In Search of Federal Remedies for LGBTQ Students Who Are Victims of Assault and Harassment in School

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INTRODUCTION

The rights of LGBTQ persons have become important topics in political and social discussions for the past decade, resulting in many debates in the federal Congress as well as among state legislatures. In some cases, the issue has become a litmus test for presidential candidates. At least one court has held that LGBTQ individuals "are an identifiable minority subjected to discrimination in our society." In addition, school youth are vulnerable to "cruel, inhuman, and prejudiced treatment by others" while they discover who they are as individuals. According to one survey, 84.6 percent of LGBTQ students report being verbally harassed, 40.1 percent report being physically harassed, and 18.8 percent report being physically assaulted in school. Further, "among teenage victims of anti-gay discrimination, 75% experience a decline in

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1 Jerry Foxhoven is the Executive Director of the Drake Legal Clinic at the Drake University Law School. I wish to thank Ryan Roemerman, Executive Director of the Iowa Pride Network and Rich Eychaner, Chair of the Eychaner Foundation for the inspiration they provided to me for this article simply by demonstrating their 24/7 commitment to the elimination of intolerance and discrimination.

2 Lesbian, Gay, Bisexual, Transgendered and Questioning.

3 Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 104, 523 F.3d 668, 678 (7th Cir. 2008).

4 Id.

5 Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996).

6 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 (9th Cir. 2006).

academic performance, 39% have truancy problems, and 28% drop out of school." As a result, courts have recently begun to acknowledge that the "significantly higher reports of depression and suicide" found among LGBTQ youth is likely caused by the discrimination these students experience in their own schools. In one state, the rate for attempted suicide among gay students is more than six times the rate of straight students.

Things are slowly beginning to change in American society. Some of the leaders of this change include students themselves who have begun to take an active role by forming alliances between LGBTQ and heterosexual students, where they openly discuss topics such as sexual orientation. Unfortunately, a responsive "use of anti-gay epithets, homophobic comments, and other forms of 'gay bashing' has become [and remains] a serious problem" in America's schools. At least one court has lamented the fact that families, schools and communities have deferred to the courts to deal with issues of civility on LGBTQ students in school:

Finally, it is difficult for this Court to understand why all parties to this lawsuit and the members of the Woodbury community, including its parents, schools, student councils, and community leaders, have relinquished their responsibility to a federal court to create parameters of behavior for its schools and its youth . . . . [I]t will always remain the privilege and responsibility of the parents and citizens of Woodbury to raise and nurture its children into decent and caring

8 See Harper, 445 F.3d. at 1179 (citing Courtney Weiner, Note, Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX, 37 COLUM. HUM. RTS. L. REV., 189, 225 (2005)).
11 Nuxoll ex rel. Nuxoll v. Indian Sch. Dist., 523 F.3d 668, 678 (7th Cir. 2008).
human beings who treat people with dignity, respect, kindness, and equality. Messages of hatred, bias, and intolerance should not be a part of any child's upbringing. The great men and women who have brought this country to where it is, while having a vision of the constitutional vigilance that must be maintained to preserve a civilized and democratic society, have always valued, first and foremost, kindness and compassion and a keen understanding that all people are considered equal under the law regardless of their race, religion, culture, sexual orientation, or gender.\textsuperscript{13}

Parents, schools and communities have frequently relied on the courts to deal with these issues. For instance, state courts have routinely recognized causes of action against schools for negligence for "failing to protect their students from the torts of their peers."\textsuperscript{14} The purpose of this article is to explore the various avenues that have been used in the federal courts to: provide relief for student-victims of verbal and physical abuse in schools as a result of their sexual orientation, to ensure the right to organize Gay Straight Alliances (GSAs), and to detail the use of the federal courts by students who assert their right to express contrary views on sexual orientation issues. The article will begin with case examples of students who were assaulted and harassed by fellow students because of their perceived sexual orientation and then detail the response by school authorities who failed to adequately address the conduct and, in some cases, how school officials even participated in the harassment. The article will continue by examining the various federal remedies employed by these student-victims against school authorities, including claims grounded in Due Process, Equal Protection, and the First Amendment, as well as claims based on federal legislation, including Title IX of the Education Amendments of 1972 and the Equal Access Act. Finally, this article will include a discussion on Gay Straight Alliance (GSA) organizations in

\begin{itemize}
  \item \textsuperscript{13} Chambers, 145 F. Supp. 2d at 1073-74.
  \item \textsuperscript{14} Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644 (1999).
\end{itemize}
schools and how LGBTQ students have had to resort to the federal courts to ensure their right to form these supportive organizations is protected.

I. CASE EXAMPLES OF STUDENTS ASSAULTING OR HARASSING LGBTQ STUDENTS

Paul Gilbert and Aaron Fricke are two of the earliest victims of bullying in school due to their sexual orientation whose experiences were described in a federal court case.\(^\text{15}\) When fellow students discovered that Paul Gilbert had requested permission to bring a male escort to the Cumberland (Massachusetts) High School prom, many taunted and spit on him.\(^\text{16}\) One student even slapped him.\(^\text{17}\) After Paul graduated from high school, another student, Aaron Fricke, requested, and was denied, permission to escort Paul Gilbert to the prom.\(^\text{18}\) After news of Aaron’s lawsuit over the principal’s denial of his request appeared in newspapers, a student launched an unprovoked attack on him, requiring five stitches under Aaron’s right eye.\(^\text{19}\)

One of the first publicized cases to describe the relentless assaults on an LGBTQ student by other students in school was Nabozny v. Podlesny in 1996.\(^\text{20}\) Jamie Nabozny’s abuse began in 1988, when he entered middle school in Ashland, Wisconsin.\(^\text{21}\) As the court put it, “Around the time that Nabozny entered the seventh grade, Nabozny realized that he is [sic] gay. Many of Nabozny’s fellow classmates soon realized it too.”\(^\text{22}\) Because Jamie did not “closet” his sexuality, he was immediately subjected to

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\(^{16}\) Id. at 383.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id. at 384.

\(^{20}\) See generally Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

\(^{21}\) Id. at 451.

\(^{22}\) Id.
harassment from other students, including being struck, spit on and regularly referred to as “faggot.”\textsuperscript{23} The harassment progressed to the point where Jamie was once pushed down to the floor by two boys and subjected to a mock rape in a science classroom where twenty other students watched and laughed.\textsuperscript{24} In eighth grade, the situation did not improve, including an episode where Jamie was assaulted in the school bathroom.\textsuperscript{25} The harassment became so severe that Jamie was advised by a district attorney to take some time off of school, which he did.\textsuperscript{26} On his return to school, the continued lack of improvements led to Jamie's first suicide attempt.\textsuperscript{27}

Jamie finished the eighth grade in a private, Catholic school, but since Ashland did not have a private high school, Jamie had no option but to enter ninth grade at the local public high school.\textsuperscript{28} “Almost immediately Nabozny's fellow students sang an all too familiar tune.”\textsuperscript{29} Again, Jamie was assaulted in a school restroom when a fellow student knocked him down into a urinal and another student urinated on him.\textsuperscript{30} Jamie later made his second suicide attempt and after leaving the hospital, ran away to Minneapolis, Minnesota.\textsuperscript{31} When Jamie eventually returned to Ashland at the urging of his parents, he was unfortunately ordered to return to the same public school by the Department of Social Services because his parents could not afford private education.\textsuperscript{32}
Conditions failed to improve at school after Jamie returned to Ashland and started the tenth grade.\(^{33}\) The year started off with Jamie being harassed on the bus, being regularly subjected to epithets such as “fag” and “queer”, and having dangerous objects thrown at him.\(^{34}\) The abuse hit its pinnacle when Jamie was attacked in a school hallway outside of the library.\(^{35}\) He was repeatedly kicked in the stomach for five to ten minutes by a fellow student while eight other students watched and laughed.\(^{36}\) The attack was so severe that Jamie collapsed weeks later from internal bleeding.\(^{37}\) In the eleventh grade, Jamie permanently withdrew from Ashland High School and “moved to Minneapolis, where he was diagnosed with Post Traumatic Stress Disorder.”\(^{38}\)

Jesse Montgomery also experienced harassment for his perceived sexual orientation for eleven years while attending his Minnesota schools.\(^{39}\) This “severe and unrelenting” harassment began in kindergarten and continued on “an almost daily basis until the end of tenth grade.”\(^{40}\) He was taunted with epithets including “faggot,” “fag,” “gay,” “Jessica,” “girl,” “princess,” “fairy,” “homo,” “freak,” “lesbian,” “femme boy,” “gay boy,” “bitch,” “queer,” “pansy,” and “queen.”\(^{41}\) Other students subjected Jesse to physical violence in as early as sixth grade, when “several students punched him, kicked him, and knocked him down

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\(^{33}\) *Id.*

\(^{34}\) *Id.*

\(^{35}\) *Id.*

\(^{36}\) *Id.*

\(^{37}\) *Id.*

\(^{38}\) *Id.*


\(^{40}\) *Id.* at 1084.

\(^{41}\) *Id.*
on the playground." One student even super-glued Jesse to his chair.

The abuse continued to escalate, including Jesse receiving several threats from students; being pushed down in front of his family in a school hallway while attending a choir concert; being knocked "several feet through the air" in a gym class; and purposefully tripped or knocked down in hockey drills. Further, a student once "unzipped his [Jesse's] backpack, threw his books to the floor and smashed his calculator." Others students also threw things, such as "crayons, paper, popcorn, water, chunks of clay, paint brushes, pencils, pen caps, trash, and other small things" at Jesse in art class and on the bus.

Also, some of the assaults inflicted on Jesse by other students were sexual in nature, including touching and grabbing Jesse's inner thigh, chest, and buttocks, and a student grinding his genitals into Jesse's backside. This same student also once "threw Jesse on the ground and pretended to rape him anally, and on another occasion sat on [Jesse's] lap and bounced pretending to have intercourse with him," while other students watched and laughed. As a result of this harassment, Jesse missed school five or six times, did not participate in intramural sports, refrained from going into the school cafeteria, only used the school bathroom for emergencies, and stopped riding the bus. Ultimately, Jesse transferred to a new school district to finish his last two years of high school.

\[42 \text{ Id.} \]
\[43 \text{ Id.} \]
\[44 \text{ Id.} \]
\[45 \text{ Id.} \]
\[46 \text{ Id.} \]
\[47 \text{ Id.} \]
\[48 \text{ Id. at 1084-85, 1094.} \]
\[49 \text{ Id. at 1085.} \]
\[50 \text{ Id. at 1094.} \]
Derek Henkle alleged similar treatment in the public schools of Nevada in *Henkle v. Gregory.*\(^{51}\) The harassment Derek experienced began after he appeared on a local access program “where he participated in a discussion about gay high school students and their experiences.”\(^{52}\) Thereafter, Derek was approached by other students at school and called numerous epithets, including “fag,” “butt pirate,” “fairy,” and “homo.”\(^{53}\) Students even lassoed him around the neck with a rope and threatened to drag him behind a truck.\(^{54}\) In an English class, students “continuously wrote the word ‘fag’ on the whiteboard and sent him notes calling him a ‘fag’ . . . . [And] drew sexually explicit pictures, and called [Derek’s] attention to them.”\(^{55}\) Derek’s fellow students must not have feared negative repercussions for their behavior, because many ran by the office and shouted derogatory, anti-gay remarks at him, and even “threw a metal object at [him]” as he was reporting their previous harassment to the school office.\(^{56}\) Not long after this experience, Derek had an emotional breakdown.\(^{57}\) Afterward, the school placed Derek in an adult education program at a local community college, making him ineligible for a high school diploma.\(^{58}\)

In comparison, George Loomis never revealed to anyone at Golden West High School, the school he attended in California, that he was gay, but in his junior year students began to suspect he was.\(^{59}\) As a result, some of George’s classmates in his “Advance Placement (‘AP’) Biology class

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\(^{52}\) *Id.*

\(^{53}\) *Id.*

\(^{54}\) *Id.*

\(^{55}\) *Id.*

\(^{56}\) *Id.* at 1070.

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 1071.

called him 'faggot' and 'queer' in front of the entire class."\textsuperscript{60} In his choir class, George was taunted with shouts from other students, including: "‘fag’, [sic] ‘queer’, [sic] ‘homo’ [sic] and ‘joto’ (Spanish for ‘homo’)."\textsuperscript{61} In his student leadership class, George was accused of "having an affair with the male teacher who was perceived by many students to be gay."\textsuperscript{62} George Loomis was even subjected to an embarrassing display when his Science and English teachers allowed his sexuality to be openly discussed in class.\textsuperscript{63} George was eventually transferred to an Independent Study Program (ISP), because his guidance counselor thought it would be in his "best interests" to do so.\textsuperscript{64}

George had been an excellent student at Golden West; being "a member of the Gifted and Talented Education Program and aspir[ing] to attend the University of California at Berkeley to study pre-medicine and to eventually go to medical school."\textsuperscript{65} However, because George was enrolled in ISP, recruiters from the University of California at Berkeley would not meet with him.\textsuperscript{66} George also had been very active in extracurricular activities, including: running on the track and cross-country teams, participating in the school choir, being selected for the exclusive "student leadership class" and was even chosen as the student representative of the school district's Board of Education.\textsuperscript{67} Again, however, once George was transferred to ISP, he became ineligible to serve on the Board of Education or to participate in any extracurricular activities.\textsuperscript{68}

\begin{thebibliography}{1}
\bibitem{60} Id.
\bibitem{61} Id.
\bibitem{62} Id.
\bibitem{63} Id.
\bibitem{64} Id. at 1096.
\bibitem{65} Id.
\bibitem{66} Id. at 1097.
\bibitem{67} See id. at 1096-97.
\bibitem{68} Id. at 1097.
\end{thebibliography}
George Loomis' gay classmates suffered similar fates. For example, one gay student at Golden West was nearly hit and run over intentionally by another student in a car.69 Another gay student received a death threat, and a third gay student had the word "Fag" spray-painted on his pickup truck.70 Gay or lesbian students, or those perceived to be gay or lesbian, at Golden West were "repeatedly called 'faggot', [sic] 'queer', [sic] and other anti-gay epithets on campus and in classrooms."71 These students were also targeted for physical abuse, such as fellow students throwing school supplies, including textbooks and food at them.72

The case of *Flores v. Morgan Hill Unified School District*, helps illustrate that female LGBTQ students have also suffered the similar fate of their schools improperly responding to LGBTQ harassment.73 For example, student, Alana Flores often found pornography and threatening notes containing messages such as "Die, dyke bitch," inside of and "scrawled on the outside" of her school locker.74 Alana showed the note to the assistant principal, requesting assignment to a different locker.75 The assistant principal allegedly responded, in part, "Don't bring me this trash any more. This is disgusting."76 She reluctantly agreed to switch Alana's locker.77 When Alana denied she was gay, the assistant principal asked, "Why are you crying, then?"78

This unsympathetic attitude from the assistant principal continued as she declined to take action in the future when

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69 *Id.* at 1093, 1102-03.
70 *Id.* at 1093, 1103.
71 *Id.* at 1093.
72 *Id.*
73 *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).
74 *Id.* at 1133.
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
Alana continued to receive inappropriate material, including more notes and pornography, in her locker.\textsuperscript{79} Another student, a male identified only as “F.F.,” in the same school district as Alana Flores was “hospitalized and treated for ‘severely bruised ribs’” after being beaten by six students who were reported to be uttering “Faggot, you don’t belong here” while they beat him.\textsuperscript{80} The school failed to take the incident seriously, and only punished one of the six students who perpetrated the assault.\textsuperscript{81} Further, the school administrators had F.F. transferred to another school.\textsuperscript{82}

An unidentified student (referred to as “John Doe”) who attended Perry (Iowa) High School brought an action describing similar harassment by classmates in Doe v. Perry Community School District.\textsuperscript{83} John Doe alleged that because he was perceived as being gay, he was harassed “by no less than forty individual students” in a school with a total enrollment of only six hundred.\textsuperscript{84} John Doe also alleged he was repeatedly subjected to anti-gay comments and epithets, such as: “gay,” “queer,” “homo,” “pussy,” “fag,” and “faggot.”\textsuperscript{85} On one occasion, a fellow Perry High School wrestler “removed [John’s] cell phone from his bag at a wrestling match and typed ‘Huge Homo’ on the greeting screen.”\textsuperscript{86} Cheerleaders placed posters on the lockers of wrestlers, and those on John’s locker were regularly vandalized and defaced by other students with anti-gay sentiments.\textsuperscript{87} Further, John was allegedly routinely

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{84} Id. at 815.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 815-16.
\textsuperscript{87} Id. at 816 & n.4.
threatened with physical violence, and was physically assaulted by other students, including "being urinated on in the shower room." The harassment became so pervasive that John quit the wrestling team. Ultimately, John left regular instruction at Perry High School in favor of home schooling. Because he was home-schooled, John missed out on many high school experiences, including prom, senior assembly, and graduation.

Similarly, in New Jersey, L.W. was harassed by other students who perceived L.W. to be gay, resulting in the legal action titled L.W. v. Toms River Regional Schools Board of Education. The abuse began for L.W. as early as fourth grade, when other students taunted him with remarks such as, "you're gay, you're a homo, you're a fag." At that point, "L.W. did not understand the teasing and asked his aunt, 'What does 'gay' mean . . . [T]hat's what everyone says I am, so what does it mean?'" By fifth and sixth grade, L.W. was hearing epithets made at him from other students on an almost daily basis. In seventh grade, L.W. found a piece of paper attached to his locker with the following written on it: "You're a dancer, you're gay, you're a faggot, you don't belong in our school, get out." That same year, in the school cafeteria, a group of ten to fifteen students surrounded L.W. while another student "taunted him with 'the usual' epithets" and also "struck him on the back of the head."

88 Id. at 816.
89 Id. at 819.
90 Id. at 814.
91 Id. at 837.
93 Id. at 540.
94 Id.
95 Id.
96 Id.
97 Id.
The verbal abuse continued to be directed toward L.W. by other students at school play practice, during physical education and while standing in the lunch line. At one point, a student grabbed L.W.’s crotch area and “humped him” while verbally taunting him as other students watched. L.W. continued to be verbally harassed after starting high school and, at one point, a fellow student approached L.W. off school property, verbally harassed him, punched him in the face, and knocked him down. From time to time, L.W. missed school as a result of the harassment to which he was subjected by other students. L.W. also often chose to walk, instead of riding the bus in order to avoid the harassment. “Prior to the harassment, family members described L.W. as a ‘very happy child.’ After the maltreatment, his family described him as ‘depressed,’ ‘fearful,’ and ‘withdrawn.’” L.W. ultimately “withdrew from the District to attend school elsewhere.”

II. RESPONSE AND INVOLVEMENT BY SCHOOL AUTHORITIES

In the cases where students were subjected to verbal and physical assault due to the student-victims’ perceived sexual orientation, the responses from school authorities were varied. In the cases discussed above, school authorities responses ranged from: effective but delayed, inaction, very little response, ineffective response (punishing perpetrators but taking action that failed to stop further abuse, or in some cases made the harassment worse), showing no emotional support for the student-victim, to even participating in the harassment. Further, these diverse responses came from all levels of the schools.
personnel hierarchy, including: principals and vice principals, counselors, staff, school police liaisons, bus drivers, and teachers. For many LGBTQ student-victims, the inadequate response for help from their school authorities helped contribute to the dramatic effect this school abuse caused to their overall wellbeing (both physically and psychologically), and harmed their educational growth and futures.

In Paul Gilbert’s case, after the taunting, spitting, and slapping event took place, and due to newspapers reporting that he had requested permission to have a male escort at the prom, the principal or assistant principal began escorting Paul to his classes and the abuse stopped.105 A nine day suspension was given in response to the later assault on Aaron Fricke at the same high school.106 Further, “Aaron was given a special parking space closer to the school doors and [like Paul Gilbert] he [was] provided an escort (either the principle or assistant principal) between classes,” resulting in no further incidents.107

In the case of Jamie Nabozny, in spite of having a policy of investigating and punishing student-on-student assaults, the school authorities “turned a deaf ear” on his requests for help and, in some instances, even mocked Jamie’s dilemma.108 When Jamie made his first report of harassment, the guidance counselor gave the two students responsible detention.109 However, as the school year progressed, the principal continually failed to take action to stop the ongoing harassment.110 For example, when Jamie reported the mock rape incident to the principal, the principal not only took no action against the offending

106 Id. at 384.
107 Id.
108 Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).
109 Id. at 451.
110 Id.
students, but instead responded "‘boys will be boys’ and told [Jamie] that if he was ‘going to be so openly gay,’ he should ‘expect’ such behavior from his fellow students." This response prompted Jamie to run home and, upon returning to school the next day, he was forced to meet with the school counselor for leaving the school without permission.\textsuperscript{112}

As the assaults and harassment continued, Jamie’s parents decided to get involved and met with the principal.\textsuperscript{113} In that meeting, the principal reiterated that they should “expect” the harassment to continue if Jamie continued to be “openly gay,” all while pledging to take action against the perpetrators.\textsuperscript{114} However, as before, nothing was ever done.\textsuperscript{115}

Other individuals in authority were also of little help: the district attorney recommended that Jamie take some time off of school; the guidance counselor, who was supposed to change Jamie’s schedule to get away from harassing students, actually put him in a special education class, and worse yet, two of the offending students were in that class; and finally, the school’s police liaison dissuaded Jamie from filing charges against the offenders.\textsuperscript{116} After the brutal kicking attack that resulted in internal bleeding, Jamie reported the incident to the school official in charge of discipline who “laughed and told [Jamie] that [he] deserved such treatment because he is gay.”\textsuperscript{117} Ultimately, the school counselor “told [Jamie] and his parents that school administrators were unwilling to help him and that he should seek educational opportunities elsewhere.”\textsuperscript{118}

\begin{thebibliography}{99}
\bibitem{111} Id.
\bibitem{112} Id.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{115} Id.
\bibitem{116} Id. at 451-52.
\bibitem{117} Id. at 452.
\bibitem{118} Id.
\end{thebibliography}
Inconsistent responses to LGBTQ student harassment by school officials is also reflected in the case of Jesse Montgomery.\(^{119}\) Jesse made hundreds of complaints over a period of ten years and, while school officials did suspend several offending students, school officials for the most part "did little more than verbally reprimand the offending students or send them to the hallway."\(^{120}\) At one point, rather than taking action against the offending students, Jesse was required to attend "group sessions with other boys to discuss strategies for responding to harassment," forcing him to miss some of his favorite classes.\(^{121}\) Twice, school officials "required the offenders to meet with [Jesse] and apologize," but this was not helpful and, in fact, "resulted in a significant amount of retaliatory harassment."\(^{122}\) One bus driver even "deliberately facilitated the harassment" by dropping Jesse off and then pulling into, and stopping in the intersection so a second bus could pull up to Jesse and allow its students to open their windows and yell insults at him while he walked home.\(^{123}\) Two of the students lost their bus privileges for their relentless abuse of Jesse (on the bus and at school), but their bus privileges were reinstated within one week.\(^{124}\)

Derek Henkle received a strikingly similar response from school authorities to his complaints of harassment and assaults by other students as a result of Derek's perceived sexual orientation.\(^{125}\) For example, Derek had to wait almost two hours, hiding in a classroom, after calling the assistant vice principal on the phone to receive help after some students lassoed him and threatened to drag him

\(^{120}\) Id. at 1095.
\(^{121}\) Id. at 1085.
\(^{122}\) Id.
\(^{123}\) Id. at 1085 n.5.
\(^{124}\) Id. at 1086.
behind a truck.\textsuperscript{126} When the assistant vice principal did show up, he “responded with laughter” and “took no action against the alleged harassers.”\textsuperscript{127} As the harassment continued, Derek was told numerous times by school officials “to keep his sexuality to himself.”\textsuperscript{128} At one point, the principal responded to Derek’s report of harassment by telling Derek to “stop acting like a fag.”\textsuperscript{129} When Derek asked to transfer schools because of the educational restraints caused by the harassment, the principal “initially told him that the transfer was not possible because [Derek] was openly gay and a traditional high school would not be appropriate.”\textsuperscript{130} The transfer was eventually approved.\textsuperscript{131} Unfortunately, Derek later had to enroll in an adult education program when school officials from his original school refused to let him transfer back, despite having the availability to do so.\textsuperscript{132}

George Loomis alleged that there was an entire culture of non-responsiveness from school officials to his calls for help from sexual harassment due to his sexual orientation.\textsuperscript{133} For instance, when another gay student at the school fought back after being attacked by other students with derogatory terms, the school administrators broke up the fight and led the gay student, who never returned to the school, away in handcuffs.\textsuperscript{134} “Administrators allegedly mocked or ignored students who asked for help from harassment.”\textsuperscript{135} Further,

\textsuperscript{126} Id. at 1069.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 1075.
\textsuperscript{129} Id. at 1070.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 1070-71.
\textsuperscript{134} Id. at 1093.
\textsuperscript{135} Id. at 1094.
administrators and counselors at the school routinely forced LGBTQ students into “independent study programs, adult schools or other alternative educational programs in order to isolate these [LGBTQ] students from their peers.”\footnote{Id.} A school official eventually told George that they “could not promise that the school would be safe for him” and that, “if he did not feel safe then he should give up school altogether and attend adult school.”\footnote{Id. at 1097.} Ultimately, school officials met with George and told him “that they all agreed that [George] should enroll in the ISP” (Independent Study Program).\footnote{Id. at 1096.}

George Loomis also alleged his own teachers in the Visalia Unified School District not only failed to take to action to stop the harassment of LGBTQ students, but also participated in, and perpetuated the harassment.\footnote{Id. at 1094.} Such instances include when a teacher “made anti-gay statements in class,” and when one school employee posted “anti-gay comments on a bulletin board in the school office.”\footnote{Id.} George Loomis was also taunted with derogatory epithets in his AP Biology class and the “teacher would often laugh along with the students.”\footnote{Id. at 1095.} Similarly, when George’s Spanish II teacher noticed that George was wearing an earring, he stated to the class: “There are only two types of guys who wear ear rings – pirates and faggots – and there isn’t any water around here.”\footnote{Id.} On the advice of the principal, George approached his Spanish teacher about the incident.\footnote{Id. at 1096.} The teacher’s response was to laugh and to continue calling George a “pirate.”\footnote{Id.} Later, when a local
newspaper published an article about the harassment George suffered in school, “teachers photocopied the article and distributed it to students in class,” and one teacher stated: “Well, we can’t talk about religion, but we can talk about this faggot boy.” This reaction of the teachers paralleled the harassment imposed on George by his classmates.

The higher staff of George’s school also would participate in harassing him. For instance, a school counselor entered a camera store where George worked and told her friend, “That boy is a faggot.” When George confronted the school counselor about the incident in her office, the counselor told the assistant principal (who was present in the office), “This is George Loomis and he is gay.” The assistant principal proceeded to mock George and his sexuality in a high-pitched, effeminate voice. As noted earlier, George’s counselor recommended that George be transferred out of his regular classes into an Independent Study Program, resulting in the university of his choice refusing to meet with him for an entrance interview.

In the case of Alana Flores and her classmates, school authorities took virtually no action, and in one instance even participated in the harassment. As stated above, when Alana asked for a locker reassignment, the assistant principal replied, “Yes, sure, sure, later. You need to go back to class. Don’t bring me this trash any more. This is disgusting.” During this same encounter, the assistant principal even bluntly asked Alana if she was gay and,

\begin{footnotesize}
\begin{itemize}
\item[145] Id. at 1098.
\item[146] Id. at 1095.
\item[147] Id. at 1097.
\item[148] Id.
\item[149] Id.
\item[150] Id. at 1096, 1097.
\item[151] Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1133 (9th Cir. 2003).
\item[152] Id.
\end{itemize}
\end{footnotesize}
when Alana denied being gay, replied, "Why are you crying, then?"\textsuperscript{153} For Alana’s schoolmate, F.F., only one of his six assailants was disciplined and F.F. was transferred to a different school.\textsuperscript{154} Another of Alana’s schoolmates, a female identified as “J.D.,” was harassed with name-calling and had food thrown at her in front of a campus monitor, who did nothing to stop the harassment.\textsuperscript{155} In fact, the campus monitor later joined in the harassment when the “campus monitor initiated a rumor among the students that J.D. and another female student were having oral sex in the [school] bathroom.”\textsuperscript{156}

The student identified as John Doe similarly alleged that his complaints of harassment and assault to officials at his Perry, Iowa high school went largely unheeded. Also, John complained that when offenders were disciplined it did not normally include any sort of suspension and the punishments were usually reduced.\textsuperscript{157} Finally, John also alleged that teachers and administrators at his school participated in “discriminatory and demeaning treatment” against him.\textsuperscript{158} For example, when John complained to school authorities about the abuse he suffered, he received little support. Instead, “one teacher criticized him for speaking out and that the teacher further stated that [John] had ‘the biggest mouth in the south.’”\textsuperscript{159} Reports to the principal and vice principal concerning the harassment resulted in John being told that: “the incidents were ‘no big deal,’ that he should ‘get tougher skin,’ ‘get used to it,’ and ‘grow up.’”\textsuperscript{160} This lack of concern was in spite of the fact

\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{158} \textit{Id. at} 815.
\textsuperscript{159} \textit{Id. at} 817.
\textsuperscript{160} \textit{Id. at} 816.
that John’s doctor had provided a letter to the school referring to John’s “suicidal tendencies and . . . [how his] stress, fear and anxiousness were exacerbated by the hostile environment” he was experiencing in the school.\textsuperscript{161}

In the case of L.W., he was able to receive some assistance from school authorities, but it was ineffective at stopping the harassment to a large degree. The director of the Division of Civil Rights found that his overall school environment exuded an “anti-homosexuality hostility” which administrators failed to correct despite disciplining offenders on an individual basis.\textsuperscript{162} The Court of Appeals agreed that L.W. had been subjected to “severe or pervasive harassment” based on his perceived sexual orientation and that the school environment was “hostile or abusive.”\textsuperscript{163} School authorities routinely responded to instances of harassment by warning the offending students that their conduct was “inappropriate and that, if repeated, they would be dealt with more severely.”\textsuperscript{164} However, although on several occasions offending students were given detention and suspended,\textsuperscript{165} on at least one occasion the assistant principal “did not have time to talk to the children involved” because “something had come up.”\textsuperscript{166} At one point the guidance counselor advised L.W. to “toughen up and turn the other check.”\textsuperscript{167} School authorities did provide L.W. with some assistance by: imposing an “open door” policy, which allowed L.W. to leave classes at any time to report harassment, moving his gym locker closer to the physical education office, and having a security guard “monitor [L.W.] between classes approximately eighty

\begin{enumerate}
\item Id. at 817.
\item Id. at 1105.
\item Id. at 1096-98.
\item Id. at 1098.
\item Id.
\end{enumerate}
percent of the time.”168 At one point, L.W. was accepted into a performing arts program at a different school and his school district agreed to pay all the costs, including attendance and transportation, so that L.W. could attend.169

III. GROUNDS FOR FEDERAL CLAIMS OFTEN PURSUED BY LGBTQ STUDENT VICTIMS OF HARASSMENT

LGBTQ students who have been victims of harassment by fellow students have relied on a number of different legal theories to pursue claims in federal court against school authorities. Those claims can be constitutionally based (on Due Process, Equal Protection, and First Amendment grounds) or statutorily based (primarily using Title IX of the Education Amendments of 1972). The application of each of those theories to student harassment of LGBTQ students will be discussed separately.

A. Due Process Claims

Actions brought by students against schools for student-on-student assaults under a Due Process theory have had little success. Federal courts have been sharply divided on the issue of whether Title IX claims (which will be discussed infra in this article) preempt a due process violation claim under a 1983 theory.170 Some federal courts have held that Title IX preempts a 1983 action,171

168 Id. at 542.
while other courts have held that Title IX does not preempt a *1983* action.174 Regardless of the preemption issue, courts have been reluctant to recognize a claim for a Due Process violation for a student-on-student assault reasoning that, unlike prisons or mental institutions, public schools do not entail such a custodial relationship as to impose a duty of protection on the school authority.175 Courts have also held that the various components of the educational process, such as participation in athletics and memberships in clubs, do not create a property interest subject to constitutional protection.176 These judicial interpretations have effectively eliminated the application of the Due Process Clause to support claims of LGBTQ students for assaults by fellow students.

Courts have also held that Due Process actions for student-on-student assaults are not viable because they “fail to satisfy the state action component required under the Due Process Clause” of the Constitution.177 Thus, some courts have similarly been led to find that schools do not have an affirmative duty to protect students from assaults by other students.178 An exception to this rule has been found when the school officials “created the danger” that caused the harm.179 At least one court has held that, in order to avail himself of this exception, the plaintiff must show that the state’s action was “reckless or intentional

174 *See, e.g.*, Crawford v. Davis, 109 F.3d 1281, 1283, 1284 (8th Cir. 1997); Seamons v. Snow, 84 F.3d 1226, 1234 (10th Cir. 1996); Lillard v. Shelby Cnty Bd. of Educ., 76 F.3d 716, 722-24 (6th Cir. 1996).

175 *See Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993).

176 *See Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976).

177 *Seamons*, 84 F.3d at 1235.


179 Uhrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995).
injury-causing” and that the action “shocks the conscious.”\textsuperscript{180} A failure to act by school officials does not meet this exception, even when those officials had a “policy or practice of ignoring [a victim’s] pleas for help” under the rationale that the school did not create a risk of harm or exacerbate an existing one.\textsuperscript{181} Therefore, in order to support a Due Process claim, an LGBTQ victim must show that school authorities actively participated in or encouraged the victimization by fellow students.

\textit{B. Equal Protection Claims}

Equal Protection claims for student-on-student assaults brought by LGBTQ students against schools have also had limited success. The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits government from perpetrating arbitrary gender-based discrimination.\textsuperscript{182} This means that discrimination by schools on the basis of gender stereotypes is prohibited by the Equal Protection Clause.\textsuperscript{183} At least one court has analyzed whether female students who were victims of student-on-student harassment were treated differently by school officials than male LGBTQ students, finding that such disparate treatment would support a claim on Equal Protection grounds.\textsuperscript{184} This means if school authorities respond more strongly to complaints by heterosexual girls filing sexual harassment complaints than to those of LGBTQ male students filing similar complaints, an Equal Protection cause of action is available.\textsuperscript{185}

\textsuperscript{180} Seamons, 84 F.3d at1236.
\textsuperscript{181} See Nabozny, 92 F.3d at 460.
\textsuperscript{182} See Reed v. Reed, 404 U.S. 71,76 (1971).
\textsuperscript{184} Nabozny, 92 F.3d at 456.
The United States Supreme Court has also held that the Equal Protection Clause prohibits government from singling out gays and lesbians as a group and denying them rights provided to other groups. Therefore, the Equal Protection Clause prohibits state discrimination based on sexual orientation. However, discrimination based on sexual orientation is subject to review on only a "rational basis" standard. In directly dealing with an Equal Protection claim by a student for student-on-student harassment, the Nabozny court acknowledged that gays are an "identifiable minority subjected to discrimination in our society." That court went on to say there was no "rational basis for permitting one student to assault another based upon the victim's sexual orientation" and, as such, permitted an Equal Protection claim against the school for failing to react similarly to what would have occurred for other assaults. Some other courts have agreed with this position.

However, other courts have disagreed, saying that, "[w]hile the Equal Protection Clause limits government's authority to deny services based on an individuals protected status, it [the Equal Protection Clause] does not require the government to prevent private actors from discriminating on that basis." This means school authorities in some jurisdictions would not be required to prevent other students (or "private actors") from discriminating against other students on the basis of his/her sexual orientation. Courts can distinguish this approach by finding that the reactions (or lack thereof) of school authorities to the complaints of the victim constitute an action of the state

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187 See Doe, 316 F. Supp. 2d at 829.
188 Richenberg v. Perry, 97 F.3d 256, 260-61 (8th Cir. 1996).
189 Nabozny, 92 F.3d at 457.
190 See id. at 456-58.
191 See Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137-38 (9th Cir. 2003); Montgomery, 109 F. Supp. 2d at 1089.
and, as such, a differential response for LGBTQ students may support an Equal Protection claim.\textsuperscript{193}

At least one court has clearly found that an Equal Protection claim may be applied against a school district for harassment and assaults of students who are (or are perceived to be) gay by other students.\textsuperscript{194} The Flores court found that students who allege discrimination based upon sexual orientation are a member of an identifiable class.\textsuperscript{195} This court further specified that, in order to sustain an Equal Protection claim under such circumstances, the plaintiffs must show that the school officials either "intentionally discriminated or acted with deliberate indifference" to the rights of gay students.\textsuperscript{196} The Flores court reasoned that school inaction, such as: failure to act in a manner that is reasonable,\textsuperscript{197} failure to take further steps once realizing that remedial actions were inadequate,\textsuperscript{198} and failure to properly train teachers, students, and campus monitors about the school district's policies of prohibiting harassment due to sexual orientation\textsuperscript{199} could all support Equal Protection claims under the "deliberate indifference" category.

\textit{C. First Amendment Claims}

The most common group of claims reviewed by the courts involving LGBTQ students in public schools are based upon the First Amendment to the United States Constitution. Over forty years ago, the United States Supreme Court, in Tinker,\textsuperscript{200} held that the free speech rights of students in a

\textsuperscript{193} Montgomery, 109 F. Supp. 2d at 1098.
\textsuperscript{194} Flores, 324 F.3d at 1135, 1136-38.
\textsuperscript{195} Id. at 1134-35.
\textsuperscript{196} Id. at 1135.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 1135-36.
\textsuperscript{199} Id. at 1136.
school setting had been a long-standing doctrine of the court.\textsuperscript{201} In some cases, courts have avoided addressing the First Amendment issues because the case had been resolved on other grounds, such as by application of the Equal Access Act (which will be discussed in infra in this article).\textsuperscript{202} In fact, one court has gone so far as to say that the Equal Access Act “effectively codified the First Amendment rights of non-curricular student groups.”\textsuperscript{203}

The First Amendment, made applicable to the states (including public school boards) by the Fourteenth Amendment, prohibits government from limiting or prohibiting speech.\textsuperscript{204} The rights to free speech are not absolute.\textsuperscript{205} It is clear that public school students do not “shed their constitutional [First Amendment] rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{206} However, the rights of public school students in schools “are not automatically coextensive with the rights of adults in other settings.”\textsuperscript{207} The United States Supreme Court has held that the First Amendment requires that, when it comes to allocation of funding support, public schools are required to be “viewpoint neutral.”\textsuperscript{208} This requires that minority views be treated equally to majority views.\textsuperscript{209}

\textsuperscript{201} Id. at 513-14 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.") Id. at 506).


\textsuperscript{207} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

\textsuperscript{208} Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 233 (2000).

\textsuperscript{209} Id. at 235.
First Amendment protection applies even if the speech is distasteful or discomforting.\textsuperscript{210}

When government creates an open public forum, citizens are entitled to a full range of free expression without limitation as to subject matter.\textsuperscript{211} LGBTQ students and student groups have used the “open forum” concept to support a claim that schools cannot provide speech restrictions based on the subject matter of the speech. When an open public forum is created, any exclusion of a speaker must “serve a compelling state interest and . . . [be] narrowly drawn.”\textsuperscript{212} Government may also create a nonpublic forum where access is restricted by “distinctions on the basis of subject matter and speaker identity.”\textsuperscript{213} In a nonpublic forum setting, restrictions must be reasonable and cannot be an attempt to suppress expression because of viewpoint.\textsuperscript{214} Finally, government can create a limited public forum where all viewpoints are allowed so long as the content of the expression falls within the permissible subject matter of the forum.\textsuperscript{215}

Unlike the Equal Access Act, the First Amendment allows a school to limit the subject-matter of topics to be discussed by groups, although, like the Equal Access Act, the First Amendment prohibits schools from restricting individual viewpoints on the allowed subject matter when it creates a limited public forum.\textsuperscript{216} Schools relying on the limited public forum rules of the First Amendment must communicate a “coherent standard” for the limitations imposed and “consistently and fairly” apply that

\begin{footnotesize}
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\item See generally Abrams v. United States, 250 U.S. 616, 630 (1919).
\item Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 49 (1983).
\item See id.
\item See id.
\end{enumerate}
\end{footnotesize}
standard. Consequently, if a school allows the formation of some “clubs” on campus, such as a “Polynesian Club” to explore the history and culture of one group of people, it may not prohibit the formation of a “Prism Club” designed to study the history and culture of LGBTQ people.

Derek Henkle asserted that his First Amendment rights were violated by school authorities when they told him to keep his sexuality to himself, conditioned his transfer to another school upon his keeping his sexuality to himself, and told him that enrollment in a traditional high school was not appropriate because he was openly gay. The court found that Derek had made “sufficient allegations, that his constitutionally protected speech was a substantial motivating factor in the adverse action directed at him” by the school to survive a motion to dismiss.

Aaron Fricke also made a First Amendment claim based on the school denying his request to take a male escort to the school prom. Aaron claimed that “it would be dishonest to his own sexual identity to take a girl to the dance,” and that his attendance “would have a certain political element and would be a statement for equal rights and human rights.” The court found that, in this instance, the conduct was transformed into protected speech. As to the school’s argument that attendance at the prom dance by Aaron with a male escort could lead to violence by other students against him, the court rejected it as allowing a “heckler’s veto” saying: “The First Amendment does not tolerate mob rule by unruly school children.”

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218 Id. at 1250.
220 Id. at 1076.
222 Id. at 385.
223 Id.
224 Id. at 387.
D. Title IX Claims

Title IX of the Education Amendments of 1972 provides, in part: “No 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.” The United States Supreme Court has held that courts should apply Title IX broadly, as its language indicates. Title IX provides the aggrieved person an implied cause of action for both injunctive and monetary relief.

In *Davis v. Monroe County Board of Education*, the United States Supreme Court held that Title IX can be the basis for private damage actions against a school for student-on-student harassment if the school: receives federal funding, “acts with deliberate indifference to known acts of harassment in its programs or activities,” and if the “harassment is so severe, pervasive and objectively offensive that it bars the victim’s access to an educational opportunity or benefit.” The potential for civil liability under Title IX does not require that school authorities take any particular action or that they maintain a completely safe environment at the school, but only that the response of, or lack of response by, authorities to the harassment cannot be “clearly unreasonable in light of the known circumstances.”

The various elements of a Title IX claim set forth by the United States Supreme Court in *Davis* for claims based

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230 Id. at 633.
231 Id. at 648-49.
232 Id. at 651.
upon harassment of LGBTQ students by other students have been delineated by the lower courts. For example, in the United States District Court, District of Minnesota, harassment qualifies as being "on the basis of sex" if it is a result of a failure to conform to gender stereotypes.\textsuperscript{233} Therefore, the harassers do not have to be motivated by any sexual desire toward the plaintiff.\textsuperscript{234} Instead, any hostility towards a victim which is based on his/her sexual orientation is sufficient to constitute sexual harassment.\textsuperscript{235}

Other courts have required that the acts of school authorities must be deliberate as opposed to merely negligent, meaning that the authorities must have "intentionally fail[ed] to intervene and put a stop to the harassment."\textsuperscript{236} Courts have held that claimants can meet the "deliberate indifference" requirement by showing that the school authorities took "only minor steps to address the harassment with the knowledge that such steps would be ineffective."\textsuperscript{237} Showing actual physical deprivation from school resources is not necessarily required, so long as the harassment is "sufficiently severe and pervasive such that it undermines and detracts from the educational experience."\textsuperscript{238} Therefore, in the Doe case, the fact that the LGBTQ student quit the wrestling team and turned to home schooling, forsaking classroom instruction, because of the hostile school environment was sufficient to meet this requirement.\textsuperscript{239}

\textsuperscript{234} Id. at 1090.
\textsuperscript{235} Id.
\textsuperscript{238} Doe, 316 F. Supp. 2d at 833.
\textsuperscript{239} Id. at 834.
IV. GAY STRAIGHT ALLIANCE ORGANIZATIONS (GSAs)

To increase tolerance and to reduce the harassment of LGBTQ students in schools, students across the country have formed Gay-Straight Alliances (GSAs). The stated purpose of a GSA is to: "provide students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance, understanding and acceptance of one another regardless of sexual orientation." As of 2008, there were over 700 GSA-like student groups in schools across the United States. A series of cases have arisen concerning the rights of students to band together and form GSAs within a school setting. Once again, LGBTQ students have often been forced to turn to the federal courts to ensure their ability to access the same rights and protections of other students.

A. GSAs and the Equal Access Act

In 1981, the United States Supreme Court held that a state university could not single out religious groups or prevent them from meeting if the university makes its facilities generally available for use by registered student groups. Three years later, Congress extended this holding to public high schools by passing the Equal Access Act. However, while the Act was intended to permit religious speech in schools, it also provided equal rights of free speech to GSAs. The Equal Access Act provides:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which

244 See id.
has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.\textsuperscript{245}

The Act also states: “A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on the school premises during noninstructional time.”\textsuperscript{246}

In \textit{Westside Community Board of Education v. Mergens},\textsuperscript{247} the United States Supreme Court defined the terms “noncurriculum related student group” broadly by holding that the terms refer to “any student group that does not \textit{directly} relate to the body of courses offered by the school.”\textsuperscript{248} The \textit{Mergens} court went on to say:

In our view, a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.\textsuperscript{249}

School boards and school authorities have had little success in preventing the recognition and formation of GSAs in light of the Equal Access Act. In fact, one court has stated that a school district who desires avoidance of application of the Act would have to give up federal funding.\textsuperscript{250} In order to attempt to avoid application of the

\begin{itemize}
\item[\textsuperscript{245}] 20 U.S.C. § 4071(a) (2006).
\item[\textsuperscript{246}] 20 U.S.C. § 4071(b) (2006).
\item[\textsuperscript{248}] \textit{Id.} at 239.
\item[\textsuperscript{249}] \textit{Id.} at 239-40.
\end{itemize}
Equal Access Act, another school stated in a formal written policy that it was their “express decision not to allow a limited open forum as defined by the Equal Access Act” for its student organizations.251 In the Mergens decision, however, the Supreme Court directed courts to look to a school’s actual practice rather than merely accepting its stated policy.252 Therefore, courts must examine the record of the “actual practices” of a student group in order to make a qualitative determination as to curriculum-relatedness.253 A “noncurriculum related student group,” may not be denied “equal access to any other group on the basis of the content of the group’s speech” by schools.254 Also, once a limited open forum is created, a school not only must provide some of the avenues of communication to all groups, but must also provide equal access to the same avenues of communication, such as allowing the group to meet, as other noncurriculum related groups.255 Because the Equal Access Act requires equal access and recognition to a GSA, no additional restriction can be placed upon the GSA that is “not uniformly applied to all noncurricular student groups.”256

School authorities cannot avoid application of the Act by claiming that it did not know that other noncurriculum related groups were operating at the school.257 Courts will not allow school authorities to avoid the application of the Equal Access Act by “[b]urying their heads in the sand and

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252 Mergens, 496 U.S. at 246.
253 Id. at 240; Straights & Gays for Equal. v. Osseo Area Schs. – Dist. No. 279, 471 F.3d 908, 912 (8th Cir. 2006); Boyd, 258 F. Supp. 2d at 685; E. High Gay/Straight Alliance, 81 F. Supp. 2d at 1180.
255 Straights & Gays for Equal., 471 F.3d at 911.
257 Boyd, 258 F. Supp. 2d at 685.
willfully ignoring student groups . . . ” who are meeting on school property.258 Further, courts have held that schools are allowing groups access, making the Act applicable, when it “knows or should know that the group is violating administration rules” by meeting, and “take[s] no action to prevent further meetings.”259

Courts have held that, while school boards may be uncomfortable about the discussions in which students will participate when a GSA is created, such feelings do not allow a violation of the Equal Access Act:

The Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. As in Tinker, however, when the school administration was uncomfortable with students wearing symbols of protest against the Vietnam War, Defendants can not [sic] censor the students’ speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint.260

At least one court has held that interpreting the Equal Access Act differently for Christian groups than for GSAs would make the courts “[c]omplicit in the discrimination against students who want to raise awareness about homophobia and discuss how to deal with harassment directed towards gay youth.”261

One attempt to deny equal access to a GSA is to claim that the existence of a GSA would be in direct contravention of the school’s “abstinence only” policy.262 A court has rejected this argument on two grounds: first, that the message of gay tolerance does not conflict with an

258 Id. at 686.
259 Id.
260 Colin, 83 F. Supp. 2d at 1149; Boyd, 258 F. Supp. 2d at 691.
261 Colin, 83 F. Supp. 2d at 1149.
abstinence-only policy, and second, that allowing message-based exceptions would defeat the entire purpose of the Equal Access Act. A Court has also rejected the idea that recognition of a GSA would promote premature sexualization of students.

B. Exceptions to the Equal Access Act

"[T]here are few limits to the types of student groups that are permitted to meet once the EAA [Equal Access Act] is triggered." One of those exceptions is that an outside group cannot "direct, conduct, control, or regularly attend activities" of the group. Merely using a name suggested by an outside (national) group and receiving emotional support from that outside group does not exempt a GSA from use of the Equal Access Act when the formation and control of the group is student-initiated.

Another exception permitted under the Equal Access Act is that the meetings of the group cannot "materially and substantially interfere with the orderly conduct of educational activities within the school." The act specifically states that schools can limit the speech of students and student groups when necessary to "maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure the attendance of students at meetings is voluntary."

Courts have refused to find that the formation of a GSA would materially and substantially interfere with the orderly

263 Id. at 1237; see also Gonzalez v. Sch. Bd. of Okeechobee Co., 571 F. Supp. 2d 1257, 1265 (S.D. Fla. 2008).
266 Id. at 1262.
instruction of students when the entire purpose of the organization is "to avoid the disruptions that take place when students are harassed due to sexual orientation."\textsuperscript{271} In one case, a school board voted to ban all clubs at a high school in response to a disruption that occurred in response to the formation of a GSA club by opponents of the GSA.\textsuperscript{272} The federal court invalidated the across-the-board ban because it refused to accept a "heckler's veto" exception to the Equal Access Act.\textsuperscript{273} School authorities cannot deny equal access to a group because people opposing the group cause disruption, but, rather, must show that the disruption is caused by the group's own disruptive activities.\textsuperscript{274}

Even though parents have the primary duty to teach their children to be tolerant and accepting citizens, courts have found that GSAs can be an effective tool in reducing hate crimes against LGBTQ students.\textsuperscript{275} In fact, the need for recognition of a GSA to end discrimination in schools based on sexual orientation was found to be so important that one court noted: "As any concerned parent would understand, this case may involve the protection of life itself."\textsuperscript{276}

\textbf{C. The First Amendment Used to Protect GSAs}

Courts have also used First Amendment analysis to review attempts by school authorities to prohibit or restrict GSA activities in schools. As noted above, the \textit{Tinker} court held a student's First Amendment rights do not evaporate at the school door and that schools must demonstrate "... something more than a mere desire to avoid the discomfort

\textsuperscript{271} Colin, 83 F. Supp. 2d at 1146.
\textsuperscript{273} Id. at 689.
\textsuperscript{274} Id. at 690.
\textsuperscript{275} Id. at 692.
\textsuperscript{276} See Colin, 83 F. Supp. 2d at 1151.
and unpleasantness that always accompany an unpopular viewpoint” in order to control a student’s freedom of expression.277 One court found that the purpose of a GSA (meeting as a group to discuss matters pertaining to sexual orientation and building trust with heterosexual students) “sounds in the political speech addressed in Tinker.”278 Another court characterized the very purpose of a GSA as “but another example of the associational activity unequivocally singled out for protection in the very ‘core’ of association cases decided by the Supreme Court.”279

D. Use of First Amendment to Protect Students Anti-Gay Expression in Schools

Students have also used the First Amendment to support their right to brandish anti-gay feelings in a school setting. For instance, in 2003, a California high school allowed its GSA group to hold a school-wide “Day of Silence.”280 The court described the event as follows:

On the “Day of Silence,” participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians; these students would not speak in class except through a designated representative. Some students wore black T-shirts that said “National Day of Silence” and contained a purple square with a yellow equal sign in the middle. The Gay–Straight Alliance, with the permission of the School, also put up several posters promoting awareness of harassment on the basis of sexual orientation.281

As a result, a group of heterosexual students organized and held a “Straight-Pride Day” during which they wore T-


278 Gonzalez, 571 F. Supp. 2d at 1269.

279 Gay Students Org. v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974).

280 Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006).

281 Id. at 1171 n.3.
shirts displaying derogatory remarks toward Gays.\textsuperscript{282} One student wore a T-shirt containing the handwritten message "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL Romans 1:27."\textsuperscript{283} The student was asked to remove the shirt, but refused to do so.\textsuperscript{284} In spite of asking to be suspended two times, the student spent the day in the school conference room doing homework.\textsuperscript{285} This student was never suspended, nor was he given any other discipline that warranted a note in his record.\textsuperscript{286}

However, despite the lack of discipline, the student brought an action against school authorities alleging, among other things, that the school violated his constitutional right to free speech.\textsuperscript{287} The court found that school authorities had the right to restrict the students First Amendment rights because the "wearing of his T-shirt 'collides with the rights of other students' in the most fundamental way."\textsuperscript{288} The court reasoned, "Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."\textsuperscript{289} Because the First Amendment requires that limitations on student speech must be "narrow and applied with sensitivity," the court limited the holding "to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."\textsuperscript{290}

\textsuperscript{282} \textit{Id.} at 1171.
\textsuperscript{283} \textit{Id.}
\textsuperscript{284} \textit{Id.} at 1172.
\textsuperscript{285} \textit{Id.}
\textsuperscript{286} \textit{Id.} at 1173.
\textsuperscript{287} \textit{Id.}
\textsuperscript{288} \textit{Id.} at 1178 (quoting in part Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
\textsuperscript{289} \textit{Id.}
\textsuperscript{290} \textit{Id.} at 1183.
A similar incident occurred at the Neuqua Valley High School in Naperville, Illinois. After a “Day of Silence” was conducted at Neuqua Valley, students who disapproved of homosexuality organized a “Day of Truth.” One student wore a T-shirt on the “Day of Truth” that said “My Day of Silence, Straight Alliance’ on the front and ‘Be Happy, Not Gay’ on the back.” Two years later, pursuant to a school rule, this student did not wear a T-shirt rendering his anti-gay feelings following the annual “Day of Silence,” but instead sued the school district claiming that the rule prohibiting him from wearing the T-shirt violated his First Amendment Rights. The court held that the phrase, “Be Happy, Not Gay” was only “tepidly negative” and, as such, would only have a “slight tendency to provoke such incidents” of harassment. The same case came back to the court three years later. In 2011, the same court similarly held that “a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality.” Again, the court held that the wording “Be Happy, Not Gay,” was mild and did not constitute “fighting words.” The court also held that the student did not exhibit any violence and, as such, prohibiting the speech because of a negative response to the message would impermissibly allow a “heckler’s veto” of free speech.

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291 Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668 (7th Cir. 2008).
292 Id. at 670.
293 Id.
294 Id.
295 Id. at 676.
296 Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874 (7th Cir. 2011).
297 Id. at 876.
298 Id.
299 Id. at 879.
CONCLUSION

There is no question that there is a great social debate going on in the United States about the rights to be accorded to LGBTQ citizens.\(^\text{300}\) Some courts have likened the debate over the rights of LGBTQ persons to the past political disagreements about racial and religious equality.\(^\text{301}\) Courts have drawn the line, however, when that debate occurs in schools and takes the form of verbal assaults:

Such disagreements may justify social or political debate, but they do not justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell. Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful. There are numerous locations and opportunities available to those who wish to advance such an argument. It is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.\(^\text{302}\)

Harassment and assaults of LGBTQ students have become such a common occurrence in our public schools that one court conceded: “As one would expect in a high school of more than 4,000 students, there had been incidents of harassment of homosexual students.”\(^\text{303}\) While, as one court explained, it is the primary responsibility of parents and communities “to raise and nurture its children into decent and caring human beings who treat people with dignity,

\(^{300}\) See Nuxoll ex rel. Nuxoll, 523 F.3d at 678.

\(^{301}\) See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1181 (9th Cir. 2006).

\(^{302}\) Id.

\(^{303}\) See Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 877 (7th Cir. 2011).
respect, kindness, and equality”, it is not surprising that victims of harassment and assaults will continue to seek federal remedies when parents and communities relinquish that authority. Although the relief achieved by LGBTQ student-victims of harassment in schools has been varied, largely based on the type of claim brought, it is worth noting that the courts’ attitudes towards these issues seem to be improving. School authorities, student perpetrators and student victims should all be aware that the federal courts have not hesitated to answer the calls for relief when schools and communities have been unable or unwilling to protect LGBTQ students from harassment and assaults at the hands of their fellow students. Likewise, the federal courts have been quick to protect the rights of LGBTQ students to organize into GSAs to promote tolerance and understanding.