Title IX Protections Against Bullying in Schools for Sex, Gender, and Orientation

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I. INTRODUCTION

Title IX of the Education Amendments of 1972 arose out of the fight to end sex-based discrimination in schools and to empower women. Senator Bayh, a key proponent of the law, saw ending sex-based discrimination in schools as the next logical step toward women's equality after the passage of the Civil Rights Act of 1964 and other antidiscrimination regulations.[1] The text of Title IX states that "no person in the United States shall, on the basis of sex, be excluded from

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1. Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 53 (1997).

participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" with a few exceptions.[2] While Title IX had its humble beginnings in protecting women in schools and prohibiting sex-based discrimination from teachers and administrators, today it has expanded beyond that initial goal and now effectively prohibits discrimination and harassment between teachers and students as well as between students themselves based on gender stereotypes.[3]

The topic of harassment and bullying of LGBT students by other students has come into vogue as LGBT students are being targeted because of their orientation and nonconformity with societal gender norms.[4] This distinction, as the courts see it, is a problem and the main weakness of Title IX, as it currently only protects LGBT students who have been bullied in schools for their nonconformity with gender norms, rather than because of their orientation.[5] This legal distinction has created a patchwork of case law across the United States where one LGBT student may find protection under Title IX if they are bullied for their nonconformity with gender stereotypes, whereas another LGBT student in a different part of the country may not be protected if they are bullied exclusively for their sexual orientation.[6] Because Title IX doesn't have specific provisions prohibiting sexual orientation-based bullying, it does not go far enough to protect LGBT students against bullying and leaves these students without adequate recourse against school administrators who turn a blind eye to the bullying.

Many of the protections that do provide LGBT students legal recourse against bullying come from the Department of Education's Office for Civil Rights 1997 letter. That letter provides guidelines that remind schools that, while orientation isn't explicitly protected, "harassing conduct of a sexual nature directed at gay or lesbian students"

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2. 20 U.S.C. § 1681 (1986). Title IX creates exceptions for religious, military, and merchant marine schools; male or female only universities; sororities and fraternities; the Boy Scouts and the Girl Scouts; father-son and mother-daughter days; and universities that give beauty pageant scholarships.

3. *See* Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 867 (8th Cir. 2011); Carmichael v. Galbraith, 574 F. App'x 286, 292 (5th Cir. June 19, 2014); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

4. Joseph G. Kosciw et al., *The Effect of Negative School Climate on Academic Outcomes for LGBT Youth and the Role of In-School Supports*, 12 J. SCH. VIOLENCE 45, 46 (2013), http://dx.doi.org.libproxy.tulane.edu:2048/10.1080/15388220.2012.732546.

5. *See* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

6. *See id.* at 1092 (protecting a Minnesota student under Title IX); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 243 (W.D.N.Y 2012) (holding there is no protection for an LGBT student in New York under IX).

that may create a "sexually hostile environment" might be a violation of Title IX.[7] This letter's directive was improved by the 2010 Dear Colleague Letter, which stated Title IX is triggered when bullying creates a hostile enough environment that it limits the student's ability to "participate in or benefit from" school services.[8] However, these letters do not go far enough to protect LGBT students against bullying. Many LGBT students will fall through the cracks created by case law and the Department of Education guidelines. Because Title IX purports to promote a safe and nurturing environment in schools for all students, regardless of their sex, this oversight is unacceptable.[9] Under Department of Education guidelines, Title IX should be applied in a way that makes schools a safe place to get an education for students who are vulnerable to bullying for their sex and nonconformity to gender stereotypes. However, the guidelines have a glaring shortcoming in that if a student is gay but conforms to gender stereotypes, then Title IX effectively does not protect them.[10]

II. PERVASIVE BULLYING OF LGBT STUDENTS REQUIRES ACTION

Numerous studies about the number of LGBT students who are bullied and assaulted in schools show that these students are disproportionately at risk for bullying. For example, a 2011 study of a convenience sample of LGBT students found that "82% [of these students] were verbally harassed at school because of their sexual orientation, and more than 18% were physically assaulted."[11] In contrast, a 2012 Indicators of School Crime and Safety survey found that only 28% of all students reported that they had been victims of bullying at school.[12]

A study conducted by the CDC further demonstrates the elevated risks for LGBT individuals.[13] The CDC ran the study between 2009 and 2011 across ten states and districts.[14] The study found that, on average,

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7. U.S. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997) [hereinafter SEXUAL HARASSMENT GUIDANCE 1997], https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.

8. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues Regarding Harassment and Bullying (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

9. *See* 20 U.S.C. § 1681 (1986); Letter from Russlynn Ali, *supra* note 8, at 7-8.

10. *See* Letter from Russlynn Ali, supra note 8, at 7-8.

11. Emily O'Malley Olsen et al., *School Violence and Bullying Among Sexual Minority High School Students, 2009-2011*, 55 J. ADOLESCENT HEALTH 432, 432-38 (2014).

12. *Id.*

13. *Id.*

14. *Id.*

LGBT students were more likely than heterosexual students to have been either threatened with a weapon on school property, skipped school because of safety concerns, or been bullied at school.[15] Specifically, in the study 43.1% of gay men reported being bullied, compared to 18.3% of heterosexual men.[16] Additionally, 24.8 % of gay men in the state study also reported being threatened with a weapon at some time, whereas only 7.8% of heterosexual males reported being threatened.[17] The numbers were lower for women in the state study: 29.5% of gay women reported being bullied, compared to 19.9% of heterosexual women.[18] Women were also threatened with a weapon less often; only 16.2% of gay women and 4% of heterosexual women reported being threatened with a weapon.[19] However, gay women were in more physical fights than gay men; 16.9% of gay women reported getting into a physical fight, compared to 12.7% of gay men.[20]

In addition to the CDC study, a recent nationwide survey of LGBT youth found that 90% of students "reported hearing the word 'gay' used in a derogatory way" and that 85% of LGBT students were "verbally harassed because of their sexual orientation."[21] The study also found that 44% of LGBT students stated they were "physically harassed" because of their sexual orientation.[22] This finding had wide-ranging implications for the mental and physical health of LGBT students, which ranged from depression and skipping school to "substance use, suicidality and sexual risk behaviors."[23] The study concluded that LGBT victimization in schools results in a strong positive link between "gender and negative mental health," with LGBT individuals at risk for lower self-esteem, less social integration, and a decrease in overall life satisfaction as a result of feeling isolated and victimized. The study found that LGBT youths who were bullied and victimized were "2.6 times more likely to report depression above the clinical cutoff" and "5.6 times more likely" to have tried suicide at least once.[24]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Steven T. Russell et al., *Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81 J. SCH. HEALTH 223, 223 (2011).
22 *See id.* at 223.
23. *See id.* at 224.
24. *See id.* at 229.

Being openly gay does appear to mitigate some of these effects. Steven Russell's study looked at the positive impacts of being openly gay in schools and found that individuals who were openly gay tended to have "lower levels of depression and more satisfaction and self-esteem," than individuals who closeted their LGBT identity.[25] According to the study, hiding one's LGBT identity in schools was overwhelmingly unsuccessful and led to students being more victimized by bullying and harassment, leading to higher levels of depression overall.[26]

Educators can also mitigate the effects of bullying for LGBT students. Left unchecked, bullying can cause serious harms: one study showed that "in-school victimization predicted decreased self-esteem and worse educational outcomes" for LGBT students, including lower GPAs and more missed days of school.[27] However, teachers and administrators who were supportive of LGBT students made "unique positive contributions to the lives of LGBT students"; having the support of these adults was shown to be the strongest way in which the students' lives were positively influenced.[28] Therefore, the study concluded that specific school policies and protections "regarding sexual orientation and gender identity or gender expression" can enhance students' self-esteem.[29]

The conclusion that administrators and policies can have a positive impact on students' lives shows that laws like Title IX, and policies that stem from it, can have a significant effect not only on the bullying of LGBT students, but on those students' lives overall. Unfortunately, Title IX is not yet effective enough to promote positive policies in schools to support LGBT students, as demonstrated by numerous studies evidencing the victimization suffered by these students. Because the statute has no specific protection to stop bullying for sexual orientation reasons, those students who are bullied for their sexual orientation feel left out and isolated.[30] This results in higher rates of depression and lower self-esteem compared to students who do feel supported by the system.

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25. Steven T. Russell et al., *Being Out at School: The Implications for School Victimization and Young Adult Adjustment.*, 84 AM. J. ORTHOPSYCHIATRY 635, 640 (2014).
26. *See id.* at 641.
27. Kosciw et al., *supra* note 4, at 54.
28. *See id.* at 58.
29. *See id.* at 59.
30 *See id.* at 46.

III. HISTORY AND LEGAL BACKGROUND OF TITLE IX

A. Legislative History

The development of Title IX began after the passage of the Civil Rights Act of 1964. In 1965, President Lyndon B. Johnson signed Executive Order 11,246, which banned federal contractors from discriminating in their employment practices based on "race, color, religion, or national origin" and laid the foundation for the eventual passage of Title IX.[31] In the summer of 1970, Representative Edith Green began drafting legislation dealing with equality in education to ban sex discrimination.[32] In the process of drafting the early versions of Title IX, Representative Green, the chairwoman of the House Subcommittee for Higher Education, held the first congressional hearings on discrimination against women in education and employment.[33] In the senate, Representative Green had support from Senator Bayh, who championed Title IX because he saw it as "the next logical step in the progression of women's equality."[34]

Senator Bayh extended the scope of Title IX beyond what Representative Green initially envisioned. Because Senator Bayh connected sexual discrimination to education, he saw his amendment to Title IX prohibiting discrimination on the basis of sex in "any educational program receiving Federal financial assistance" as crucial for solving problems that he saw in the education system.[35] While Representative Green's focus for Title IX was simply to "end educational quotas for admissions at law and medical schools,"[36] Senator Bayh designed his amendment to cover all aspects of the educational system, including "admissions, scholarships, hiring, [and] pay scales" at all levels of education.[37] His goal was to ensure that all students in America were able to access and enjoy education at all levels, regardless of their background.[38] However, because the law only covers sex, and not sexual orientation, LGBT students are still struggling to gain the access and enjoyment that Senator Bayh envisioned.

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31. Iram Valentine, *Title IX: A Brief History*, 1997 WOMEN'S EDUC. EQUITY ACT PUB. CTR. DIG. 1, http://search.proquest.com.libproxy.tulane.edu:2048/docview/207669433?accountid=14437&rfr_id=info%3Axri%2Fsid%3Aprimo.

32. *Id.*

33. *Id.*

34. Sweeney, *supra* note 1, at 53.

35. *Id.* at 54.

36. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 85 (2013).

37. Sweeney, *supra* note 1, at 54.

38. *Id.*

Sexual orientation clearly was not on the minds of legislators or Americans at the time of Title IX's passage, as they worried more about whether the "bill would require educational institutions to allow women to play football" than if the bill was going to extend coverage to harassment and bullying of someone based on their sexual orientation in addition to their sex.[39] After its passage, Title IX was developed through specific regulations enacted by the Department of Health, Education, and Welfare between 1972 and 1975.[40] The first regulations required schools to designate an employee to be the Title IX coordinator, to make "nondiscrimination policies" and procedures public, and to change all previous policies that might be noncompliant with Title IX, including taking steps to increase equality and participation in programs where biases were found.[41]

After the initial development of Title IX, it became clear that the final version of the law was only meant to fill the gaps left behind by Title VI and VII.[42] To fix Title VI, all Title IX did was add the word "sex" into the existing wording which filled that gap; for Title VII, it filled the gap of stopping employment discrimination in education based on sex. However, courts have expanded Title IX to protect against bullying and sex-based harassment not only between educators and students, but also between students themselves.[43]

B. Interpreting Title IX Through Case Law

The debate about how to interpret Title IX and the rights that it encompassed gave rise to Supreme Court precedent expanding the protections and remedies under the law. The first Supreme Court case interpreting Title IX came just seven years after Title IX's enactment in *Cannon v. University of Chicago*, which addressed the issue of whether there was a private cause of action under Title IX.[44] The Court held that the plaintiff did have a right to bring a private cause of action under Title IX against universities and schools based on the four-part test articulated in *Cort v. Ash*.[45] The Court found that all four factors were satisfied, thereby implying a private cause of action under Title IX.[46] In regard to the first factor, the Court held that the special class for whom the statute

39. Valentine, *supra* note 31.
40. *Id.*
41. *See id.*
42. Sweeney, *supra* note 1, at 56.
43. *Id.*
44. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).
45. *See id.* at 689-708 (citing Cort v. Ash, 422 U.S. 66 (1975)).
46. *See id.* at 709.

was enacted was private individuals within the protected class.[47] For the second factor, the legislative history revealed that lawmakers substituted the wording in Title VI with the word "sex." Because Title VI did have a private remedy, the Court reasoned that it can be implied that Title IX should also have a private remedy.[48] For the third and fourth factors, the Court agreed with the Department of Health, Education, and Welfare's position that it would be consistent with legislative intent to find that a private remedy would provide "effective assistance to achieving the statutory purpose."[49] For the fourth factor, the Court held that it is only a federal remedy, and not a state remedy, because, "since the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against such discrimination."[50] However, while the Court in *Cannon* conferred a private right of action under Title IX, which effectively allowed students to sue their schools for Title IX violations, following *Cannon*, the meaning of Title IX's text and the types of incidents covered under the law still required explanation by the courts.[51]

After *Cannon*, the Court in *Grove City College v. Bell* held that Title IX applies even to private universities that refuse direct federal funding because students who attend these schools still use federal grants.[52] Even though these federal grants went to students, because they benefitted the schools, the Court in *Grove City* held that those universities were still bound by Title IX. However, the Court also stated that the Department of Education could only condition federal financial assistance to Title IX within the programs and activities where the school received federal funding.[53] In practice, this meant that the holding of *Grove City* was limited to the school's financial aid programs.[54] This meant that the Department of Education's only remedy for discriminatory practices at these private universities would be to pull funding for these specific programs.[55]

Because *Grove City*'s holding limited the scope and application of Title IX to school programs and activities that received federal assistance was seen by many as a shockingly narrow reading of Title IX's intended

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47. *See id.* at 689-90.
48. *See id.* at 694.
49. *See id.* at 707.
50. *See id.* at 708 (quoting Steffel v. Thompson, 415 U.S. 452 (1974)).
51. *See id.* at 709.
52. Grove City Coll. v. Bell, 465 U.S. 555 (1984).
53. *See id.* at 575.
54. *See id.* at 573-54.
55. *See id.*

scope, it prompted an almost immediate legislative reproach.[56] Title IX was originally intended to remedy sex discrimination in education, not just eliminate sex discrimination in federally funded programs.[57] In limiting Title IX's application to only the programs that received federal funding, either directly or indirectly, *Grove City* diverged from that intent.[58] In response, Congress quickly passed the Civil Rights Restoration Act of 1988, which overruled *Grove City* and "mandated that all educational institutions that receive any type of federal financial assistance, whether direct[ly] or indirect[ly], [are] bound by Title IX."[59]

Next, in *Franklin v. Gwinnet County Public Schools*, the Court held that monetary damages are available as a remedy for Title IX violations.[60] In *Franklin*, the plaintiff sued the school district for sexual harassment she suffered at the hands of the coach-teacher at the high school she attended. Noting that Title IX and Title VI are almost identical in wording and development, the Court reasoned that because Title VI supports damages in a private suit for violations, Title IX must as well, particularly because no legal or legislative intent says otherwise.[61] In so holding, the Court rejected the argument that Title IX remedies were limited to "back pay and prospective relief" as both of those remedies were merely "equitable in nature."[62] The Court reasoned that damages are a "remedy in law."[63] Together, *Cannon* and *Franklin* allow a plaintiff to both sue and receive monetary damages for their school's violations of Title IX that result from teachers harassing students.

Under *Gebser v. Lago Vista Independent School District*, however, a cause of action under Title IX only arises if a school district has actual notice of the specific harassment at issue and is deliberately indifferent to that harassment.[64] The Court justified this holding in part by its reasoning that, because the law never explicitly gave a private right to a cause of action, the right arose as a judicial inference of congressional intent.[65] Rather than an "outright prohibition" on discrimination, the *Gebser* court envisioned Title IX as a condition dictating the situations in which the federal government should remove funds from educational

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56. *See* Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 83 (2013).
57. *See id.*
58. *See id.* at 86.
59. *See id.*
60. Franklin v Gwinnet Cty. Pub. Schs., 503 U.S. 60 (1992).
61. *See id.*
62. *Id.*
63. *See id.* 75-76.
64. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).
65. *Id.* at 285.

institutions.[66] Thus, it concluded that it would go against the intent of Title IX to punish institutions that would have otherwise corrected harassment through their own procedures and rules.[67]

Finally, in *Jackson v. Birmingham Board of Education*, the Court expanded the reach of Title IX by holding that retaliation against a person for complaining about sex discrimination is a form of sex discrimination covered by Title IX that gives rise to a private cause of action.[68] The Court reasoned that retaliation for complaining about sex discrimination is an intentional act of discrimination against the complainant.[69]

Through its holdings in the foregoing cases, the Supreme Court helped to shape the landscape of how and when Title IX applies. However, Title IX's coverage of LGBT students is still evolving. Although the Supreme Court has held that gender nonconformity discrimination is sex discrimination under Title IX, sexual orientation discrimination is still not covered uniformly across the United States because the Supreme Court has not addressed the issue of whether sexual orientation discrimination is included under Title IX.[70] Also, Congress has not amended the statute to include sexual orientation as a protected class.[71] Lower courts have considered expanding Title IX's prohibition of sexual harassment and sex-based discrimination to harassment because of sexual orientation, but the Supreme Court has yet to consider the issue.[72] Part IV explores the legal basis for that expansion and how it occurred and then considers where case law might be headed in the future, outlining the gaps in Title IX that leave LGBT students vulnerable to harassment and bullying purely based on their sexual orientation.

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66. *Id.* at 286.
67. *Id.* at 292-93.
68. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).
69. *See id.*
70. *Id.*
71. *See* Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235 (W.D.N.Y 2012); *see also* A.E. *ex rel.* Evans v. Harrisburg Sch. Dist. No. 7, No. 6:11-CV-6255-TC, 2012 WL 4794314, at *1 (D. Or. Oct. 9, 2012).
72. *See* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000); Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ., No. 1:11-cv-850, 2012 WL 5268946, at *1, *9 (S.D. Ohio Oct. 23, 2012).

IV. DEPARTMENT OF EDUCATION GUIDELINES AND CASE LAW TO EXPAND TITLE IX PROTECTIONS

A. Case Law

In *Davis v. Monroe County Board of Education*, the Court held that students can sue the funding recipients for student-on-student harassment, but only where certain criteria are met.[73] In reaching this result, the Court created a five-part test. The recipients of federal funding are liable to students when they are (1) deliberately indifferent, (2) to sexual harassment, (3) with actual knowledge of that harassment, (4) that is so "severe, pervasive, and objectively offensive," (5) that it practically bars the student from receiving "an educational opportunity or benefit."[74] The Court reasoned that it was not agency or negligence principles that made the Board liable for their employees' actions, but rather the fact that the district was liable only when the district itself "intentionally acted" with deliberate indifference to the harassment of which they had "actual knowledge."[75] Instead of holding a district liable for their teachers' and employees' actions or inactions in response to student-on-student harassment, the *Davis* test holds a district liable for its own failure to act.[76]

As the Court saw it, school districts retained a large degree of flexibility because the deliberate indifference standard for student-on-student harassment only triggers when the "recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[77] Finally, the Court examined when plaintiffs may receive damages for gender-based discrimination. The Court reasoned that while Title IX clearly protects students from gender-based harassment, the specific incidences depend on a "constellation of surrounding circumstances [and] expectations."[78] More specifically, the Court held that "simple acts of teasing and name-calling . . . even where these comments target differences in gender" do not give rise to damages under Title IX because the behavior has to have the "systemic effect of denying" the student equal access to the school's different programs and activities.[79]

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73. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).
74. *Id.*
75. *Id.* at 642.
76. *Id.* at 653-54.
77. *Id.* at 648 (quoting Oncale v. Sundowners Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).
78. *Id.* at 651.
79. *Id.* at 652.

The *Davis* case created a test for guiding future cases of student-on-student harassment, which is the key source of problems for LGBT students. This case gave rise to damages under Title IX that helped lower courts to slowly expand the definition of deliberate indifference and what meets the level of denying the student equal access to school programs. *Davis* also laid the foundation for recognizing gender-based harassment as a form of sexual discrimination. This allowed the lower courts to interpret harassment for nonconformity to gender stereotypes as a form of sex discrimination.

One of the first district courts to recognize harassment due to one's LGBT status as a form of sexual discrimination was in California in *Ray v. Antioch Unified School District*. In *Ray*, the court held that a student does not have to make allegations that the harassment itself was sexual in nature as courts can infer that harassment based on a plaintiff's sexuality is harassment "on the basis of sex."[80] The court noted that there was no actual difference between a girl who is harassed because the harasser views her as a sexual object, as prey, and a male student who is harassed because he is gay and, thus, prey.[81] Both instances of harassment are based on the perception the harasser has of the victims' sexuality.[82] This was significant because the court was able to see that a student's sexual status is the same as their orientation. The court reasoned that a student being harassed for their orientation means they were being harassed on the basis of sex. The court's holding protects LGBT students from harassment under Title IX in the cases where they are targeted for how the harasser perceives their sexuality. However, while this was a good step toward protecting all LGBT students, it still kept the door open for other courts to take the view that certain types of harassment were not because of the harasser's perception of the victim's sexual status.

The next big step was in the United States District Court for the District of Minnesota in 2000 in *Montgomery v. Independent School District No. 709*. In that case, the court refused to extend Title IX protections to completely encompass orientation under Title IX but still held that harassment based on nonconformity with gender norms is prohibited under Title IX.[83] A gay student brought suit to recover under Title IX for harassment he faced in school from other students and for the misconduct of teachers and administrators who inadequately responded to his complaints. The court applied Title VII analysis to this

80. Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).
81. *Id.*
82. *Id.*
83. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

Title IX issue, as the Supreme Court did in *Franklin v. Gwinnet County*. The court held that because Title VII's precedent said "failure to meet expected gender stereotypes" was actionable under Title VII, the same applies to Title IX because the wording of "on the basis of sex" is identical in both statutes.[84]

The *Montgomery* court was the first to apply the gender norms standard from Title VII to Title IX and opened the door for other courts do the same.[85] This development allowed courts to merge discrimination based on sexual orientation with sex discrimination without outright saying that the two are the same. The ruling defined harassment as making fun of a gay student, calling him by a girl's name, bullying him because he was not manly enough, and saying that he wanted to do girly things rather than stereotypically manly things based on the perception that because he is gay, he is not a real man. The same reasoning would apply for a girl who is bullied and harassed for being a lesbian and saying she was acting like a man since she would not wear makeup or dresses but instead wears boy's clothes.

In addition to the two above-mentioned district courts, the United States Courts of Appeals for the Second and Eighth Circuits have also accepted that nonconformity with gender stereotypes because of one's sexual orientation falls within the purview of Title IX. In 2006, the United States Court of Appeals for the Second Circuit was the first circuit to adopt this rule in a short unpublished opinion in *Doe v. East Haven Board of Education*. The Second Circuit held that the verbal harassment suffered by the plaintiff, including being called "a slut, a liar, a bitch, [and] a whore," reflected "sex-based stereotypes," and that such harassment would never have happened "but for the girl's sex."[86] While this was not a case of an LGBT student making a Title IX claim, it was the first instance where a circuit court embraced the rule that defined harassment based on nonconformity with stereotypes as sex-based harassment under Title IX, albeit briefly and with no analysis.[87]

In 2011, the United States Court of Appeals for the Eighth Circuit held that the standard for deliberate indifference requires the plaintiff to show that the harassment is based on sex, meaning either the harasser is motivated by the plaintiff's gender or his "failure to conform to" gender stereotypes.[88] In *Wolfe v. Fayetteville, Arkansas School District*, the

84. *See id.* at 1091.
85. *Id.*
86. Doe v. E. Haven Bd. of Educ., 200 F. App'x 46, 48 (2d Cir. Oct. 10, 2006).
87. *Id.*
88. Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 867 (8th Cir. 2011).

Eighth Circuit upheld the lower court ruling and relied on a Title VII analysis based on the identical wording in Title VII and Title IX.[89] The Eighth Circuit reasoned that courts have long held that "discriminat[ion] . . . because of . . . sex" and "on the basis of sex" are "treated interchangeably" because the statutory definitions of both phrases are the same.[90] Thus, the court could use the Supreme Court's guidance in *Oncale v. Sundowner Offshore Services, Inc.* regarding when harassment becomes "actionable discrimination": "The conduct at issue 'constituted discrimination because of sex' and was not just 'merely tinged with offensive sexual connotations.'"[91] This was the first time a circuit court adopted the gender stereotype rule as actionable under Title IX, and more courts have begun to use and adopt this rule as a result.

The United States Court of Appeals for the Fifth Circuit was also faced with the decision of whether to adopt the gender stereotype rule in 2014 in *Carmichael v. Galbraith*.[92] However, in an unpublished opinion, the Fifth Circuit did not address the issue because they did not see it as applicable to the case.[93] The Carmichaels brought the suit because of the bullying and harassment their son faced in school, including one incident in which his attackers videotaped themselves stripping him down, tying him up and forcing him into a trash can while yelling slurs based on his sexual orientation.[94] The concurrence by Judge Dennis reasoned that the Fifth Circuit has embraced the rule of harassment becoming sex-based when it is motivated by the victim not satisfying "gender-based stereotypes."[95] In his concurrence, Dennis stated that the bullying that the Carmichaels' son faced in school every day was because his attackers believed that his sexual orientation made him not "sufficiently masculine," and that this harassment therefore was "pervasive harassment of a sexual character" within the protections of Title IX.[96] While the Fifth Circuit opinion did not adopt this rule, the concurrence by Justice Dennis left open the possibility that the Fifth Circuit might adopt this rule in a case where it may have more relevance.

The next district court to adopt this rule was in *Galloway v. Chesapeake Union Exempted Village Schools Board of Education*. In *Galloway*, the court held that the LGBT student-plaintiff was

89. *Id.*
90. *See id.* at 866
91. *Id.* (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998)).
92. Carmichael v. Galbraith, 574 F. App'x 286, 292 (5th Cir. June 19, 2014).
93. *Id.*
94. *Id.*
95. *See id.* (Dennis, J., concurring).
96. *Id.*

discriminated against because of other students' perception of his orientation and that the school allowed students to harass him based on his gender.[97] The student was harassed multiple times, with several incidences where the harassers pulled out their penises and told the student to touch them, pulled down his pants in school, or snuck up on him and pressed their genitalia into his back.[98] The court held that these acts went beyond banter or teasing and were instead the severe and objectively offensive kind of actions prohibited by Title IX.[99] The court also relied on the *Wolfe* rule that harassment motivated by nonconformity with gender stereotypes violates Title IX's prohibition against discrimination on the basis of sex and held that creating a "hostile school environment based on gender and perceived sexual orientation" is a violation of Title IX.[100]

The *Galloway case* was another instance where the court equated orientation with gender stereotypes to fit orientation-based harassment into the narrow text of Title IX because the court did not want to read the text too broadly and interpret Title IX as protecting sexual orientation. As this rule starts to gain more and more acceptance in the courts, it is slowly becoming easier for LGBT students to make successful Title IX claims to recover for harassment based on their sexual orientation as oftentimes harassment because of orientation and nonconformity with gender stereotypes are one and the same. However, there are still scenarios where LGBT students who do conform to gender stereotypes are harassed solely because of their orientation.

One district court in California has held that the distinction between sex discrimination and gender stereotyping is "illusory and artificial" and that discrimination because of sexual orientation is not a distinct and separate category apart from sex and gender discrimination.[101] In *Videckis v. Pepperdine University*, the court held that because discrimination against sexual orientation is the same as sex and gender discrimination, Titles IX and VII cover all three kinds of discrimination.[102] The court considered the struggle other district and circuit courts have in attempting to draw a line separating sex and gender from orientation, and ultimately decided that such a distinction is a

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97. Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ., No. 1:11-cv-850, 2012 WL 5268946, at *1, *9 (S.D. Ohio. Oct. 23, 2012).

98. *See id.* at *1.

99. *See id.* at *9.

100. *Id.*

101. Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).

102. *See id.*

"lingering and faulty judicial construct."[103] The court fully rejected Pepperdine University's efforts to draw that distinction because the claims under Title IX are the perpetrator's biases against the person being harassed rather than the victims' orientation.[104] In short, the court refused to question the victims' orientation as that was not the goal of a Title IX analysis.[105] The court concluded that when someone makes a claim based on orientation and sexuality, they are making a claim "on the basis of sex or gender."[106]

The fact that the *Videckis* court allowed sexual orientation discrimination to be covered under Title IX is a huge step forward. As the court held, the distinction between orientation, sex, and gender is illusory and a legal fiction made up by the courts based on outdated ideas.[107] While the movement toward including orientation in Title IX has been slow—moving from covering only sex-based discrimination, to adding gender-based discrimination, to finally including orientation-based discrimination—the *Videckis* court has made the first necessary step to include sexual orientation discrimination in Title IX.

Courts have made similar advances in Title VII cases. The Supreme Court has accepted that it is possible to use Title VII rules and cases in analyzing Title IX cases since both statutes have the same wording and have been read to mean the same thing in different settings.[108] In *Hively v. Ivy Tech Community College*, the United States Court of Appeals for the Seventh Circuit reversed its prior decision in an en banc ruling and became the first appellate court to hold that sexual orientation discrimination is, per se, a form of sex discrimination.[109] In its en banc decision, the Seventh Circuit analyzed the case based on multiple theories, including the comparative method, the gender nonconformity theory, and the associational theory, leading it ultimately to conclude that the plaintiff was discriminated against because she was a lesbian woman.[110] Citing the Supreme Court decision *Loving v. Virginia*, where the Court saw there would be no discrimination if they changed the races of the plaintiff, the *Hively* court saw that Hively would not have faced the

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103. *Id.*
104. *See id.*
105. *See id.* at 1159-60.
106. *Id.*
107. *See id.*
108. *See* Franklin v Gwinnet Cty. Pub. Schools, 503 U.S. 60 (1992); Montgomery v. Indep. School Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).
109. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017).
110. *See id.* at 345-46.

same discrimination if she were a man.[111] Therefore, the Court concluded that the discrimination Hively suffered was because of "distinctions drawn according to sex."[112]

As significant as *Videckis* and *Hively* are for sexual discrimination law, those rulings do not have a binding effect outside of those jurisdictions. While both cases conclude that discrimination on the basis of sexual orientation is a form of sex-based discrimination, unless more courts adopt that line of reasoning, change will continue to be slow, and the gaps left behind by other courts will still be problematic. Additionally, while it is promising that the *Hively* court concluded that discrimination against orientation is discrimination based on sex, its holding has yet to be formally adopted into the Title IX context. As evidenced by the next two cases, this can be very problematic, as the gap between gender and orientation has left many LGBT students unprotected under Title IX.

B. Department of Education Guidelines

While case law as described in the preceding Parts has begun to expand protections to LGBT students under Title IX, the Department of Education has also written letters designed to clarify their policies and regulations within the scope of the Title IX case law that the Department is bound to follow and apply to schools across the country.[113] In 1997, for example, the Department of Education stated that sexual harassment towards LGBT students "may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students."[114] However, while this letter was a promising step toward protecting LGBT students from harassment and bullying in schools, because it stated that only sexual harassment directed toward LGBT students that created a sexually hostile environment in the school is a Title IX violation, it fell short of universal protection against LGBT bullying.[115]

In 2010, the Department of Education released another letter that clarified that gender nonconformity harassment constitutes sexual harassment. In that Dear Colleague Letter, the Department stated that

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111. *Id.* (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).

112. *Id.*

113. *See, e.g.*, Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015); SEXUAL HARASSMENT GUIDANCE 1997, *supra* note 7; Letter from Russlynn Ali, supra note 8, at 7-8.

114. SEXUAL HARASSMENT GUIDANCE 1997, *supra* note 7.

115. *See id.*

bullying becomes sexual harassment when it is aimed at someone who fails to exhibit "what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity."[116] Additionally, the letter reminded schools that the sex, gender, or sexual orientation of the harasser and the victim do not matter, because Title IX is triggered when a hostile environment severe enough to "interfere with or limit a student's ability to participate in or benefit" from school services and programs is created.[117]

While the Department of Education did explicitly mention sexual orientation in their 2010 letter, it still fell short of universal protection because it simply confirmed the already established rule that gender nonconformity harassment is discrimination based on sex.[118] The letter even explicitly states that harassment purely based on sexual orientation is not covered by Title IX before gently reminding administrators that sexual orientation discrimination can still be gender nonconformity discrimination which is, per se, sexual discrimination.[119] While recognizing gender nonconformity discrimination as sex discrimination is progress, the failure to cover sexual orientation discrimination still leaves LGBT students vulnerable to bullying.

V. HOW PROTECTIONS AGAINST ORIENTATION-BASED BULLYING FALL SHORT

One of the problems of the gap left behind by so many courts distinguishing between orientation, gender, and sex led to the holding in *Preston v. Hilton Central School District* in a New York district court.[120] The court held that the plaintiffs' allegations that their son was harassed in school on the basis of gender was insufficient to sustain a Title IX claim.[121] The court refused to include discrimination based purely on sexual orientation as a Title IX violation. The court held that "the fact that A.P.'s harassers asked him embarrassing sexual questions and used terms with sexual connotations such as 'gay,' 'homo,' 'faggot' and 'bitch,' is insufficient to suggest that A.P. was harassed on the basis of his

116. Letter from Russlynn Ali, *supra* note 8, at 7-8.

117. *Id.* at 2.

118. *See* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000); Carmichael v. Galbraith, 574 F. App'x 286 (5th Cir. June 19, 2014); Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ., No. 1:11-cv-850, 2012 WL 5268946, at *1 (S.D. Ohio. Oct. 23, 2012).

119. Letter from Russlynn Ali, supra note 8, at 7-8.

120. Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235 (W.D.N.Y. 2012).

121. *See id.* at 243.

gender."[122] The court declined to make "broad generalizations about a speaker's motives" and found that the words used in this case did not "indicate an anti-male bias."[123] Instead, the court held that the insults directed towards the victim were mostly anti-female and anti-homosexual rather than anti-male.[124] The court concluded that the harassment at issue was a result only of the plaintiff's sexual orientation and therefore not protected under Title IX.[125]

The *Preston* court went to great lengths to reject the plaintiff's gender nonconformity claim. Arguably, most courts would have found that a male being called a "bitch" implies that he is being harassed for not being manly enough and failing to comply with gender norms. Although weakness is a stereotypically female characteristic, this New York district court refused to say that the plaintiff was being bullied for failing to comply with gender norms. It seems that this court went out of its way to explain how the plaintiff's bullying was purely for sexual orientation and not sex or gender harassment. Even if the court wanted to say that orientation is not protected under Title IX, as is generally accepted, it did not need to say that insults against the victim were not somewhat connected to being anti-gender and anti-sex. The court even admitted that some of the questions were of a sexual nature and that many of the insults did have sexual connotations.[126] However, the court still refused to hold that insults of a sexual nature and connotation fall within the protections granted by the wording of Title IX.[127] If insults and harassment of a sexual nature and connotation are not based on sex, then it becomes difficult to say what is covered under the "basis of sex" wording in Title IX.

The next case where the gap between sex, gender, and orientation was clear is in an Oregon district court in *A.E. ex rel. Evans v. Harrisburg School District No. 7*.[128] The court held that to fall within Title IX's protections, the harassment must be because of the victim's gender. Because the plaintiff here claimed that he was harassed due to his "perceived homosexuality," he was not covered under Title IX.[129] The court held that even though the victim was "called 'faggot,' 'gay,' etc. by

122 *Id.*
123 *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 238.
128 A.E. *ex rel.* Evans v. Harrisburg Sch. Dist. No. 7, No. 6:11-CV-6255-TC, 2012 WL 4794314, at *1 (D. Or. Oct. 9, 2012).
129. *Id.* at *2.

other elementary and middle school students," these words in that age grouping do not have the same sexual connotations as used by older people since little kids quite often do call each other "gay" and "faggot" and don't mean it in a literal sense.[130] This holding by the court is especially baffling because they are basically saying that it is acceptable for kids to call each other sexual slurs because they do it all the time, and since they do not mean it literally, it is not really a form of bullying based on perception.

In its reasoning, the court relied on *Carmichael v. Galbraith*, which stated that sometimes bullies and harassers in the age group at issue use different insults interchangeably. Using that reasoning, the court in *Harrisburg School District* decided that sometimes words like "faggot" or "gay" are just one of the many words a bully might use to belittle someone and therefore have no connection to being gay in the mind of the bully.[131] The court looked at other insults used against the victim, like when he "was called 'motherfucker,' an 'asshole,' and a 'fat fucker' among other things" to say that he was called a "faggot" as just another random insult, rather than a specific epithet aimed at him because he was perceived as being gay.[132]

While this court's analysis does start off in the right direction by looking solely at orientation as the bully perceives it, it takes a very problematic turn when it says that because these insults can be used interchangeably, they are outside the scope of Title IX's protections. Bullying can occur in many ways; one day someone might be bullied with only sexual- and gender-based slurs, while another day a bully might use neutral slurs. But at the end of the day, the student is still being targeted for his sex, gender, or sexual orientation and the slurs, whether or not they are specifically targeted for sexual orientation, are just used to belittle him for that reason. By focusing on the specific kinds of slurs used against the victim, *Harrisburg School District* made it more difficult to ascertain whether the bullying was because of sex, gender, or sexual orientation, or for another reason entirely. It seems very convenient for a school district to show how other slurs were used to defend themselves against Title IX claims and say that the student was not bullied for his protected status but rather for an unknown ulterior cause that does not subject the school to Title IX liability.

Together, the *Harrisburg School District* case and the *Preston* case illustrate how the gaps left behind by the courts in Title IX cases take

130. *Id.*
131. *Id.*
132. *Id.*

away protections from LGBT students and confuse courts that are now left to draw the line to separate orientation from sex and gender. Because there is not much guidance on where that line falls, or if it exists at all, courts are left to their own devices to determine where that line is. This has led to a very fragmented and patchwork system where many students who should be protected remain unprotected depending on the jurisdiction where they reside. Because Title IX is a federal law and should cover all students equally, these uneven results run counter to the primary goal and intention of the statute.

VI. RECOMMENDATIONS

A. Amend Title IX

One recommendation to fill the gap and allow Title IX to encompass all students, regardless of why they are bullied, is to amend Title IX. Updating Title IX to clearly and explicitly state that it covers sexual orientation, as well as sex discrimination, or that sexual orientation is a form of sex discrimination, would solve the currently fragmented legal framework. Right now, courts have an interpretation problem where if they read the phrase "on the basis of sex" broadly, they can easily fit sexual orientation into its meaning.[133] However, if they look at it narrowly and construe it to mean only biological sex, reading orientation into its meaning is impossible. At best, courts can expand Title IX's sex category to encompass discrimination based on nonconformity with gender stereotypes, which still leaves many LGBT students unprotected by Title IX. Some narrower readings even exclude discrimination based on gender stereotypes, which constricts the statute even more. As mentioned previously, this outcome is problematic because it creates a patchwork of case law where one jurisdiction might allow protections for orientation or nonconformity with gender stereotypes but another might not. This creates uncertainty in the extent to which LGBT students are protected from bullying. This is proven by the research that shows that LGBT students who do not feel adequately supported by laws like Title IX, internal school policies, or even their teachers tend to have higher rates of depression and isolation than LGBT students in schools that have policies that support LGBT students.[134] Amending Title IX to clearly and explicitly state that sexual orientation is a protected class under Title IX would ensure that LGBT students across the country feel protected by providing them a uniform law that applies

133. 20 U.S.C § 1681(a) (1986).
134. Kosciw et al., *supra* note 4, at 54.

evenly to all students. This would likely lower rates of depression and isolation for LGBT students because students would feel more welcome to openly express themselves at school.

If Title IX were amended, LGBT students would not feel they had to keep their sexual orientation hidden in school. LGBT students would also be more open to coming out to their friends with the support and protection of the administration, teachers, and the law. As the study *Being Out at School* explains, when LGBT students do not hide their orientation, they tend to have less stress, depression, and suicide and have better and stronger overall mental health and development as they grow into adults.[135] It is very important that schools do not victimize and marginalize LGBT students because inclusion of everyone in education, regardless of their sex, was the basic goal of Title IX from the beginning. Encompassing sexual orientation in Title IX is the next rational step to achieving that goal.

Amending Title IX would also serve the additional purpose of providing protection for LGBT students much more quickly than the courts. The current lack of protection under Title IX leaves the door open to the possibility that school administrations and districts might not adequately respond to complaints by students who are being bullied for their sexual orientation. Currently, the law disincentives these authorities to act because they have a strong legal defense that the bullying was not covered under Title IX. This, in fact, is similar to what happened in *Preston v. Hilton Central School District*, where the court read the statute very narrowly and denied relief to the student.[136] Amending Title IX would be much faster than waiting on case law to read sexual orientation into Title IX as a form of sex discrimination. Already, it has taken more than sixteen years to go from *Ray v. Antioch* and *Montgomery v. Independent School District*, the first steps to protect students from orientation-based harassment, to *Videckis v. Pepperdine University*, which completely encompassed sexual orientation within the protections of Title IX in that jurisdiction.[137]

B. Include Sexual Orientation in Title IX Through Case Interpretation

Another recommendation is for courts to interpret Title IX to include sexual orientation, per se. However, this is a very slow process

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135. Russell et al., *supra* note 25, at 640.

136. Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 243 (W.D.N.Y 2012).

137. Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).

that leaves a lot of uncertainty for LGBT students in the meantime. *Videckis v. Pepperdine* was the first big step to fully include sexual orientation-based harassment within Title IX's protections, which is a promising development. The hope is that other courts and school districts start to adopt this rule and follow this analysis in future Title IX cases, just as they followed *Ray v. Antioch* and *Montgomery v. Independent School District*. However, there will always be courts that will reject that approach, leaving a patchwork of case law where one jurisdiction protects against sexual orientation discrimination and another does not.

It is also possible that another district or circuit court will follow the Seventh Circuit's reasoning in *Hively* and apply it to Title IX, as other courts have applied Title VII case law to Title IX questions. If that were to happen, sexual orientation might increasingly be protected under both Titles VII and IX. It is more likely, however, that the holding from *Hively* will first be applied to Title VII across the circuits and, if enough circuits follow along, only then will it be expanded to Title IX.[138] This is a slower approach than just adopting the rule in *Videckis*, but if that is the route that the courts want to take, then it could still be a workable alternative to amending the actual text of Title IX.

However, the only way a uniform system will be adopted is if the Supreme Court speaks on the issue, which is very unlikely to happen soon. The Supreme Court has not even spoken on the issue of including protections against bullying for nonconformity with gender stereotypes in Title IX, even though they did get very close to it in *Davis*.[139] The inclusion of the gender language in *Davis* seems to be a promising step toward at least including bullying for nonconformity with gender stereotypes in Title IX.[140] However, it is very likely that the Court simply was relying on the outdated notion that gender and sex are one in the same and can be used interchangeably. It is possible that the Court was simply confused on the terminology in *Davis* and used the word gender when they meant sex, given the longstanding assumption that these words mean the same thing based on the notion that there are only two sexes, male and female, and two genders, man and woman.[141]

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138. *See* Zarda v. Altitude Express, Inc., 2018 WL 1040820, at *1, *5 (2d Cir. Feb. 26, 2018).

139. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

140. *Id.*

141. *Id.* at 650. The Court notes that the statutory language says it is "on the basis of gender," when the actual wording of the statute is "sex" rather than "gender."

Even if the Court was not mistaken by the terminology and recognized that there are more than two genders, but only two sexes, it is possible that the Court might accept that bullying based on nonconformity with gender stereotypes is a form of sex discrimination at some point in the future. However, this still leaves unsettled the problem of accepting sexual orientation as a form of sex discrimination.

To resolve that issue, the Court would have to take the analytical steps that the California court did in *Videckis v. Pepperdine University*.[142] The *Videckis* court held that orientation and sex are one and the same because when a student is bullied based on sexual orientation, the student is bullied based on sex. As the court in *Videckis* reasoned, a "line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct" that incorrectly excludes some people from Title IX protections.[143] The Supreme Court is unlikely to reach this same conclusion because the Court relies on legislative intent when analyzing Title IX.

It is abundantly clear that in the early 1970s, legislators were only concerned with protecting women and men in education from discrimination based on the sex they were assigned at birth. Sexual orientation discrimination simply was not on the agenda.[144] The biggest issue in the minds of many was whether Title IX would require that funding for women's sports would be equal to the funding for men's, not whether Title IX would punish schools for being complacent when LGBT students were bullied. There is no evidence that the well-being of LGBT students was at the forefront of legislators' minds when drafting Title IX, given that homosexuality was not socially accepted and was actively discouraged at the time.

In all, it would be better for Title IX to be amended directly to include orientation. However, there is still a chance that courts will interpret Title IX to include sexual orientation, which would do away with the need to amend it.

VII. CONCLUSION

In order to fully protect students of both sexes from discrimination, Title IX must encompass sexual orientation. Currently, it claims to protect all, but it excludes LGBT students from recovering for

142. Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).
143. *Id.* at 1159.
144. Sweeney, *supra* note 1, at 55.

harassment based purely on their orientation. This is dangerous for LGBT students who are harassed, bullied, and victimized every day in schools across the country, leading to higher rates of suicide and depression.[145] While some courts have interpreted Title IX to protect some victims of sexual orientation bullying through the gender stereotype analysis, many students are still left vulnerable and unprotected under Title IX.

Looking forward, there are many possible solutions, including amending the law to explicitly cover sexual orientation in its wording, or waiting on the courts to build up case law to that effect. The quickest and most ideal solution would be for Congress to amend Title IX because that would remove any doubt as to whether sexual orientation is covered under Title IX. However, there is some doubt as to whether that could happen under the new administration, leaving some questions open as to an amendment's practicality.[146]

There have also been promising steps taken by the courts, changing Title IX through case law. It seems that the Seventh Circuit and some district courts have taken the lead with the *Videckis* and *Hively* opinions. However, this process will be very slow and, unless the Supreme Court takes up the question, it is highly unlikely that the main problem underlying the current patchwork of jurisprudence will be solved anytime soon.

145. Russell et al., *supra* note 21, at 224.

146. For example, Department of Education Secretary DeVos recently rescinded a 2011 Dear Colleague Letter that described the review standards that universities must use under Title IX in sexual assault investigations.