup>141</sup> Incidents included a student who was harassed with pornography and received notes saying “Die, dyke bitch,” and physical beatings that led to hospitalization.<sup>142</sup> The court held that the school district’s claim that it believed it had been enforcing its non-harassment policies, combined with its lack of a response to LGBT bullying, could lead a reasonable jury to conclude that the school district was deliberately indifferent to LGBT bullying.<sup>143</sup>

In *Seiwert v. Spencer-Owen Community School Corporation*, the student was kicked, threatened, repeatedly called “faggot,” and received a death threat communicated through his sister when he was absent from school.<sup>144</sup> This treatment lasted two years.<sup>145</sup> The court held that the plaintiff presented sufficient evidence for a jury to find that the school district violated the student’s equal protection rights,<sup>146</sup> concluding that the school district’s departure from its bullying policies in response to that student’s two death threats and continual harassment was sufficiently egregious that his equal protection claim for deliberate indifference could proceed.<sup>147</sup>

## 2. Lessons from Students’ Legal Defeats

The two cases where students failed to overcome school districts’ summary judgment motions also share common characteristics. Both cases involved continuous anti-LGBT name-calling but only one incident of physical violence. Both cases also involved harassment that continued for approximately two years—a shorter duration than the successful cases discussed above. In these two cases, the quality of the schools’ responses to the harassment was quite different. In *Estate of Brown v. Ogletree*, the school district expressed

---

139. *Id.* (quoting *Harris v. McRae*, 48 U.S. 297, 322 (1980)).

140. See *T.E. v. Grindle*, 599 F.3d 583, 588 (7th Cir. 2010); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003); *Doe v. Galster*, No. 09-C-1089, 2011 WL 2784159, at \*7–8 (E.D. Wis. July 14, 2011).

141. 324 F.3d at 1132.

142. *Id.* at 1133.

143. *Id.* at 1135.

144. 497 F. Supp. 2d 942, 951, 1132 (S.D. Ind. 2007).

145. *Id.* at 947.

146. *Id.* at 954.

147. *Id.* at 952.

indifference toward the student's harassment. In *Shaposhnikov v. Pacifica School District*, the school district lacked a sufficient response to the student's and father's complaints. These cases teach an important lesson: school districts will only be held liable for deliberate indifference when its members know about LGBT bullying and the district administrators respond in a manner that treats LGBT students differently from non-LGBT students. This observation, combined with the fact that four of the ten federal cases were dismissed because the school district was not sufficiently aware of the bullying, provides proof of the need for bullying notification laws. Notification laws would help ensure that school districts are aware of bullying problems and that LGBT students have access to the information necessary to demonstrate whether their school district responds differently to LGBT bullying than to non-LGBT bullying.

In *Ogletree*, the school district's motion for summary judgment was granted despite its awareness of, and lack of response to, more than two years of LGBT bullying.<sup>148</sup> The student, Asher Brown, committed suicide following peer-to-peer bullying about his sexual orientation.<sup>149</sup> Asher's peers joked that he had AIDS by naming him "AsherAIDS" and called him "gay," "faggot," and "queer."<sup>150</sup> He was also thrown down a staircase.<sup>151</sup> Asher and his parents filed complaints to the school district, but the school board did not return the family's messages.<sup>152</sup> After Asher's death, a member of the school board commented "don't worry, Asher complained about everything, always filled out incident reports . . . . [H]e would even complain that it was a Wednesday or that the wind blew in his face."<sup>153</sup> Although bullies targeted Asher because of his sexual orientation, the equal protection claim was rooted in gender discrimination.<sup>154</sup> The court found, however, that the plaintiff merely listed bullying incidents involving male and female victims.<sup>155</sup> Consequently, it granted the school district's motion for summary judgment, finding that the evidence presented was insufficient to discern a difference between the school district's response to male

---

148. *Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at \*2, \*12 (S.D. Tex. Feb. 21, 2012).

149. *Id.* at \*2.

150. *Id.* at \*1.

151. *Id.* at \*2.

152. *Id.*

153. *Id.* (quoting the record).

154. *Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at \*12 (S.D. Tex. Feb. 21, 2012).

155. *Id.*

and female bullying—an essential element in an equal protection claim.<sup>156</sup>

In *Shaposhnikov*, the student's peers taunted him about his sexual orientation because he dressed conservatively and danced competitively.<sup>157</sup> This harassment lasted for two years.<sup>158</sup> One peer warned the student during an athletic event not to “break his fingernails.” He also received a death threat, which the school deemed not serious, and another student accused him of bankrupting the school district with his complaints.<sup>159</sup> In response to these and similar actions, the school gave the bullies warnings and suspensions.<sup>160</sup> The court acknowledged that the student raised an equal protection claim, but dismissed the Title IX claim because it found that the school district did not act with deliberate indifference,<sup>161</sup> because the district administrators investigated or responded to every incident they knew about.<sup>162</sup>

#### D. Monetary Damages: Settlement Agreements and Jury Awards

Some lawyers are motivated by money.<sup>163</sup> Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 to provide attorneys with a financial incentive to help people whose rights were violated by the government.<sup>164</sup> This Act benefits lawyers undertaking § 1983 litigation, including cases that vindicate claims against school districts for violating LGBT students' equal protection rights.<sup>165</sup> Prospective LGBT student plaintiffs and their attorneys should be aware of previous jury awards and settlement agreements to understand how much financial compensation is at stake when the school

156. *Id.*

157. *Shaposhnikov v. Pacifica Sch. Dist.*, No. C 04-01288 SI, 2006 WL 931731, at \*1 (N.D. Cal. Apr. 11, 2006).

158. *Id.* at \*3.

159. *Id.* at \*5–6.

160. *Id.*

161. *Id.* at \*3.

162. *Id.* at \*7–8.

163. Compare David Arkush, Note, *Preserving “Catalyst” Attorney’s Fees Under the Freedom of Information Act in the Wake of Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 37 HARV. C.R.-C.L. L. REV. 131, 157 (2002); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, UCLA L. REV. 29, 102 (1989); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1452–53 (2011), with Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 603–04 (2011); Ailsa Chang, *Not Enough Money or Time to Defend Detroit’s Poor*, NATIONAL PUBLIC RADIO (Aug. 17, 2009), <http://www.npr.org/templates/story/story.php?storyId=111811319>.

164. See Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006).

165. See 42 U.S.C. § 1988(b) (2006).

district is held liable for such a deprivation of rights. Moreover, school districts should be aware of the potential monetary costs of discriminating against LGBT students.

### 1. Settlement Agreements

LGBT student plaintiffs and their school districts should be aware of the financial damages that similarly situated plaintiffs have received to understand the scale of past financial remedies for certain discrimination. For example, *Nabozny* and *Flores*, discussed above, resulted in settlement awards of \$962,000 and \$1.1 million, respectively.<sup>166</sup> In 2002, another settlement agreement in a claim by an LGBT bullied youth totaled \$451,000.<sup>167</sup> A decade or more has passed since these agreements, however, and settlement amounts have decreased in recent years.<sup>168</sup> The Department of Justice released information about two settlement agreements between students and their school districts for LGBT bullying that are illustrative of the facts underlying contemporary LGBT bullying litigation and awards.<sup>169</sup> In *Lovins v. Pleasant Hill Public School District, R-III*, Jeremy Lovins alleged that his peers harassed him because of his sex and perceived sexual orientation for four years.<sup>170</sup> Lovins claimed that the school district officials were aware of the harassment and did not take “immediate and appropriate corrective actions.”<sup>171</sup> Lovins settled his claims for \$72,500, including attorneys’ fees.<sup>172</sup>

The settlement agreement in *Lovins* also required “all District employees to promptly report, to the principal or a compliance coordinator[,] . . . harassment that they observe, are informed of, or

---

166. *Students: Know Your Rights*, S. POVERTY L. CENTER, <http://www.splcenter.org/what-we-do/lgbt-rights/students-know-your-rights> (last visited Aug. 15, 2012) [hereinafter S. POVERTY L. CENTER].

167. *Groundbreaking Legal Settlement is First to Recognize Constitutional Rights of Gay and Lesbian Students to be Out at School & 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).

168. *Compare* S. POVERTY L. CENTER, *supra* note 166 (discussing settlement awards upwards of \$325,000), *with* J.L. v. Mohawk Cent. Sch. Dist., No. 09-CV-943, at 2 (N.D.N.Y. Mar. 29, 2010) (Stipulation and Settlement Agreement), *available at* <http://www.justice.gov/crt/about/edu/documents/mohawksettle.pdf> (\$72,500 awarded).

169. Educational Opportunities Cases, DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/edu/documents/classlist.php> (last visited Mar. 21, 2012).

170. No. 99-0550-CV-W-2 (W.D. Mo. July 20, 2000) (consent order), *available at* <http://www.justice.gov/crt/about/edu/documents/lovinsor.php>.

171. *Id.*

172. *Id.*

reasonably suspect” and to “identify to whom at each school in the District and at the District’s central office such allegations should be reported.”<sup>173</sup> It is instructive that the agreement also requires the school to keep extensive records, which are to be supplied to the superintendent.<sup>174</sup> In effect, the agreement requires from one school what this Note seeks to mandate for all public schools: a bottom-up bullying notification requirement.

In *J.L. v. Mohawk Central School District*, the School District and the student’s family settled for a payment of \$50,000 and reimbursement for counseling sessions up to \$100 per week for approximately three years.<sup>175</sup> The School District also paid attorneys’ fees to the New York Civil Liberties Union Foundation in the amount of \$25,000.<sup>176</sup> The case involved a male student whose peers subjected him to more than two years of intimidation, verbal harassment, and physical abuse because he did not conform to traditional male gender norms.<sup>177</sup>

The *J.L.* settlement agreement also required that school staff be trained in managing student bullying.<sup>178</sup> The school was required to hire an expert to conduct annual training exercises that “include an emphasis on the affirmative obligation of staff to identify and report potential incidents of . . . bullying, and harassment based on . . . sexual orientation.”<sup>179</sup> The school board was required to issue compliance reports with summaries of the bullying reports, investigations, and results of complaints.<sup>180</sup> These financial outcomes and non-financial settlement conditions give future bullying victims and their attorneys a foundation for dispute resolution negotiations with school districts.

## 2. Jury Awards

Juries have found school districts liable for amounts ranging from \$27,000 to \$300,000 for LGBT bullying claims brought under

---

173. *Id.*

174. *Id.*

175. No. 09-CV-943, at 2 (N.D.N.Y. Mar. 29, 2010) (Stipulation and Settlement Agreement), available at <http://www.justice.gov/crt/about/edu/documents/mohawksettle.pdf>.

176. *Id.*

177. See *J.L. v. Mohawk Cent. Sch. Dist. No. 6:09-CV-943*, at 3 (N.D.N.Y. Jan. 14, 2010) (Motion to Intervene), available at <http://www.justice.gov/crt/about/edu/documents/mohawkmotion.pdf>.

178. *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943, at 2–3 (N.D.N.Y. Mar. 29, 2010) (Stipulation and Settlement Agreement), available at <http://www.justice.gov/crt/about/edu/documents/mohawksettle.pdf>.

179. *Id.*

180. *Id.* at 3–4.

Title IX.<sup>181</sup> These jury verdict amounts give an indication of the awards that today's LGBT students and their attorneys might receive if they win at trial, as a number of these awards were determined within the past decade.<sup>182</sup> Because of the similarity between the underlying facts in certain Title IX claims and equal protection violations, students may use these awards to assess a reasonable range of damages. The Title IX-related damages are therefore instructive for school districts and bullying victims when quantifying the school districts' appropriate financial responsibility for LGBT bullying-related equal protection violations.

In *Theno v. Tonganoxie Unified School District No. 464*, the jury found the school district liable to the student for \$250,000<sup>183</sup> and awarded attorneys' fees and expenses of \$268,793.51,<sup>184</sup> an outcome that vindicated both the rights of the student and the efforts of the attorney. Dylan's peers had perceived him to be LGBT and subjected him to continual verbal harassment for approximately five years.<sup>185</sup> In addition to being called "faggot" and other derogatory terms, students screamed at him "Dylan sucks cock," and "Dylan likes men."<sup>186</sup> He had slurs written in the dust on his car and donuts smeared on his car.<sup>187</sup> A number of these incidents resulted in physical altercations.<sup>188</sup> The court, citing the Title VII case *Oncale*, affirmed the jury's verdict based on its ability to draw "reasonable inferences" from the social context of these incidents.<sup>189</sup> *Theno* illustrates the potential benefit of LGBT bullying-related litigation for both students and their attorneys.

---

181. Juries have awarded damages of the following amounts: \$27,000; \$60,000; \$125,000; \$175,000; \$220,000; and \$300,000. *The Cost of Harassment* 1, ACLU, <http://www.aclu.org/files/pdfs/lgbt/schoolsyouth/costofharassment.pdf> (last visited Aug. 15, 2012) [hereinafter *The Cost of Harassment*]; see also *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258, 264 (6th Cir. 2000).

182. *The Cost of Harassment*, *supra* note 181, at 1.

183. 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005) (assessing the merits of the case).

184. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 404 F. Supp.2d 1281, 1292 (D. Kan. 2005) (determining attorneys' fees).

185. See *Theno*, 394 F. Supp. 2d at 1305–06 (discussing harassment from seventh grade through eleventh grade).

186. See *id.* at 1305.

187. *Id.*

188. *Id.* at 1305–06.

189. *Id.* at 1307.

### III. PROBLEMS ESTABLISHING SCHOOL DISTRICT LIABILITY FOR LGBT BULLYING

This section explains why LGBT students continue to encounter difficulty when suing school districts that fail to treat them equally with other bullied students. First, it shows that current bullying laws do not increase school districts' awareness of LGBT bullying because information about bullying is filtered down to teachers, in the form of policies, rather than up to administrators. This is a problem because school district administrators' awareness of bullying is an essential component of equal protection claims. Next, this section addresses the difficulty in drawing a meaningful line between actionable and non-actionable bullying. Lastly, this section discusses recent changes in litigation pleading standards and how these changes may affect LGBT bullying lawsuits.

#### A. *The Problem with Bullying Laws that Do Not Increase School Board Awareness of Students' Equal Protection Violations*

State bullying laws do not go far enough to protect LGBT students. School district administrators must first receive notice of a problem in order to be liable for deliberate indifference to student bullying.<sup>190</sup> This makes sense because deliberate indifference involves an element of discrimination, and it would not be rational to accuse a board of having a culpable state of mind when it is not aware of the situation.<sup>191</sup> This detrimental gap in many state notification laws is perpetuated by the absence of a federal requirement that administrators receive bullying notifications. Despite this essential flaw, some state laws do include limited attempts to alleviate student bullying through increased reporting of such harassment.

The Illinois bullying statute, for example, involves a top-down declaration from the state legislature to local governments that they must develop a general bullying policy.<sup>192</sup> The statute includes a bottom-up requirement that schools file their bullying policies with the State Board of Education,<sup>193</sup> but lacks specific guidance for what provisions should be included in the bullying policies. Although

---

190. See, e.g., *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871, 875–76 (N.D. Ohio 2003).

191. Cf. *Gant ex rel. Gant v. Wallingford Bd. of Educ.* 195 F.3d 134, 145–46 (2d Cir. 1999) (describing a situation in which the school district was not found liable for deliberate indifference because it was not sufficiently aware of the harassment).

192. 105 ILL. COMP. STAT. § 5/27-23.7 (West Supp. 2012).

193. *Id.* at § 5/27-23.7(d).

there is oversight for the filing requirement, there is no mechanism to ensure compliance if the town fails to develop an adequate bullying policy. The absence of an enforcement mechanism may result from the lack of a provision that articulates what would be an adequate bullying policy.<sup>194</sup>

North Carolina's bullying statute has a bottom-up approach, but lacks a requirement that school officials who are aware of bullying inform an outside school district administrator.<sup>195</sup> Consequently, the North Carolina scheme does not compel schools to inform any outside body that provides oversight, like a school district. Nor does this law expand municipal liability for LGBT bullying because it does not require a school board to be aware of the harassment—a necessary element of liability.

New Hampshire's bullying legislation contains a provision asserting that the legislation should not be interpreted to create a new cause of action.<sup>196</sup> This provision could be read to decrease a student's ability to assert in a suit that the school board has a custom of discrimination. For example, under the Sixth Circuit's rationale that awareness is a prerequisite for liability, even if the notification law gives school boards heightened awareness, there would remain the question of whether a school board's liability resulting from such awareness arose out of a law that explicitly precluded a new cause of action.<sup>197</sup> At a minimum, it is uncertain whether the statute's prohibition of new causes of action would prevent a court from finding liability from the notification law's effect of increasing school district awareness.

In many cases, parents are the ones who notify the school board or the municipal authority of their children's harassment. Some students, however, do not have involved parents to notify officials on their behalf. These students would derive less protection from bullying laws that do not require staff reporting. With lower rates of reporting, there would be less pressure from the school district administrators to remedy bullying. If Congress enacted a law requiring school staff to inform school district administrators about instances of harassment, then local authorities would be more likely to act regardless of parental action or inaction.

---

194. *Id.*

195. N.C. GEN. STAT. § 115C-407.15(d) (2011).

196. N.H. Rev. Stat. Ann. § 193-F:9 (2008 & Supp. 2011).

197. *See* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 263–64 (6th Cir. 2000) (discussing awareness of potential harm as a substantial factor for liability).

*B. The Unclear Threshold for a Municipal Custom of Deliberate Indifference Toward Students' Equal Protection*

It is difficult to establish municipal liability for a discriminatory response to bullying. In a recent discrimination case that inspired a California law protecting LGBT bullying victims, the plaintiff's attorney did not bring a federal claim against the school district for discrimination, but instead brought a discrimination claim against the school district under the State Constitution.<sup>198</sup> This omission was intentional and is demonstrative of the status of federal equal protection law as applied to school districts. The attorney specifically brought a claim for "discrimination by all the defendants, *except the School District*, in violation of the Equal Protection Clause of the Fourteenth Amendment."<sup>199</sup> A problem confronting plaintiffs in cases like this is the paucity of successful suits against school boards for a custom of deliberate indifference and, accordingly, few examples of the type of evidence needed to demonstrate deliberate indifference.<sup>200</sup>

Before 2009, few courts issued opinions involving these types of equal protection claims, perhaps because some courts dismissed students' equal protection arguments under the theory that Title IX barred additional claims under § 1983.<sup>201</sup> The courts barred these claims because of the Supreme Court's holding in *Middlesex County Sewerage Authority v. National Sea Clammers Association*<sup>202</sup> that § 1983 claims were barred if Congress passed a law intended to be the exclusive remedy for a specific type of claim.<sup>203</sup> Although the Seventh Circuit did not apply this reasoning in *Nabozny*,<sup>204</sup> some courts had read *Sea Clammers* to mean that the passage of Title IX precluded § 1983 litigation based on students'

---

198. See *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1113, 1123–24 (E.D. Cal. 2011); *California Governor Signs 'Seth's Law' Anti-Bullying Measure, Two Transgender Rights Bills*, LGBTQ NATION (Oct. 10, 2011), <http://www.lgbtqnation.com/2011/10/california-governor-signs-seths-law-anti-bullying-measure-two-transgender-rights-bills/>.

199. *Walsh*, 827 F. Supp. 2d at 1113 (emphasis added).

200. Although constitutional torts alleging a violation of the Equal Protection Clause normally require a discriminatory purpose as the standard, the school discrimination cases discussed in this Note use the standard of deliberate indifference.

201. See, e.g., *Leach v. Evansville-Vanderburgh Sch. Corp.*, No. EV98-0196-C-Y/H, 2000 WL 33309376, at \*12 (S.D. Ind. May 30, 2000) (holding that the school district's alleged failure to address sexual harassment of female students, which denied females an education equal to that of males, was within the scope of Title IX and thus preempted and barred by *Sea Clammers*).

202. See 453 U.S. 1, 2–3 (1981).

203. *Id.* at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.")

204. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

claims of discrimination in violation of the Equal Protection Clause.<sup>205</sup> Application of *Sea Clammers* had inhibited the development of a legal standard for the burden a student must meet to demonstrate that a school district has a custom of discriminating against a specific class of bullied students.

In 2009, the Supreme Court removed the *Sea Clammers* impediment in *Fitzgerald v. Barnstable School Committee*, which held that Title IX does not preclude a § 1983 action for gender discrimination in schools that fail to prevent peer-to-peer sexual harassment.<sup>206</sup> Now all courts may confront cases that require them to determine what circumstances constitute a school district custom of violating a students' right to equal protection from LGBT bullying. After *Fitzgerald*, the time has come to establish criteria for how a court should determine when a school board has a custom of deliberate indifference.<sup>207</sup>

Precedent in this area highlights the importance of informing school boards of discriminatory harassment. In *Schroeder ex rel. Schroeder v. Maumee Board of Education*, the court held that, although a student endured harassment, including repeatedly being called a "fag" and having his head hit into a urinal, the equal protection claim against the school board should be dismissed because no member of the board or the superintendent knew about the incidents.<sup>208</sup> Thus there could be no purposeful discrimination to support an equal protection claim.<sup>209</sup> When boards are informed, on the other hand, courts look to a Title IX standard to determine the threshold for violation of students' rights.<sup>210</sup>

Lower courts have adopted the standard of "severe, pervasive, and objectively offensive" to determine when a school district's unresponsiveness to LGBT bullying violates the Equal Protection Clause.<sup>211</sup> This standard derives from the Supreme Court's Title IX

---

205. See, e.g., *Doe v. Allentown Sch. Dist.*, 2009 WL 536671, at \*4 (E.D. Pa. Mar. 2, 2009); *Leach*, 2000 WL 33309376 at \*12.

206. 555 U.S. 246, 248–49 (2009).

207. *Id.* at 248 (declining to address, in the first instance, the merits of the plaintiffs' claims and the sufficiency of their pleadings).

208. 296 F. Supp. 2d 869, 871, 875–76 (N.D. Ohio 2003).

209. *Id.* at 874 (noting that to succeed, the plaintiff must show either that the defendants intentionally discriminated against him or acted with deliberate indifference).

210. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003) ("We agree with the other circuits that have considered similar issues that the plaintiffs must show either that the defendants intentionally discriminated or acted with deliberate indifference.").

211. See, e.g., *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005); *Doe ex rel. Doe v. Bellefonte Area Sch. Dist.*, No. 4:CV-02-1463, 2003 WL 23718302, at \*8 (M.D. Pa. Sept. 29, 2003).

case *Davis v. Monroe County Board of Education*.<sup>212</sup> There, the Court's benchmark for "severe, pervasive, and objectively offensive" was that the school district had notice that the "victim-students [we]re effectively denied equal access to an institution's resources and opportunities."<sup>213</sup> Under this analysis, the right deprived is equal protection under a school's general bullying policy.

Three jarring fact patterns of student harassment shed light on what the courts consider to be severe, pervasive, and objectively offensive in an LGBT bullying context. In *Doe ex rel. Doe v. Bellefonte Area School District*, the court held that three years of oral harassment, including remarks such as "fag" and "gay boy" were "sufficiently severe to trigger liability under Title IX."<sup>214</sup> In *Patterson v. Hudson Area Schools*, the court held that there was a genuine issue of material fact about whether a school district was deliberately indifferent under Title IX when a student was repeatedly called names during a three-year period, including "faggot," "gay," and "queer," more than 200 times in just one of those years.<sup>215</sup> Lastly, in *Theno v. Tonganoxie Unified School District No. 464*, the court denied a motion for summary judgment, finding that a jury could hold a school district liable for rarely taking measures "beyond merely talking to and warning the harassers" when bullies routinely called a student names such as "faggot," "jack-off boy," "banana boy," and "flamer."<sup>216</sup> The court held that years of such harassment met the sufficiently severe and pervasive standard.<sup>217</sup>

### C. The Pleading Standard Problem in § 1983 Litigation

A newly heightened pleading standard may pose difficulties for students alleging that a school district has a policy or custom of discrimination. Although this Note's proposed legislation would not alter the pleading requirement, it would provide publicly available information about past occurrences of LGBT bullying to help future plaintiffs meet the heightened pleading requirement and demonstrate the existence of a discriminatory custom.<sup>218</sup>

---

212. 526 U.S. 629, 633 (1999).

213. See *id.* at 651 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1999)) (comparing a Title IX example of deprived access to a school facility to a Title VII creation of an abusive work environment).

214. 2003 WL 23718302, at \*2, \*8.

215. 551 F.3d 438, 438, 440 (6th Cir. 2009).

216. 377 F. Supp. 2d at 956-58, 966, 968.

217. *Id.* at 963.

218. See *Ashcroft v. Iqbal*, 556 U.S. 662, 666-67 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In 2007, the Supreme Court in *Bell Atlantic Corporation v. Twombly* ruled that a complaint must meet a new “plausible” standard, which requires the plaintiff to demonstrate that a viable claim is more than just “conceivable.”<sup>219</sup> In 2009, the Supreme Court held in *Ashcroft v. Iqbal* that a pleading alleging a *Bivens* violation<sup>220</sup> must demonstrate “purposeful discrimination”—which requires “undertaking a course of action” more than simply an awareness of a discriminatory effect—and that a decision maker took a course of action *because* of its adverse effect on the person’s membership in a specific demographic.<sup>221</sup>

Taken together, these two cases require that a plaintiff plausibly, not merely conceivably, allege that an official acted with discriminatory intent or deliberate indifference to adversely affect the plaintiff.<sup>222</sup> This raises the pleading threshold twofold in the context of school board liability for discriminatory handling of peer-to-peer bullying. First, *Twombly* forces students’ attorneys to ask what is necessary in order to plausibly, rather than merely conceivably, allege that the school board was deliberately indifferent to the students’ harassment. With plausibility as the new threshold, this Note’s proposed legislation would both add to and detract from the difficulty of filing a pleading that would survive a motion for summary judgment. It would benefit plaintiffs by creating more publicly available information about LGBT bullying, through both a mandatory reporting requirement and a mandatory publication requirement.<sup>223</sup> The notification law would also, however, increase the difficulty of filing a successful pleading if no notifications existed because it would be more difficult to claim a plausible custom of discrimination without such mandatory notifications in the school district’s records.<sup>224</sup>

Second, *Iqbal*, in asserting that purposeful discrimination in a supervisory liability context requires not mere knowledge but also action based on discriminatory intent,<sup>225</sup> raises the question of

---

219. 550 U.S. 544, 570 (2007).

220. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* lawsuits are the federal counterparts to § 1983 lawsuits against states. 403 U.S. 388 (1971); Isabella Ruth Edmundson, Note, *Imprisoned by Liability: Why Bivens Suits Should Not Be Available Against Employees of Privately Run Prisons*, 45 GA. L. REV. 1127, 1133 (2011).

221. *Iqbal*, 556 U.S. at 666–67.

222. *See id.*; *Twombly*, 550 U.S. 544.

223. For more on the publication requirement, see *infra* Part IV.D.

224. *See id.*

225. In *Iqbal*, the Supreme Court states “vicarious liability is inapplicable to . . . § 1983 suits.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). However, there would be no vicarious liability claim if the government supervisors were aware of the discriminatory actions. Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS &

whether it is sufficient for a pleading to state that a school district has a custom of discrimination through inaction in the face of known LGBT bullying. Although municipal liability does not involve supervisory liability, and thus can be distinguished from *Iqbal*, the decision demonstrates a trend towards protecting the government from allegations of discriminatory intent absent a showing of an affirmative discriminatory action. If this standard is applied to the municipal liability context, then notification laws may increase the likelihood that school board members would discuss LGBT bullying and decide whether to instruct employees to respond to LGBT peer-to-peer harassment. Such an action would then meet *Iqbal*'s pleading threshold for discriminatory intent.

#### IV. PROPOSED LEGISLATIVE REFORM AND *MONELL* LIABILITY

This section proposes a federal bullying notification law. It discusses why such notification laws are valuable and how Congress has authority to enact notification laws for state-run school districts. It also proposes specific language for the notification law, which would effectively make school districts aware of LGBT bullying and attach liability to them if they have a policy or custom of deliberate indifference to that bullying. Finally, this section addresses concerns about the effects of this reform on both school district liability and on federalism.

The proposed reform is structured to help solve the current problem and perception that § 1983 suits are difficult to win<sup>226</sup> because it may be difficult to draw a connection between peer bullying and school board inaction.<sup>227</sup> A reporting requirement creates evidence of school districts' responses to bullying because the reports help ensure that school districts are made aware of any incidents of bullying in their schools, including discriminatory bullying.

##### *A. Reporting Requirement*

Required reporting mechanisms increase transparency and accountability of government decisions. Increased accountability can

---

CLARK L. REV. 279, 290–91 (2010); see also *Iqbal*, 556 U.S. at 690 (Souter, J., dissenting) (highlighting that the government officials “conceded . . . if they had ‘actual knowledge’ of discrimination by their subordinates and exhibited ‘deliberate indifference’ to that discrimination,” then they would be liable).

226. See Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 406 (2012).

227. See *id.*

either cause officials to behave differently or cause the public to pressure the government to change course.<sup>228</sup> Increasing school district liability is likely to decrease school districts' discriminatory treatment of LGBT bullying because school officials are less likely to discriminate against minorities when they must justify their actions or inaction.<sup>229</sup> The utility of reporting requirements to marshal public resources to effect change is based, in part, on the reflexive law approach, which seeks reform through mechanisms, like reporting, that do not involve direct legal intervention.<sup>230</sup> Increased transparency in government decisions can motivate proactive change. It can also motivate change through litigation, which forces school district officials to justify their actions, minimize their exposure to potential liability, and decrease the likelihood of future discrimination.<sup>231</sup> Reporting requirements have been advocated and enacted in a variety of situations, such as race-based housing discrimination,<sup>232</sup> federal contractor hiring,<sup>233</sup> presidential signing statements,<sup>234</sup> Medicaid fraud,<sup>235</sup> corporate social reporting,<sup>236</sup> environmental regulation,<sup>237</sup> and securities law.<sup>238</sup>

Required reporting could also benefit victims and potential victims of LGBT bullying. Reporting helps identify when discrimination has occurred.<sup>239</sup> However, as discussed above, certain students are often reluctant to self-report discriminatory practices.<sup>240</sup>

---

228. Cf. Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231–32 (1995).

229. See Michael Dobbs & William D. Crano, *Outgroup Accountability in the Minimal Group Paradigm: Implications for Aversive Discrimination and Social Identity Theory*, 27 PERSONALITY AND SOC. PSYCHOL. BULL. 355, 363 (2001).

230. See Orts, *supra* note 228, at 1232 (“[A] theory of reflexive law proposes an alternative approach to law reform. It focuses on enhancing self-referential capacities of social systems and institutions outside the legal system, rather than direct intervention of the legal system itself through agencies, highly detailed statutes, or delegation of great power to courts.”).

231. See Malinda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705, 733–34 (2008); see also Dobbs & Crano, *supra* note 229, at 363.

232. John P. Relman, *Components of a Model Consent Decree—Recordkeeping and Reporting*, 1 HOUS. DISCRIM. PRACT. MANUAL § 7:10 (2011).

233. Applicability of the Affirmative Action Program Requirement, 41 C.F.R. § 60-741.40 (2012).

234. Lee, *supra* note 231, at 733.

235. MD. CODE ANN., HEALTH—GEN. § 2-611(a) (West 2012).

236. See David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 47 (1999).

237. See Orts, *supra* note 228, at 1231.

238. *Id.* at 1232.

239. See Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform*, 18 J. L. & POL'Y 263, 287 (2009).

240. See *supra* Part I.A; Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 407 (2011).

Though some victims or observers may be afraid to report when it is optional, mandatory reporting requirements provide school staff with social protection by removing their discretion and requiring them to report.<sup>241</sup>

Reporting requirements are sometimes controversial, especially at the intersection of civil liberties and public safety.<sup>242</sup> For example, local school districts may not want the public to know if they are disregarding students' verbal or physical altercations. Another potential controversy stems from the publication of the victims' names. The problem of name-based reporting, however, could easily be alleviated with unique identifier-based reporting.<sup>243</sup> Given that not all hate crimes are currently reported, an increased rate of reporting could lead to the erroneous perception that the frequency of discrimination has increased.<sup>244</sup> However, it may merely be the case that reporting of the actual statistics is becoming more accurate.<sup>245</sup> At a minimum, reports of harassment would be evidence of bullying incidents,<sup>246</sup> which would cause authorities and the general public to become aware of bullying when it occurs.<sup>247</sup>

### B. Congressional Authority to Enact LGBT Bullying Notification Laws

There are three provisions in the Constitution that provide Congress with authority to enact this Note's proposed notification legislation affecting federally funded schools: the Spending Clause, the Equal Protection Clause, and the Commerce Clause.<sup>248</sup> In 2011, the House of Representatives amended its rule for how members of

---

241. See Hess, *supra* note 236, at 81–82; see also Gerard Sinzduk, *An Analysis of Current Whistleblower Laws: Defending A More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1668 (2008) (“[S]tates should allow employees to report either internally or externally to any government agency so long as the employee possesses an objectively and subjectively reasonable belief that the report’s recipient can alter the employer’s unlawful conduct.”).

242. See Lawrence O. Gostin & James G. Hodge, Jr., *The “Names Debate”: The Case for National HIV Reporting in the United States*, 61 ALB. L. REV. 679, 683–84 (1998).

243. See Stacey D. Blayer, Note, *But Names Will Never Hurt Me: HIV Surveillance & Mandatory Reporting*, 39 B.C. L. REV. 1175, 1186–87 (1998) (discussing the option of reporting specific individuals by a number instead of a name).

244. See Sally J. Greenberg, *The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?*, 31 NEW ENG. L. REV. 103, 106 (1996).

245. See *id.*

246. See *id.* at 107.

247. See *id.* at 158.

248. U.S. CONST. art. 1, § 8, cls. 1, 3; U.S. CONST. amend. XIV, § 1.

Congress cite the constitutional authority for their proposed legislation.<sup>249</sup> Previously, a House rule required that each bill's report contain a statement citing the bill's constitutional authority for enacting the law.<sup>250</sup> Now, clause 7(c) of House Rule XII requires that all bills must be introduced with a statement in the *Congressional Record*, citing the source of constitutional authority for the legislation.<sup>251</sup> This Note recommends that members of Congress cite to the Spending, Equal Protection, and Commerce Clauses for the sources of constitutional authority for the proposed notification legislation.

Although the Constitution does not specifically grant Congress authority to regulate elementary and secondary school education,<sup>252</sup> the Spending Clause gives Congress power to direct funds for a public purpose.<sup>253</sup> The spending power requires that the legislation satisfy five conditions: that it be for the general welfare, with unambiguous conditions, in the federal interest for a particular program, without compelling states to act unconstitutionally, and that it not be coercive.<sup>254</sup> A national bullying notification law would satisfy all five conditions. Student safety and a productive learning environment are part of the general welfare. Specifying parameters for how teachers and school administrators report instances of bullying would make the notification law unambiguous. The federal government has an interest in the success of its funding for elementary and secondary education programs. There is nothing unconstitutional about protecting the dignity and welfare of LGBT and LGBT-perceived individuals. Lastly, the extent to which the legislation is coercive may be determined by the percentage of funding that is tied to compliance with the legislation, and the suggestion of an unspecified percentage is not inherently coercive.<sup>255</sup>

The Congressional Research Service, an apolitical research agency within the Library of Congress, recommends that § 5 of the

---

249. KENNETH R. THOMAS, SOURCES OF CONSTITUTIONAL AUTHORITY AND HOUSE RULE XII, Clause 7(c) 1 (2011), available at [http://assets.opencts.com/rpts/R41548\\_20110118.pdf](http://assets.opencts.com/rpts/R41548_20110118.pdf).

250. Rep. Louise M. Slaughter, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON RULES MAJORITY OFFICE, [http://democrats.rules.house.gov/archives/req\\_comm\\_rpts.htm](http://democrats.rules.house.gov/archives/req_comm_rpts.htm) (last visited Aug. 21, 2012) (discussing constitutional authority statement requirement in Rule XIII, Clause 3(d)(1)).

251. See Marc Spindelman, *House Rule XII: Congress and the Constitution*, 72 OHIO ST. L.J. 1317, 1317 (2011) (quoting House Rule XII, Clause 7(c)(1)); *New Constitutional Authority for Introduced Legislation*, HOUSE OF REPRESENTATIVES COMMITTEE ON RULES (Jan. 5, 2011), <http://rules.house.gov/about/PolicyDetail.aspx?NewsID=72>.

252. See Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Education Ideals?*, 37 J.L. & EDUC. 193, 196 (2008).

253. See U.S. CONST. art. I, § 8, cl. 1; *United States v. Butler*, 297 U.S. 1, 66 (1936).

254. See *South Dakota v. Dole*, 483 U.S. 203, 207–11 (1987).

255. See *id.* at 211–12.

Fourteenth Amendment (§ 5) be the constitutional authority for civil rights or equal protection enforcement legislation.<sup>256</sup> The Civil Rights Acts of 1957,<sup>257</sup> 1960,<sup>258</sup> and 1964<sup>259</sup> did not include citations to constitutional authority in the text of the bills. The laws' corresponding reports, however, did include citations to § 5 for their constitutional authority.<sup>260</sup> The legislation proposed in this Note should also specify that another source of authority for the LGBT bullying legislation is § 5.

The Commerce Clause is another source of congressional authority for a bullying notification law. The Commerce Clause provided the source of authority for Congress to create the Department of Education.<sup>261</sup> Additionally, before Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,<sup>262</sup> the Department of Justice issued a memorandum citing the Commerce Clause as the source of constitutional authority for that hate crime prevention legislation.<sup>263</sup> If Congress used the Commerce Clause as a source of authority for notification legislation, then the government would need to prove on a case-by-case basis that the notification legislation has "an explicit and discrete connection between the proscribed conduct and interstate or foreign commerce."<sup>264</sup> The Commerce Clause may, however, be the least compelling of the aforementioned sources of congressional authority.

### *C. School District Liability Adds Value to Bullying Notification Laws*

The lack of a uniform method for tracking discriminatory harassment in U.S. schools could be resolved with a federal statute requiring teachers and school administrators to report all known

---

256. See THOMAS, *supra* note 249, at 8.

257. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

258. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 89.

259. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

260. See, e.g., S. REP. NO. 1205-2, at 2, 14 (1960); H.R. REP. NO. 291, at 6 (1957).

261. See THOMAS, *supra* note 249, at 6.

262. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190.

263. MARTIN S. LEDERMAN, MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL OFFICE OF LEGISLATIVE AFFAIRS, CONSTITUTIONALITY OF THE MATTHEW SHEPARD HATE CRIMES PREVENTION ACT 5 (2009), available at <http://www.justice.gov/olc/2009/shepard-hate-crimes.pdf>.

264. *Id.*; see also *United States v. Lopez*, 514 U.S. 549, 561 (1995) (stating that, while the case at hand had too attenuated a connection to interstate commerce, case-by-case inquiries may still be appropriate to determine whether a prohibited activity significantly affects interstate commerce).

instances of bullying to municipal boards of education. These notifications, discussed in greater detail below, should also be made public in a manner that would allow government officials and concerned citizens to track and monitor instances of LGBT bullying and compare them to other forms of bullying. Public notification should not, however, include the names of student victims, to avoid additional harm to the victims that could result from public disclosure of their harassment.<sup>265</sup>

Enacting a law that requires teachers and school administrators to report bullying would compel school districts to become aware of bullying incidents. This would allow students to claim that sustained inaction on the part of a town is indicative of a policy or custom that allows harassment of LGBT students. Additionally, if the law requires that notifications be made public, then students with such claims would have their claims buttressed by the reported information from other instances where the town or school board ignored the bullying of its LGBT students. Students would thereby have additional information to pressure the municipality to protect its students and to prove whether a policy or custom of discrimination exists.<sup>266</sup>

Potential critics of this Note's proposal might argue that the legislation creates an affirmative duty for school districts to protect students from peer-to-peer harassment based on LGBT status, although they have no affirmative duty to protect students from harassment.<sup>267</sup> This legislation could, the argument goes, lead school boards to conclude that they are compelled to expend disproportionate time and resources to protect LGBT students and avoid lawsuits alleging discrimination.<sup>268</sup> Additionally, this imposed obligation could be criticized as either inappropriate for federal legislation;<sup>269</sup> an inappropriate policy decision, given the ubiquity

---

265. See GUIDANCE ON NOTIFYING PARENTS WHEN A STUDENT HAS BEEN BULLIED BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY/EXPRESSION: IMPLEMENTATION OF 603 CMR 49.05, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION 2 (2011), available at <http://www.gbpf.org/uploads/guidance.pdf>.

266. See *Nabozny v. Podlesny*, 92 F.3d 446, 553, 554 (7th Cir. 1996).

267. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 189–90 (1989).

268. See Patricia Alex, *Bullying Law Tough on School Districts*, THE RECORD (Oct. 9, 2011, 6:52 PM), [http://www.northjersey.com/news/131437448\\_Bullying\\_law\\_tough\\_on\\_school\\_districts.html](http://www.northjersey.com/news/131437448_Bullying_law_tough_on_school_districts.html); Anna Spiewak, *Ridgewood School District Says New Bullying Law is a Drain on Resources*, THE RIDGEWOOD NEWS (Dec. 19, 2011, 11:01 AM), [http://www.northjersey.com/news/135859258\\_Ridgewood\\_school\\_district\\_says\\_new\\_bullying\\_law\\_is\\_a\\_drain\\_on\\_resources\\_.html](http://www.northjersey.com/news/135859258_Ridgewood_school_district_says_new_bullying_law_is_a_drain_on_resources_.html).

269. Sarah Hulsenga, *Michele Bachmann Says Anti-Gay Bullying "not a federal issue,"* CBS NEWS (Sept. 16, 2011, 7:11 PM), [http://www.cbsnews.com/8301-503544\\_162-20107604-503544.html](http://www.cbsnews.com/8301-503544_162-20107604-503544.html).

of peer-to-peer bullying;<sup>270</sup> or a potential financial burden on schools with limited budgets if they must pay damages for not complying with the law.<sup>271</sup>

Such criticisms are, in part, rooted in an assumption that the Constitution is one of negative rights—that the government’s obligation is to avoid depriving citizens of their inherent rights.<sup>272</sup> However, the United States Constitution contains many affirmative obligations.<sup>273</sup> Affirmative obligations, such as the right to counsel, can have practical financial costs, but such costs should not be dispositive of whether the government should facilitate those rights.<sup>274</sup> Likewise, if LGBT students are deliberately deprived of the same level of protection as their non-LGBT peers, their right to equal protection has been violated and Congress should provide a remedy for those constitutional violations.

#### *D. Suggested Provisions for Notification Law*

The proposed legislative reform has five elements. First, the legislation would require school districts or municipalities to publicly designate an employee of the town council or school board as the authority to whom notifications of peer-to-peer bullying should be sent. Second, the statute would require all teachers and school administrators to report any instance of school bullying of which they are aware. Third, the designated employees would be required to inform all members of the town council or school board about the occurrences of bullying that the employee receives within a reasonable amount of time to help the bullying victim.<sup>275</sup> Fourth, the notification law would require that teachers and school administrators

---

270. Lee Fang, *California Christian Coalition Explains Repeal Effort Against Gay Education Law: Bullying is Normal*, THINKPROGRESS (Sept. 19, 2011, 2:06 PM), <http://thinkprogress.org/lgbt/2011/09/19/322730/ca-christian-coalition-bullying/?mobile=NC>.

271. Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 469 (2000).

272. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990); see also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 491 (1989).

273. Bandes, *supra* note 272, at 2312 n.212 (“See, e.g., U.S. CONST. art. I, § 2 (“House of Representatives shall be composed of”); art. I, § 9, cl. 2 (privilege of writ of *habeas corpus*); art. I § 9, cl. 7 (regular statement and account of receipts and expenditures shall be published); art. I, cl. 8 (President will preserve, protect and defend the Constitution); amend. IV (warrant and probable cause requirements); amend. V (grand jury requirement); amend. VI (right to speedy, public jury trial; confrontation, compulsory process, counsel); amend. VII (right to civil jury trial)”).

274. Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

275. It is beyond the scope of this Note to determine what amount of time is “reasonable.” However, a time period would be per se unreasonable if a pattern of LGBT bullying occurred and the official was not made aware early enough to notice the pattern.

also notify school districts of other bullied students' demographic information, both to protect all students and to provide a basis of comparison for an equal protection cause of action. Finally, the designated employees would be required to publish reports from students, teachers, or school officials about the occurrences of all bullying.

The first requirement—that school districts or town councils designate and publicize one of its own employees as the person to receive notifications—would create two positive results. First, accountability would derive from a member of government being held responsible for the implementation of legislation. Second, teachers, school administrators, and members of the community would know whom they should send their complaints to. For this legislation to be effective, however, the designated employee should be a school district employee, to help attach liability to school districts.

The second requirement—that all teachers and public administrators must report bullying—is beneficial for both teachers and students. The teachers benefit because they are less likely to be accused of being a whistleblower or being pro-LGBT in a community that is anti-LGBT. The legal obligation to report LGBT bullying would provide “cover” to those who might not otherwise want to report an incident of LGBT bullying to the school district. Students would also benefit because they would be able to find out, through public information, whether teachers are reporting the discrimination that they witness. If teachers do not report instances of bullying, the absence of notifications in the district records would be evidence of a teacher's noncompliance with the law, and students or advocates could inform school supervisors that the teacher is not fulfilling all job requirements.

The third requirement—that the designated employee report notifications to the school board—is essential to the establishment of municipal liability because it ensures that board members are aware of the existence, and any potential pattern, of LGBT bullying in their schools. One benefit of this requirement is that board members who want to protect LGBT students would know where to direct their efforts. Additionally, for purposes of establishing municipal liability, school boards would be unable to deny that they had a policy of tolerating LGBT bullying but were merely unaware of the problem, since the board members would receive regular updates. The appropriate time period to respond may depend on how many LGBT bullying incidents transpire within a school district and the amount of time that passed between such occurrences. This

Note proposes that reports should be made four times per year. As discussed above, courts have generally found that the right to equal protection is violated after approximately two years of continuous harassment. Therefore, in order for school district officials to be made aware of the problem early enough to prevent a civil rights violation, they should be notified in terms of quarterly, not annual, reports.

The fourth requirement is that teachers and school administrators notify the school district of other bullied students' demographic information and of the schools' responses to non-LGBT harassment. This requirement would help protect a variety of students from unequal treatment because some schools may have non-LGBT bullying issues based on other demographic biases. This notification requirement can provide a basis of comparison for a wide range of students' concerns about equal protection violations. A student who claims deliberate indifference to LGBT harassment through a comparison with the treatment of other bullied students would need evidence of the school district's responses to non-LGBT bullying.<sup>276</sup> This fourth requirement would provide such data.

The final requirement—that general information about the notifications be made public—is essential to establishing a policy or custom of discrimination.<sup>277</sup> A student may be the victim of a few incidents of LGBT bullying and not be aware that other students have also been the victims of the same type of bullying. The student or parent may be unaware of a pattern of ignored incidents. Increased knowledge about a pattern of discriminatory conduct may encourage victims and their families to report the harassment to the designated school district official. Publicly available information could also convince a judge that a policy or custom of discrimination exists, given that the court could be presented with a history of disregard for a class of students' welfare. Moreover, the public nature of the notifications could prompt a school board to mitigate LGBT bullying to avoid the appearance of a custom of discrimination.

---

276. See *Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at \*12 (S.D. Tex. Feb. 21, 2012).

277. The information could be made public in a variety of ways, for example, through a school's website or newsletter.

## E. Federalism Concerns

The proposed congressional extensions of municipal liability raise federalism concerns.<sup>278</sup> Although federalism embraces the tenet that the federal government should respect state governments' authority, federalism nonetheless adheres to the well-established principle that states must honor the Constitution's guarantee of equal protection.<sup>279</sup> *Monell* liability is one product of the federalist concern for balancing municipal liability for constitutional violations with the concomitant need to respect the states.<sup>280</sup> The Eleventh Amendment<sup>281</sup> was enacted to overcome a Supreme Court opinion<sup>282</sup> that held that states are subject to suit by their citizens.<sup>283</sup> If the extension of municipal liability allows for a more attenuated level of causation between an employee's actions and municipal liability, the law runs the risk that "municipal liability collap[s] into *respondeat superior* liability."<sup>284</sup> *Respondeat superior* liability is not appropriate for municipal liability because the purpose of municipal liability is that the government be accountable for its own conduct, policies, or customs—not those of its employees.<sup>285</sup>

Federalism concerns protect state governments from liability in cases that affect the fiscal health of state treasuries.<sup>286</sup> The Supreme Court's sanctioning of municipal liability for constitutional torts, however, puts school districts' and municipalities' fiscal health at a greater risk because municipal treasuries are smaller than state treasuries. Municipal fiscal health may therefore be harmed by extensions of municipal liability.<sup>287</sup> However, juries' previous damages awards of \$27,000–\$300,000 in this type of litigation should not be a prohibitive cost for protecting students.<sup>288</sup>

278. See Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 415 (1997).

279. See Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels*, 28 B.C. L. REV. 813, 814 (1987); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1696 (2004).

280. Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CALIF. L. REV. 539, 542–43 (1989).

281. U.S. CONST. amend. XI.

282. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

283. See Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* 174 (2d ed. 1988); Gerhardt, *supra* note 280, at 545.

284. Board of Cnty. Comm'rs of Bryan Cnty, Okla. v. Brown, 520 U.S. 397, 415 (1997).

285. See Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 24–26 (1982).

286. See Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 552–54 (2001).

287. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 724 (1978) (Rehnquist, J., dissenting).

288. See *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258, 264 (6th Cir. 2000); *The Cost of Harassment*, *supra* note 181, at 1.

Critics of this Note's proposed legislation could also argue that any legislation establishing municipal liability for LGBT bullying is tantamount to the creation of a federal tort for school board decisions.<sup>289</sup> Such a concern is misplaced because the liability that results from this law has already been established under *Monell* and its progeny. The proposed reform merely ensures that school districts are made aware of the problems in their schools, removing the reporting onus from students and putting it on teachers and administrators. It does not alter the standard of conduct for school officials or heighten the legal requirements for their actions.

These federalism concerns also do not recognize that Congress knowingly impacted the balance between the federal and state governments by allowing certain state actors to be subject to suit under § 1983.<sup>290</sup> Congress adopted § 1983 to compel states to respect their citizens' right to equal protection at a time when states were not enforcing basic civil liberties.<sup>291</sup> Moreover, this Note's proposed legislation does not advocate for an extension of municipal liability but instead facilitates the enforcement of an existing right.

#### CONCLUSION

The Equal Protection Clause and § 1983 provide the federal government with the tools necessary to require that states treat their citizens equally. The contemporary problem of LGBT student bullying demonstrates that these students do not receive equal protection under the law. The Supreme Court's establishment of *Monell* liability provides these students with the legal foundation to enforce their right to equal protection, but students frequently cannot prove that there is a custom of discrimination because they lack evidence that school district administrators were aware of, and deliberately indifferent to, the students' discriminatory bullying. A federal notification law would solve both problems: school district authorities would become aware of, and be able to prevent, LGBT students' unequal treatment, and students who are forced to enforce their rights through litigation would have evidence to rebut the school districts' defense that they were not aware that LGBT students were treated differently.

---

289. Cf. Brown, *supra* note 279, at 820.

290. See Susanah M. Mead, *Evolution of the 'Species of Tort Liability' Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?*, 55 *FORDHAM L. REV.* 1, 11 (1986).

291. See *Mitchum v. Foster*, 407 U.S. 225, 240-41 (1972).

We live in a time when students bully LGBT youth at school, children cause other children to contemplate suicide, and many school officials turn a blind eye to these problems. This Note's proposed notification law will provide information to students so they know they are not alone, to school administrators as an instruction that preventative measures should be taken, and to parents and attorneys seeking evidence for litigation if unequal treatment persists. Congress should put the towns on notice: help LGBT bullying victims or pay the price for deliberate indifference.