Deliberately Strengthening Our Reading of "Deliberate Indifference": A Call to Re-Interpret School Liability for Peer Bullying Under Title IX

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INTRODUCTION

The aspects of the American public education system that can prevent students from getting a good education often seem insurmountable. Far too many of our public schools are plagued by bad teachers, bad neighborhoods, drug problems, gang problems, overcrowding, and insufficient resources. Now imagine facing any one of these problems as a gay, lesbian, bisexual, or transgender student in America today. Imagine, for example, being one of the two-thirds of LGBTQ[1] students who report feeling unsafe at school due to their sexual orientation,[2] many of who miss school due to their fears.[3]

It is difficult to deem these fears unfounded. Over the past few months, a grisly spate of suicides by gay teens has brought into the national spotlight

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[1] The acronym "LGBTQ" refers to individuals who identify as lesbian, gay, bisexual transgender, queer or questioning.

[2] JOSEPH G. KOSCIW, PH.D. ET AL., GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 91 (2009) *available at* http://www.glsen.org/binary-data/GLSEN-ATTACHMENTS/file/000/001/1675-1.pdf.

[3] *Id.* at xvii. Indeed, the GLSEN report indicates that "[s]tudents were 3 times as likely to have missed school in the past month if they had experienced high levels of victimization related to their sexual orientation . . . or gender expression." *Id.*

an ongoing reality: LGBTQ students face a genuine and severe threat at public schools in the form of peer bullying. A 2009 survey of American middle and high school students revealed that nearly nine of out every ten LGBTQ students experienced at least one form of harassment at school over the past year.[4] Approximately 85 percent of LGBTQ students report verbal harassment, 40 percent report physical harassment, and 21 percent report being physical assaulted at school over the past year, all due to their sexual orientation.[5] And if these statistics do not adequately convey the magnitude of the problem, perhaps a closer look at the victims will. Thirteen year-old Seth Walsh, from Tehachapi, California, recently hung himself in his parents' backyard after an onslaught of homophobic bullying.[6] Billy Lucas, a fifteen year old, was found dead in the family barn after hanging himself following ongoing homophobic harassment despite never having said that he was gay.[7] Eighth grader Asher Brown, an "A" student, shot himself in the head after constant homophobic harassment from other students—after being literally, as his parents describe it, "bullied to death."[8]

These incidents, when taken cumulatively and in light of their severity, weaken the argument that bullying is a normal part of growing up—and when peer bullying against LGBTQ students is examined in comparison to other students, it certainly weakens the argument that bullying, of this degree, is something all students face as a typical rite of passage. This Note argues that the current plight of LGBTQ students violates both America's legal and moral obligation to provide equal access to public education and therefore warrants legal action and reform. It advocates, as one such reform, a strengthening of the "deliberate indifference" prong of the Title IX liability standard for school districts facing suits based on their failure to protect LGBTQ students from peer bullying.[9] While this Note does not address whether using Title IX is the best vehicle for the claims of LGBTQ students,[10] it seeks to strengthen a particular prong of the standard given that

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[4] *Id.* at 25-26.

[5] *Id.* at 26-27.

[6] Lornet Turnbull, *Offering Support, Hope for Gay Teens Who Face Bullying*, WASH. POST, Oct. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/16/AR2010101600106.html.

[7] Kilian Melloy, *Yet Another Gay Teen Suicide, This Time in Michigan*, EDGE BOSTON, Oct. 21, 2010, http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=111901.

[8] Peggy O'Hare, *Parents Say Bullies Drove Their Son to Take His Life*, HOUSTON CHRON., Sept. 29, 2010, http://www.chron.com/disp/story.mpl/metropolitan/7220896.html. *See also* Tammye Nash, *Teen Suicides Put Spotlight on Bullying*, DALLAS VOICE, Dec. 31, 2010, http://www.dallasvoice.com/teen-suicides-put-spotlight-bullying-1058193.html.

[9] See *infra*, Part IV.

[10] Because the text of Title IX prohibits only discrimination "on the basis of sex," there is an ongoing controversy whether the statute applies when LGBTQ individuals are subjected to harassment on the basis of their sexual orientation. *See, e.g.*, Susan Hanley Kosse and Robert H. Wright,

so many LGBTQ students are currently using this statute as a means of redress.

Part I of this Note discusses the current standard applied to peer bullying cases seeking relief under Title IX, with particular attention to the "deliberate indifference" prong of the standard and its conventional interpretation. Part II describes the recent divergence from the conventional interpretation by courts that have applied a more victim-centric reading to the concept and required a stronger showing by school districts seeking to evade liability. In Part III, this Note argues that both the language and purpose of Title IX would be better served by this broader reading of "deliberate indifference," and that it would also comport with other contexts in which the concept is applied. Finally, in Part IV, this Note considers how the experiences of plaintiffs bringing peer bullying actions under Title IX can inform proposed legislative efforts to protect LGBTQ students, such as the Student Non-Discrimination Act currently pending in Congress, or could prompt an express codification of a broader and more victim-centric reading of the standard.[11]

I. *DAVIS*: THE TITLE IX PEER BULLYING STANDARD AND ITS FLAWED APPLICATION

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[12] The statute was passed in 1972 as a means of plugging the holes left by Title VI,[13] which eliminated discrimination in education on the basis of race, color, and national origin,[14] but left out sex discrimination. With the passage of Title IX, however, school districts can

How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?, 12 DUKE J. GENDER L. & POL'Y 53, 70-71 (2005). However, there is substantial support for the proposition that the category of sex discrimination should include and subsume sexual orientation discrimination. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (arguing that sexual orientation harassment is indistinguishable from gender-based sexual harassment); Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 199 (2005) (arguing that "it is impossible to have sexual orientation discrimination without sex/gender discrimination"). This Note argues that a textualist approach to Title IX should ground claims by LGBTQ plaintiffs squarely within the province of the legislation.

[11] *See* discussion *infra* Part V.

[12] 20 U.S.C. § 1681 (2006).

[13] *See* Adam S. Darowski, *For Kenny, Who Wanted to Play Women's Field Hockey*, 12 DUKE J. GENDER L. & POL'Y 153, 159 (2005) (noting that "[t]he purpose of Title IX was to apply the same standard prohibiting racial discrimination to gender discrimination" and that Title IX was originally proposed as an amendment to Title VI).

[14] 42 U.S.C. § 2000(d) (2006).

be denied federal financial assistance if they discriminate on the basis of sex.[15]

Davis v. Monroe County Board of Education was the first Supreme Court case in which a plaintiff sought relief under Title IX for peer sexual harassment.[16] *Davis* held that Title IX provides a private right of action against a board of education for peer sexual harassment,[17] and established that in order to meet this standard, a three-pronged test must be satisfied.[18] According to *Davis*, under Title IX, student victims of peer sexual harassment may hold their school districts liable for harassment by their peers if the following three conditions were met:

> "(1) the school districts were recipients of federal funds, (2) the districts had 'actual knowledge' of the harassment but remained 'deliberately indifferent' to it, and (3) the harassment was 'so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[19]

Although schools face Title IX liability only for deliberate indifference to peer harassment on the basis of a student's sex, not sexual orientation, a number of cases have recently been brought under Title IX seeking relief for the peer bullying of students who are—or are perceived to be—LGBTQ.[20] These plaintiffs have not claimed that they have suffered from sexual orientation harassment (as that is an unprotected class under Title IX), but instead that the harassment is "based on a perceived nonconformity to traditional gender stereotypes."[21] Thus, a student targeted for being gay, for example, must claim that he is entitled to relief not for harassment on the basis of his sexual orientation, but rather for harassment on the basis of his being overly effeminate—or not manly enough—for his failure to conform

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[15] § 1681.

[16] Michele Goodwin, *The End of Adolescence: Sex, Theory & Practice: Reconciling* Davis v. Monroe *& the Harms Caused by Children*, 51 DEPAUL L. REV. 805, 805 (2002). In *Davis v. Monroe*, (526 U.S. 629 (1999)), a Georgia fifth-grader was subjected to repeated harassment by another student during school hours, including vulgar language and attempts at inappropriate touching, to the point that her mental health and ability to concentrate were negatively affected. She alleged that the school's deliberate indifference to the harassment created an intimidating, hostile, offensive and abusive school environment in violation of Title IX. The district court, however, found that "student-on-student" harassment was not a basis for an action under Title IX, and the Eleventh Circuit, sitting en banc, affirmed. The Supreme Court reversed, finding that Title IX does indeed provide a private right of action against a board of education for peer sexual harassment.

[17] *Davis*, 526 U.S. at 643.

[18] *Id.* at 650.

[19] Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 164 (2009) (citing *Davis*, 526 U.S. at 650).

[20] *See, e.g.*, Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009); Doe ex rel. Doe v. Bellefonte Area Sch. Dist., 2003 U.S. Dist. LEXIS 25841 (M.D. Pa. 2003).

[21] Sacks & Salem, *supra* note 19 at 164.

to gender stereotypes.[22] As one scholar has pointed out, "the often illusive distinction between 'sexual orientation' and non-conformity with gender stereotypes yields . . . strikingly irrelevant disputes over semantics, with plaintiffs arguing that sexually offensive taunts were motivated by gender discrimination, and defendants contending that sexually charged language was based on something else."[23] Of course, for some students, the danger runs much deeper than merely being forced to plead one's claim in a particular way. For example, gay, lesbian or bisexual students who *do* conform to gender stereotypes but are harassed on the basis of being gay, lesbian, or bisexual are left without access to relief under Title IX. Further, what does discrimination "on the basis of sex" or the failure to conform to gender stereotypes look like for transgender students, 89.5% of who report feeling unsafe at school?[24]

While experts have widely discussed the inconsistencies inherent in applying a standard so grounded in semantics,[25] a further problem plagues even those victims of peer sexual harassment who *can* establish a claim under Title IX: the *Davis* standard's "deliberate indifference" prong. To constitute deliberate indifference, a school district must respond to the harassment in a manner that "is clearly unreasonable in light of known circumstances," a level of response that is "clearly higher than mere negligence but something less than actual intent that harm occurs from the known threat."[26] To avoid liability, then, a school does not have to go so far as to prevent or even end the peer harassment, does not have to expel the harassers or impose any particular consequence—they must simply "respond to known peer harassment in a manner that is not clearly unreasonable."[27]

The central problem with the deliberate indifference standard is that courts have often evaluated whether a school's response is "clearly unreasonable" by looking at whether the consequences imposed were "reasonably calculated to deter known bullies from repeating offenses."[28] Thus, if a school

[22] Similarly, a female student targeted for being lesbian would have to claim that her harassment is not on the basis of her sexual orientation, but rather for a perceived failure to conform to gender stereotypes, such as not being "feminine" enough.

[23] Sacks & Salem, *supra* note 19, at 164.

[24] Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J.L. & GENDER 337, 348 (2005).

[25] *See id. See also* Jason A. Wallace, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 746-47 (2011) (noting, for example, that because "Title IX cannot protect students based on their sexual orientation but only as victims of egregious sexually charged violence, a vast majority of bullied gay plaintiffs cannot rely on Title IX for relief."); Weiner, *supra* note 10 at 199 (discussing the "sexual orientation loophole").

[26] Sandra J. Perry & Tanya M. Marcum, *Liability for School Sexual Harassment Under Title IX: How the Courts Are Failing Our Children*, 30 U. LA VERNE L. REV. 3, 38 (2008).

[27] Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648-49 (1999).

[28] Sacks & Salem, *supra* note 19, at 154-55.

deals with each bully in turn, penalizing them and deterring them from continuing their conduct, the school successfully avoids liability. However, if the target of the bullying is the same student, whether or not each individual bully ever repeats the conduct may not matter.[29] In a school with hundreds of students that could serve as potential first-time bullies, an individual victim could be bullied quite literally all the way until graduation – if he or she makes it that far.

The "deliberate indifference" prong of the liability standard in practice has thus been perpetrator-centric rather than victim-centric. For this reason, the *Davis* standard fails to protect some of the student victims of peer bullying most in need of protection—those who, because of some characteristic or quality that makes them stand out amongst their peers, suffer repeated harassment from multiple peer perpetrators.

An example of repeated harassment from multiple perpetrators can be found in *Doe ex rel. Doe v. Bellefonte Area School District*.[30] John Doe experienced harassment beginning in middle school and continuing through twelfth grade—harassment so unrelenting that it caused him to avoid attending school events such as football games and to forego participation in activities such as soccer, key club, student newspaper, and student government.[31] The harassment ranged from verbal harassment to physical assault, and John expressed feeling unsafe at "trouble spots" throughout his school.[32] Indeed, the Pennsylvania district court found that a reasonable finder of fact could conclude "that the harassment was sufficiently severe to trigger liability under Title IX."[33] Nevertheless, the school district was awarded summary judgment because the court found that it had "responded to each and every occurrence of harassment reported to it" and that "every time [John] reported an alleged incident of harassment and [the school] warned or otherwise disciplined the alleged perpetrator, that perpetrator never bothered [John] again."[34] Thus, despite John experiencing harassment during every year of high school, the court found that "[t]he School District's method of dealing with specific, identified perpetrators involving [John] was one hundred percent effective," and therefore that the school district was not deliberately indifferent as a matter of law.[35]

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[29] *Id.* at 153-56.

[30] Doe ex rel. Doe v. Bellefonte Area Sch. Dist., 106 F. App'x 798 (3d Cir. 2004).

[31] Doe ex rel. Doe v. Bellefonte Area Sch. Dist., No. 4:CV-02-1463, 2003 U.S. Dist. LEXIS 25841, *5-*15 (M.D. Pa. Sept. 29, 2003), *rev'd* 106 F. App'x 798 (3d Cir. 2004).

[32] *Id.* at *14-*15.

[33] *Id.* at *22.

[34] *Id.* at *25.

[35] *Id.* at *25-*26.

The Third Circuit affirmed the finding of summary judgment due to John's failure to meet the deliberate indifference standard.[36] More specifically, although John argued that the harassment he experienced was "a systemic problem,"[37] because "each subsequent incident involved a student other than the student that had been disciplined in any of the prior incidents,"[38] the court held that each incident of harassment occurred under "new and different circumstances" and therefore the school district was not deliberately indifferent.[39] In sum, despite years of harassment and bullying, John could not recover under Title IX. Like so many other victims of peer bullying, the fact that he had suffered repeatedly, had complained to the school repeatedly, and that the school had failed to protect him from continued bullying was insufficient to justify Title IX relief. The Court's interpretation of the *Davis* standard stood in his way.

II. New Interpretations of Davis' Deliberate Indifference Requirement

Given cases like *Bellefonte Area School District*, several scholars[40] have attacked the *Davis* standard and the outcomes that flow from its application. These critics assert that "victories occur only in the most egregious circumstances"[41] and that *Davis* has not provided a vehicle to curtail sexual harassment in the schools but instead, "has been the glue that has held the . . . status quo of general indifference in place."[42]

Recently, however, a few courts have begun to interpret *Davis*' "deliberate indifference" standard to require school districts to make a stronger showing to avoid liability. In 2000, the Sixth Circuit ruled in *Vance v. Spencer County Public School District* that "where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior."[43] Further, the Sixth Circuit held that "[w]here a school district has

[36] Doe ex rel. Doe v. Bellefonte Area Sch. Dist., 106 F. App'x 798, 800 (3d Cir. 2004).

[37] *Id.* at 799.

[38] *Id.*

[39] *Id.* at 800.

[40] *See*, Kosse & Wright, *supra* note 10, at 60; Gigi Rollini, Davis v. Monroe County Board of Education: A *Hollow Victory for Student Victims of Peer Sexual Harassment*, 30 Fla. St. U.L. Rev. 987, 995 (2003).

[41] Kosse & Wright, *supra* note 10, at 60.

[42] Rollini, *supra* note 40, *at* 995.

[43] Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 261 (6th Cir. 2000). In *Vance*, plaintiff-student sued her school district for peer bullying under Title IX. The trial court denied the school district's motion for summary judgment and on appeal, the Sixth Circuit found that the plaintiff-student had demonstrated that the peer sexual harassment was so severe, pervasive and objectively offensive that it deprived her of access to educational opportunities, that the school had

actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances."[44] Read broadly, this interpretation of deliberate indifference could consider a situation in which "inadequate and ineffective"[45] remedial action includes not only situations where individual bullies are undeterred, but where bullying in general pervades the school environment or continues to harm a particular victim.

Some courts have begun to adopt this broader interpretation of the deliberate indifference standard, yielding a sharply different result for plaintiffs who experience bullying of a systemic nature. For example, in *Patterson v. Hudson Area Schools*, the district court interpreted the deliberately indifference prong narrowly, while the appellate findings were based on the more broader, progressive reading of the prong—producing sharply contrasting decisions.[46] For years, Michigan middle school student Dane Patterson experienced harassment including being called a "faggot," "queer," and other derogatory terms on a daily basis.[47] His clothes were urinated on, his shoes were thrown in the toilet, and sexually explicit images were graffitied onto his lockers.[48] At one point, Dane was physically assaulted with other boys' genitalia in his face in the boys' locker room while other students blocked the exit.[49]

When Dane's parents brought a Title IX suit against the school district for deliberate indifference to peer harassment, the district court applied the *Davis* three-pronged standard in its more traditional interpretation.[50] Although the district court found that Dane successfully met the first two prongs of the *Davis* standard—the school had actual knowledge of the harassment, and the harassment was sufficiently severe, pervasive and offensive to deprive Dane of his educational opportunities[51]—the court concluded that the "deliberate indifference" prong was not met.[52] Noting that even

actual knowledge of the harassment, and that the school was deliberately indifferent to the harassment.

[44] *Id.*

[45] *Id.*

[46] *Compare* Patterson v. Hudson Area Sch., No. 05-74439, 2007 U.S. Dist. LEXIS 87309 (E.D. Mich. Nov. 28, 2007) (finding that the deliberate indifference prong was not met because the school successfully dealt with each of several successive bullies), *rev'd* 551 F.3d 438 (6th Cir. 2009) *with* Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009) (holding the school's "isolated" success with each individual bully did not shield it from liability in light of the "overall and continuing harassment" Dane faced).

[47] *Patterson*, 2007 U.S. Dist. LEXIS 87309 at *2.

[48] *Id.* at *8-*9.

[49] *Id.* at *9.

[50] *Id.* at *13-*14.

[51] *Id.* at *17-*21.

[52] *Id.* at *23-*24.

Dane admitted that each time the school penalized a particular bully, that bully stopped harassing him, the district court did not believe that the school had responded to the harassment in a manner that was "clearly unreasonable."[53] Thus, while Dane suffered extreme physical and emotional harassment for years, under the traditional approach to deliberate indifference employed by the district court, he had no available means of redress under Title IX.

The Sixth Circuit Court of Appeals, however, reversed and remanded the case to the district court, differing in particular on the interpretation of "deliberate indifference."[54] The court noted that "[t]he thrust of [the school's] argument is that [it] dealt successfully with each identified perpetrator; therefore, it asserts that it cannot be liable under Title IX as a matter of law."[55] Flatly rejecting this assertion, the Court of Appeals wrote that "[t]his argument misses the point. . .[The school's] success with individual students did not prevent the overall and continuing harassment of [Dane], a fact of which [the school] was fully aware, and thus [its] isolated success with individual perpetrators cannot shield [the school] from liability as a matter of law."[56] Instead, the Sixth Circuit reversed the grant of summary judgment for the school district, holding that the issue of deliberate indifference was one for the jury.[57] In short, by shifting the focus of the deliberate indifference standard away from the individual bully and towards the experience of the victim, the Sixth Circuit yielded a substantially different result for the plaintiff.

A Kansas district court used a somewhat similar approach in *Theno v. Tonganoxie Unified School District*.[58] There, the court acknowledged the sanctions that the school district imposed on individual perpetrators, but, in evaluating their reasonableness, considered that "[t]he result" of the school's actions (or lack thereof), "was a school culture in which many students appeared to have felt at ease making inappropriate comments to [the] plaintiff openly in front of teachers and other students, even during classes."[59] While

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[53] *Id.* at *24-*25.

[54] Patterson v. Hudson Area Sch., 551 F.3d 438, 450 (6th Cir. 2009).

[55] *Id.* at 449.

[56] *Id.*

[57] *Id.* at 449-50. While the court reversed the grant of summary judgment, they noted that ". . .at this stage of the litigation, [plaintiffs] are not required to prove that [the school] is actually liable for the continued harassment of [Dane] (i.e., that [the school's] actions were clearly unreasonable), but only that there is a genuine issue of material fact as to whether [the school] was deliberately indifferent to the harassment. In other words, [plaintiffs] must show only that a reasonable jury *could* find that [the school] violated Title IX. Viewing the facts in the light most favorable to the [plaintiffs], we believe [they] have met this burden." *Id.* at 450.

[58] Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299 (D. Kan. 2005).

[59] *Id.* at 1311.

a close reading of *Theno* may not necessarily support some scholars' assertions that *Theno*'s treatment of the incidents was "cumulative,"[60] at the very least *Theno* supports a more victim-centric approach by evaluating the school culture in which the victim-student must operate in order to obtain his education.

III. DELIBERATELY STRENGTHENING OUR READING OF "DELIBERATE INDIFFERENCE"

Cases like *Patterson* and *Theno*, by considering incidents of peer bullying not as discrete events, but instead as part of an overall school culture for which the district is at least partly responsible, represent a more progressive approach to the concept of deliberate indifference. Further, theses cases appear to better effectuate Title IX's underlying purpose of ensuring equal access to educational opportunities and benefits.

Title IX was enacted in the midst of the women's civil rights movement, which prompted Congress to consider the issue of sex bias.[61] Title IX itself was introduced by Senator Birch Bayh of Indiana, who noted that the economic inequities women face in the workplace can often be traced to unequal educational opportunities.[62] While the statute may have been, in its immediate sense, a response to inequities based on gender, the Supreme Court has already stated its impression of Congress' two underlying objectives, holding that "[f]irst, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes."[63] Given that the statutory focus was on *protecting individual citizens*, broadening the reading of "deliberate indifference" to protect Title IX plaintiffs against systemic harassment would comport with the legislative purpose.

While this Note generally asserts that a broader reading of "deliberate indifference" better aligns with the underlying purpose of Title IX, applying a textualist approach to the statutory language in Title IX supports the same conclusion as a purposive approach. An ordinary reading of the language of

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[60] *See* Sacks & Salem, *supra* note 19, at 160-61 (asserting that the *Theno* court viewed the recurring incidents as cumulative). The result in *Theno*, however, appears not to be based on a situation where multiple incidents of harassments were dealt with effectively in succession, yet nevertheless accumulated, but also in part because certain incidents of harassment were *not* dealt with and the school administrators essentially turned a blind eye to certain incidents. *See Theno*, 394 F. Supp. 2d at 1309-12.

[61] U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL § II (2001), *available at* http://www.justice.gov/crt/about/cor/coord/ixlegal.php.

[62] *Id.*

[63] Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

Title IX implies that its meaning should be interpreted not as focused primarily on the actions of the perpetrator, but on the denial of educational benefits or opportunities to the *victim*. The statute reads, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[64] The Supreme Court has noted that this language "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."[65] The Court contrasted the way that Title IX is framed in terms of a condition with the way that Title VII,[66] in focusing on economic discrimination, is framed as an "outright prohibition."[67] This prohibition "aims centrally to compensate victims of discrimination" while "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."[68] As one commentator noted, "Title VII's purpose is furthered even when the defendant was unaware of the discrimination, because its purpose is to compensate victims of discrimination . . . ."[69] By contrast, Title IX's focus on protection means that its "central concern" is to ensure "that the receiving entity of federal funds [has] notice that it will be liable for a monetary award,"[70] so that a receiving entity or school district has both the incentive and the opportunity to better protect its students. As we have seen above, however, this idea of giving a school proper "notice" of liability has been perverted to mean that school districts are only held responsible for acts of peer bullying that were exceedingly obvious—as in, acts of bullying from the *same individual student* after a victim reports having problems with that student. While there must be "an opportunity to take action to end [or

[64] 20 U.S.C. § 1681 (2006).

[65] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[66] 42 U.S.C. § 2000e (2006). Title VII states, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

[67] *Gebser*, 524 U.S. at 275.

[68] *Id.* at 287. Further, as Justice Stevens argues in the *Gebser* dissent, the use of passive verbs in the statutory language "focus[es] on the victim of the discrimination rather than the particular wrongdoer," making the assignment of federal funds conditioned upon the experience of the victim. *Id.* at 296 (Stevens, J., dissenting).

[69] *See* Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 375 (2008).

[70] *Gebser*, 524 U.S. at 287 (quoting Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 74 (1992)).

limit] the harassment,"[71] reading the statute so narrowly offends its central protective purpose.

Of course, just because students are in need of protection from discrimination under Title IX does not itself yield the conclusion that a school district should be held liable for the bullying actions of other students. Indeed, the Supreme Court has noted that liability arises not from the misconduct of an individual within the school, but from "an official decision by the [school district] not to remedy the violation."[72] Thus, the Court established in *Gebser v. Lago Vista Independent School District*[73] and *Davis*[74] that "recipients [can] be liable in damages only where their own deliberate indifference effectively 'caused' the discrimination."[75] The Court found in *Davis* that "the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[76] Additionally, "the harassment must take place in a context subject to the school district's control."[77] In practice, then, the deliberate indifference standard means that a school district's liability is limited "to circumstances wherein the [school district] exercises substantial control over both the harasser and the context in which the known harassment occurs."[78]

The peer bullying situation in *Bellefonte Area School District*,[79] like in so many other cases, falls plainly within these circumstances. The Supreme Court held in *Davis* that where "the misconduct occurs during school hours and on school grounds," the school district "retains substantial control over the context in which the harassment occurs."[80] As for control over the harasser, the Court found "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[81] It recognized "the importance of school officials' 'comprehensive authority' . . . to prescribe and control conduct in the schools"[82] and that "[t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the

[71] *Id.* at 289.

[72] *Id.* at 290.

[73] *See generally id.* (applying the standard in the student-teacher harassment context); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[74] Davis ex. rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (applying the standard in the peer harassment context).

[75] *Id.* at 642-43 (quoting *Gebser*, 524 U.S. at 291).

[76] *Id.* at 645 (quoting Title IX).

[77] *Id.*

[78] *Id.*

[79] Doe ex rel. Doe v. Bellefonte Area Sch. Dist., 106 F. App'x 798 (3d Cir. 2004).

[80] *Davis*, 526 U.S. at 646.

[81] *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1955)).

[82] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)).

workplace."[83] On one hand, the Court defined avoiding liability for "deliberate indifference" as employing a response "to known peer harassment in a manner that is not clearly unreasonable."[84] There is no reason, however, to assume that situations in which multiple students repeatedly harass a student-victim, creating a culture of fear and discrimination (and in some cases, a genuine threat to the student's safety), fall outside of school control over "the harasser and the context in which the known harassment occurs"[85] simply because the perpetrators are a series of first-time offenders rather than a single repeat-offense bully.[86]

Moreover, a broader understanding of the meaning of "deliberate indifference" is consistent with other contexts in which the standard is applied. In the context of municipal liability under 42 U.S.C. § 1983,[87] for example, deliberate indifference is viewed through a broader, more systemic lens. Under § 1983, a municipality may be held liable for failing to properly train its police force "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[88] To draw parallels between the components of "deliberate indifference" for municipal liability under § 1938 and for school liability under Title IX, the training or discipline of the municipality's police would be akin to the "training" or discipline of the school's students, and the deliberate indifference "to the rights of persons with whom the police come into contact" would be akin to deliberate indifference to the rights of students who may be particularly vulnerable to bullying by their peers. Critically, in the § 1983 context, the focus is not on whether a municipality failed to adequately train a particular individual officer, but on failures or flaws in the municipality's general training *program* or *policy*.[89] Indeed, as the Supreme Court noted in *Canton v. Harris*, "the focus must be on the adequacy of the training *program*

[83] *Id.* (quoting Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996)).

[84] *Id.* at 649.

[85] *Id.* at 645.

[86] Nor, of course, does it require the conclusion that "any response" is a reasonable response. Developing a more victim-centric understanding of a "reasonable response" to meet the deliberate indifference prong certainly would not mandate findings of school liability, but would instead allow a finding of school liability albeit their isolated successes with individual perpetrators.

[87] 42 U.S.C. § 1983 (2006). § 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Thus, a municipality can be held liable under this section, in certain circumstances, for constitutional violations that result from its failure to train its employees. *See* Canton v. Harris, 489 U.S. 378, 380 (1989).

[88] *Canton*, 489 U.S. at 388.

[89] *See id.*

in relation to the tasks the particular officers must perform" and "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city."[90] Viewed analogously to a school district's deliberate indifference for peer bullying, the fact that a particular student does or does not bully another should similarly not be the focus of the standard, but rather, the adequacy or inadequacy of the school's bullying *policies* should serve as the basis for liability.

In many ways, focusing on a school or a municipality's programs/policies, rather than on their treatment of a particular student or officer, serves to narrow liability rather than expand it. The required showing is likely greater in order to find an entire policy or program problematic, compared with merely finding a particular occurrence problematic. However, the *focus* of the deliberate indifference standard in the § 1983 context is on the broad system of how a municipality's policies and actions impact a class of potential victims; the inquiry is what the municipality must do to improve its general programs to better train *all* those under its control to avoid harm to potential victims.[91] Thus, reading "deliberate indifference" in the context of school liability in a way that focuses on what a school district can do to better discipline *all* those under its control to avoid peer bullying is in line with the heart of the standard in the § 1983 context. That a school district sufficiently disciplines a particular bully should not be the inquiry; the question instead must be whether the school district's general policies and programs sufficiently protect potential victims.

Of course, § 1983 differs in substantial ways from Title IX. At the very least, the statutory language in § 1983 structures the remedy so that a municipality or official who subjects "any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[92] Title IX, as we have seen, is expressly structured to condition federal funds on statutory compliance. Nevertheless, § 1983 "originated from the Civil Rights Act of 1871, which Congress intended to . . . 'aid in the preservation of human liberty and human rights,'"[93] making its overarching purpose not unlike that of Title IX, which—in the

[90] *Id.* at 390 (emphasis added).

[91] *See id.* at 390-91.

[92] 42 U.S.C. § 1983 (2006).

[93] Kevin R. Vodak, *A Plainly Obvious Need for New-Fashioned Municipal Liability: The Deliberate Indifference Standard and* Board of County Commissioners of Bryan County v. Brown, 48 DEPAUL L. REV. 785, 789 (1999) (quoting CONG. GLOBE, 42D CONG., 1ST SESS., app. 68 (1871) (statement of Rep. Shellabarger)).

midst of the women's civil rights movement—was intended to protect citizens from discrimination.[94]

Although one method of reform has been to advocate for either a judicial reversal of the *Davis* standard or legislative overhaul of Title IX itself, neither of those are necessary to improve the position of peer harassment plaintiffs. The results in *Theno* and *Patterson* imply that in practice, there is ample room for courts to reconsider the meaning of this critical concept—with significant implications for victims. The Sixth Circuit's approach to the concept of "deliberate indifference" is in line with the understanding of "deliberate indifference" in analogous contexts such as § 1983 liability, as well as both a purposive and textual understanding of Title IX. Its expansion would therefore better serve both LGBTQ plaintiff-victims of peer sexual harassment, and a close reading of the statutory language.

IV. Options Going Forward

The severity of the problem of peer harassment of LGBTQ students can be inferred by Congress' recent attention to the issue in the form of the Student Non-Discrimination Act of 2011 (SNDA).[95] Introduced in March 2011 by Representative Jared Polis (D-CO), the bill mirrors the language of Title IX in providing that "[n]o student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[96] Senator Al Franken (D-MN) also introduced a Senate version of the legislation in March 2011 as S. 555,[97] a bill that now has over thirty cosponsors.[98] The bills currently remain in committee,[99] but stand to offer students a substantial increase in protection against peer harassment: rather than only being protected from harassment on the basis of gender stereotyping under Title IX, the SNDA would also protect students from sexual orientation and gender identity harassment.[100]

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[94] *See infra* Part IV.

[95] H.R. 998, 112th Cong. (1st Sess. 2011).

[96] *Id.*

[97] S. 555, 112th Cong. (1st Sess. 2011). Representative Polis and Senator Franken introduced identical legislation in the 111th Congress—H.R. 4530 and S. 3390, respectively—but both bills died in committee when the 111th Congress adjourned *sine die*.

[98] *See* Library of Congress THOMAS, S. 555 Bill Summary & Status, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.555: (last visited Apr. 20, 2011).

[99] *See id.*; *see also* Library of Congress THOMAS, H.R. 998 Bill Summary & Status, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:H.R.998: (last visited Apr. 20, 2011).

[100] *See* H.R. 998.

More than thirty national education and civil rights group currently endorse the SNDA, including the Gay, Lesbian and Straight Education Network, the American Civil Liberties Union, Gay & Lesbian Advocates & Defenders, Gay-Straight Alliance Network, Human Rights Campaign, the National Gay and Lesbian Task Force Action Fund, and Lambda Legal.[101] Supporters claim that the proposed legislation would help to "enshrine the values of equality and opportunity in our classrooms"[102] and would "send a clear message to schools that they must address the hostile environment many LGBTQ students face in schools."[103]

While the bills could offer potentially life-saving support to LGBTQ students, one concern is the impact that the proposal of the legislation could have in the courts. If the legislation should fail to be passed, courts could conceivably take the proposal of the SNDA as an indication that Congress does not envision LGBTQ plaintiffs as already having a claim to protection from discrimination under Title IX.[104] The very introduction of the SNDA, therefore, could have negative ramifications for LGBTQ plaintiffs if it affects the way that courts interpret existing protections under Title IX. Further, if the legislation *is* passed, although clear protection would be provided on the basis of sexual orientation and gender identity, LGBTQ plaintiffs may be forced to start from ground zero in building a jurisprudence under the new statute, rather than continuing to gradually build judicial recognition of their claims under Title IX. Finally, given that the SNDA tracks the language of Title IX, it is plausible that while the SNDA would expand protection against peer harassment, it would still be subject to varying interpretations of the deliberate indifference standard. Nevertheless, the critical and express protection that the legislation would offer to LGBTQ students may well outweigh these lingering concerns.

Regardless of whether the Student Non-Discrimination Act could further benefit the plight of LGBTQ plaintiffs, Title IX stands to offer an entirely adequate vehicle for their protection. The extent of this protection, however, hinges upon the interpretation of the "deliberate indifference" standard.

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[101] Human Rights Campaign, *Student Non-Discrimination Act of 2010 Introduced in U.S. House*, HUMAN RIGHTS CAMPAIGN NEWS (Jan. 27, 2010), http://www.hrc.org/14041.htm. *See also* Human Rights Campaign, *Student Non-Discrimination Act Re-introduced in Congress*, HUMAN RIGHTS CAMPAIGN NEWS (March 10, 2011), http://www.hrc.org/issues/youth_and_campus_activism/15390.htm.

[102] *See id.* (quoting Rep. Jared Polis, sponsor of the Student Non-Discrimination Act).

[103] Press Release, Gay, Lesbian, & Straight Educ. Network, Franken Introduces Student Non-Discrimination Act in Senate to End Anti-LGBT Discrimination in Schools (May 20, 2010), http://www.glsen.org/cgi-bin/iowa/all/news/record/2579.html.

[104] *See supra* note 10 and associated text.

An option to more directly confront the courts on their interpretation of "deliberate indifference" would be a legislative codification of a more victim-centric interpretation of the text of Title IX. Such an approach has precedent in the Civil Rights Act of 1991, which was a congressional move to expand the understanding of what constituted a violation under 42 U.S.C. § 1981, a statute prohibiting employment discrimination on the basis of race or color.[105] The statute, in its operative part, says "[a]ll persons . . . have the same right in every State and Territory to make and enforce contracts,"[106] among other rights. Prior to the passage of the Civil Rights Act of 1991, the Supreme Court had been interpreting the phrase "to make and enforce contracts" extremely narrowly, finding in one notable case that an employee could not bring a claim for racial harassment in employment because there was no issue of ability "to make and enforce contracts."[107] To address the overly narrow approach taken by the courts, Congress statutorily redefined the phrase "to make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[108]

If courts refuse to expand their interpretation of "deliberate indifference" to cover the multiple-perpetrator situation in actions for Title IX peer harassment, Congress has the option of amending Title IX to expressly codify such a reading. An example of such a proposal could be an amendment that, first, codifies the general standard, and second, expressly defines "deliberate indifference." Thus, it might read: "School districts may be held liable under Title IX for peer harassment if and only if (1) the school districts are recipients of federal funding, (2) the districts had 'actual knowledge' of the harassment but remained 'deliberately indifferent' to it, and (3) the harassment was 'so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school."[109] 'Deliberate indifference' is to be defined as a clearly unreasonable response to an overall and cumulative environment of harassment at the school of which the school is aware, and a school is not shielded from immunity due to isolated success with individual past perpetrators." Such an interpretation would maintain the "actual notice," "severe and pervasive" and "deliberate indifference" prongs of the original interpretation,

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[105] *See* 42 U.S.C. § 1981 (2006).

[106] *Id.*

[107] *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

[108] 42 U.S.C. § 1981(b) (2006).

[109] There may well be problems with this third prong of the *Davis* standard as well, particularly regarding what is found to be "objectively offensive" in societies where LGBTQ tolerance is low. This third prong is therefore included in the proposed standard as is solely because such an analysis is beyond the scope of this Note.

but would frame the perspective of deliberate indifference to include indifference to the cumulative environment of harassment from the perspective of the victim, rather than indifference to the conduct of a particular perpetrator. Further, the revised standard would maintain a school district's "opportunity to correct any [environment of] discrimination before withdrawal of federal funding,"[110] an opportunity required of legislation enacted under the federal government's Spending Clause such as Title IX.[111]

Finally, even without an express codification of the expanded approach to deliberate indifference or the passage of the Student Non-Discrimination Act, courts still retain the ability to interpret the "deliberate indifference" standard more expansively in the cases before them. Such an approach could be modeled on the precedent set by the Sixth Circuit in *Patterson* or the perspective suggested by *Theno*. If they choose to do so, this Note demonstrates that courts can be confident that an expanded reading of the liability standard would comply with the statutory language and intent.

V. CONCLUSION

Whether it occurs via expansive judicial interpretation, legislative codification of an expanded reading of the "deliberate indifference" standard, or a separate statute addressing victims' needs, something must be done to protect students from peer bullying. As one scholar argues, without further action, "*Davis* will continue to spawn inconsistency and subjectivity in the federal circuit courts and will continue to serve as more of an obstacle than a tool for student victims of sexual harassment."[112] In the meantime, LGBTQ students like Seth Walsh and Billy Lucas continue to face pervasive school bullying that threatens their education and their safety alike. While Justice Scalia may be correct that "little girls always tease little boys and little boys always tease little girls,"[113] "one hundred sixty thousand children in the United States skip school every day because they are afraid of bullies."[114] As one scholar noted, "[w]e entrust our children to the care of educators almost every day, and they must be kept safe, whether that means keeping them safe from those outside the school system or from each other."[115]

Worse, the burden of bullying's consequences is not equitably carried. When the majority of LGBTQ students are victims of bullying that causes

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[110] Perry & Marcum, *supra* note 26, at 7.

[111] *See id.*

[112] Rollini, *supra* note 40, at 1016.

[113] Transcript of Oral Argument at 3, Davis ex. rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (No. 97-843).

[114] Jill Grim, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 155 (2008).

[115] *Id.* at 176.

them to fear for their safety at school—indeed, two out of three LGBTQ students do—we can no longer look the other way.[116] Such figures indicate that LGBTQ bullying has reached crisis proportions, and traditional legal interpretations must cede to interpretations that afford students the protection they deserve. To persist in our current interpretations, given our actual knowledge of their failures, is truly the epitome of deliberate indifference—and doing so would mean denying the promise of American education to students equally deserving of its benefits.

[116] *See supra* Part I.