

## THE NEXT STEP: PROTECTING LGBTQ STUDENTS IN OUR SCHOOLS

In South Dakota, a young eight-year-old girl, whose dad is gay, ran home from school because students teased her and referred to her dad as a “cocksucker,” a “faggot,” and told her that her dad “sucks dick.”<sup>1</sup> When students began to laugh, the teacher didn’t issue a consequence; the teacher joined the students and started laughing.<sup>2</sup> In Utah, a seventeen-year-old transgender boy shared, “I’ve been shoved into lockers, and sometimes people will just push up on me to check if I have boobs.”<sup>3</sup> Nationwide, approximately thirty-four percent of gay, lesbian, and bisexual students in grades nine to twelve report being bullied while on school property.<sup>4</sup> Given this type of treatment, it’s not surprising that the number of gay, lesbian, and bisexual teenagers that will attempt suicide is four times greater than their heterosexual counterparts.<sup>5</sup> Despite empirical evidence that LGBTQ students are discriminated against because of their sexual orientation and/or gender identity, the federal government does not expressly protect these students.<sup>6</sup> This Article asserts that the passage of a “Student Non-Discrimination Act”<sup>7</sup> (SNDA), which would bar recipients of federal financial assistance from discriminating against students “on the basis of perceived sexual orientation or gender identity,”<sup>8</sup> should be a top priority of Congress and the people of the United States.

There are currently six federal laws that protect students from discrimination.<sup>9</sup> The first of such laws is Title VI of the Civil Rights Act of 1964, which states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>10</sup> Second, in 1972, Congress passed Title IX of the Education Amendments, which states that “[n]o person in the United States shall, on the basis of sex, be excluded

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1. HUMAN RIGHTS WATCH, *LIKE WALKING THROUGH A HAILSTORM: DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS* 2 (2016).

2. *Id.*

3. *Id.*

4. Laura Kann, *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9-12 — United States and Selected Sites, 2015*, 65 *MORBIDITY AND MORTALITY WEEKLY REPORT*, Aug. 12, 2016, at 15.

5. *See id.* at 20.

6. *Student Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/student-non-discrimination-act> (last updated Apr. 3, 2017).

7. *See* Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015).

8. *Id.* § 4.

9. *See* 42 U.S.C. § 2000d (2017); 42 U.S.C. § 2000d (2017); 20 U.S.C. § 1681 (2017); 29 U.S.C. § 794 (2017); 42 U.S.C. § 12132 (2017); 42 U.S.C. § 6101 (2017); 20 U.S.C. § 7905 (2017).

10. 42 U.S.C. § 2000d (2017).

from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>11</sup> Third, in 1973, Congress passed Section 504 of the Rehabilitation Act and, fourth, in 1990, passed Title II of the Americans with Disabilities Act, which provides that individuals with disabilities may not be subjected to discrimination by any entity (including schools) that receive federal financial assistance.<sup>12</sup> Fifth, Congress passed the Age Discrimination Act of 1975, which seeks to “prohibit discrimination on the basis of age . . . .”<sup>13</sup> Finally, in 2001, the Federal Government passed the Boy Scouts of America Equal Access Act, which states that public educational institutions may not “deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America . . . .”<sup>14</sup> You read that correctly; the Boy Scouts of America is shielded from discrimination by public schools, but LGBTQ students remain unprotected.

If you are not convinced the federal government should pass such legislation to protect LGBTQ students, consider the following information: thirty-one states do not have laws that prohibit bullying on the bases of sexual orientation and gender identity.<sup>15</sup> Further, eight states currently prohibit “the promotion of homosexuality”<sup>16</sup> or restrict “discussions of homosexuality”<sup>17</sup> in schools.<sup>18</sup> Currently, at least three states have laws mandating the manner in which homosexuality may be discussed.<sup>19</sup> For example, Alabama requires:

[C]ourse materials and instruction that relate to sexual education or sexually transmitted diseases should include . . . that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense . . . .<sup>20</sup>

In Texas, “[T]he materials in education programs for persons younger than 18 years of age must . . . state that homosexual conduct is not an acceptable lifestyle and is a criminal offense . . . .” Finally, in Utah, “State law prohibits public schools from using materials . . . that include instruction in . . . the advocacy of homosexuality.”<sup>21</sup> These states have maintained language in their statutes that homosexuality is illegal despite

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11. 20 U.S.C. § 1681 (2017).  
 12. 29 U.S.C. § 794 (2017); 42 U.S.C. § 12132 (2017).  
 13. 42 U.S.C. § 6101 (2017).  
 14. 20 U.S.C. § 7905 (2017).  
 15. See HUMAN RIGHTS WATCH, *supra* note 1, at 14-15.  
 16. *Id.* at 12.  
 17. *Id.*  
 18. *Id.*  
 19. *Id.*  
 20. *Id.* (citing Ala. Code § 16-40A-2(c)(8)).  
 21. *Id.* (citing Tex. Health and Safety Code § 85.007(a), (b)).

the landmark decision in *Lawrence v. Texas* that deemed such laws unconstitutional.<sup>22</sup>

State actors, however, are not the only concern addressed by SNDA. By passing SNDA, Congress would prevent inconsistent treatment of LGBTQ students by future presidents who interpret existing laws differently. On May 13, 2016, the U.S. Department of Justice (DOJ) and U.S. Department of Education (DOE), under the Obama administration, issued a joint “Dear Colleague Letter” interpreting Title IX to protect students on the basis of their gender identity.<sup>23</sup> The agencies concluded, “This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”<sup>24</sup>

However, less than a year later (under the Trump administration), the DOJ and DOE withdrew the policy announced in the May 13, 2016 Dear Colleague Letter.<sup>25</sup> In explaining their rationale for rescinding the previous policy announcement, the DOJ and DOE stated that the previous guidance did not “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX . . . .”<sup>26</sup> Put simply, without an express federal statute passed by Congress, the rights and protections afforded to LGBTQ students are at the whim of differing presidential policy choices. Passage of the SNDA would eliminate a president’s ability to rescind rights protected by the statute.

State and federal policies that fail to protect LGBTQ students have a measurable negative impact on such students.<sup>27</sup> In a study conducted in Massachusetts, “[Y]outh with a minority sexual orientation were significantly more likely than heterosexual youth to report perceived discrimination (33.7% vs. 4.3%).” Similarly, a larger percentage of transgendered youth reported discrimination than non-transgendered youth (31.3% vs. 3.7%). Importantly, another study found that “as the proportion of school districts that adopted anti-bullying policies increased, rates of past-year suicide attempts among lesbian and gay youths decreased.”<sup>28</sup> Additionally, in counties with inclusive anti-bullying policies peer victimization is less likely.<sup>29</sup>

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22. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

23. U.S. Dep’t. of Justice Civil Rights Division & U.S. Dep’t. of Education Office for Civil Rights, Dear Colleague Letter (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

24. *Id.*

25. U.S. Dep’t. of Justice Civil Rights Division & U.S. Dep’t. of Education Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

26. *Id.*

27. See Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J YOUTH ADOLESCENCE 1001 (2009); see also Mark L. Hatzenbuehler & Katherine M. Keyes, *Inclusive Anti-Bullying Policies and Reduced Risk of Suicide in Lesbian and Gay Youth*, 53 J ADOLESCENT HEALTH S21 (2012).

28. Hatzenbuehler & Keyes, *supra* note 27, at S24.

29. *Id.*

Part of the solution to the problems addressed above is the passage of SNDA. SNDA was introduced in the House of Representatives and the Senate on February 10, 2015.<sup>30</sup> The bill, however, fell short of the votes needed to survive.<sup>31</sup> The bill is yet to be reintroduced in the 115<sup>th</sup> Congress.<sup>32</sup>

The SNDA proposed in the 114<sup>th</sup> Congress (and supported by this article) states:

No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>33</sup>

Compliance with the SNDA would be tied to funding (as it is with the other non-discriminatory laws previously discussed).<sup>34</sup> In essence, if the law were to pass, the federal government could terminate or refuse to grant assistance to any recipient of federal funds that has been found to fail to comply with the law.<sup>35</sup>

This Article does not contend that passing the SNDA would solve all of the problems and challenges facing LGBTQ students across this nation. Nonetheless, LGBTQ students and parents of LGBTQ students should be provided protection by the federal government so that they can seek a remedy if their students are discriminated against on the basis of sexual orientation or gender identity. Some of our greatest legislative accomplishments occurred when we decided, as a nation, to protect all citizens, regardless of race (in 1964), regardless of gender (in 1972), regardless of disability (in 1973 and 1990), and regardless of age (1975). Let's make 2018 the year that we, as a nation, decide to offer the same protection to LGBTQ students.

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30. HUMAN RIGHTS CAMPAIGN, *supra* note 6.

31. *Id.* (In the U.S. Senate, SNDA was proposed as an amendment by Sen. Franken and fell short of the 60 votes needed to pass (the amendment received 52 votes). To see senators that voted against SNDA visit [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=114&session=1&vote=00236](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00236).)

32. *Id.*

33. Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015).

34. *See id.*

35. *Id.*

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