



Comprehensive Federal Approach Needed to Create Safe Schools for All Students

Obama Administration Takes Important Steps to Help Nation's LGBT Youth

Mark Hines and Jeff Krehely | September 2011

Introduction

All students in the United States deserve access to not only a quality education, but also one that takes place in an environment that is safe and respects their basic human dignity. Unfortunately, many of our nation's students are subject to harassment, bullying, and violence in the school system. Youth who are (or are perceived to be) lesbian, gay, bisexual, or transgender, or LGBT, are especially at risk for this type of abuse. A spate of high-profile cases over the past year has helped our nation become more aware of the problem of anti-LGBT bullying, as well as its magnitude and impact on students, their families, schools, and our society.

Many states have taken legislative and regulatory steps to foster safe environments for LGBT youth in schools, albeit to varying degrees of coverage and enforcement. Federal legislation that applies to all schools and covers all youth would provide the most comprehensive level of protection, and Congress should immediately move to enact such laws. As discussed later, three different LGBT-inclusive antibullying bills have been introduced in the current session of Congress.

Short of legislation, the federal government also has the authority through existing civil rights laws to intervene when schools are not adequately protecting their students. The Obama administration recently used this authority to require several school districts to protect LGBT students from discriminatory and dangerous harassment and bullying. As Congress debates the three antibullying bills that have been introduced, the Obama administration should continue to use its authority to enforce existing laws, thereby helping to create safe learning environments for all students.

State laws are not sufficient

Congress should pass comprehensive federal legislation requiring schools to enact programs and policies that reduce and eliminate the harassment and bullying of LGBT students. In the absence of a federal law, states have woven together a patchwork of policies to protect LGBT students. This policy quilt, however, is riddled with weak patches and holes that leave many students vulnerable to bullying and harassment.

While most states have added some form of protection for at least some students, three states currently have no antibullying policies: Michigan, Montana, and South Dakota. The effectiveness of the policies in the other states varies, as many do not enumerate the categories for protection, leaving it up to individual school districts to determine who is covered by the policy and whether the perpetrators receive mandated bullying punishment and counseling.

For example, Minnesota Public Radio's six-month investigation of bullying in Minnesota schools concluded that the state's antibullying law offers some of the weakest protections in the nation. Additionally, the law is also the nation's shortest antibullying law at only 37 words. Under the law, each individual school district is left to determine its own definition of bullying, and broad interpretations lead to protections that in practice are nonexistent or, at best, very weak.

Further, while the law directs Minnesota schools to prohibit bullying of "any student," the lack of enumerated categories leaves the implementation of the law somewhat subjective. One example of how a lack of enumerated categories in state law translates into weak protections in specific schools is the "neutrality rule" at Anoka-Hennepin school district to the north of Minneapolis-St. Paul. This rule prohibits faculty and staff from taking sides in any discussion about sexual orientation or LGBT issues. It also dissuades teachers from speaking in support of LGBT students, and sends a signal that LGBT students are not worthy of specific support or protection.

This school district already has one of the most notorious records of bullying in the nation, including reports of students being repeatedly harassed because of their actual or perceived sexual orientation. The school district has an even larger concern with the safety and well-being of its students, with nine student suicides over the past two years, more than any other district in the nation. The federal government is currently investigating whether or not harassment and bullying contributed to several of the suicides and violence in the district.

The implementation of Minnesota's antibullying law demonstrates why bullying policies that do not enumerate specific categories of protection do not help all students. In fact, research shows that LGBT students in states with generic bullying laws experience the same rates of bullying as students in states with no bullying laws. If a law requires

schools to say that bullying of LGBT students will not be tolerated, it sends a signal to potential bullies that they will be punished for their actions, that this type of bullying is not tolerated, and that LGBT students are valued members of the community.

To make sure all students in every state have a safe place to learn, federal legislation that clearly includes LGBT students is needed.

Federal authority to intervene on civil rights violations

While Congress considers federal antibullying legislation, the Obama administration is already using legal tools to remedy hostile environments that foster violence and harassment directed at LGBT students. Current law gives the federal government the authority to investigate and intervene on a student's behalf because sexual harassment against LGBT and gender nonconforming students constitutes a civil rights violation if it “creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”

Both Title IV of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 make it illegal to discriminate based on sex, including both sexual harassment and discrimination based on gender nonconformity. The Educational Opportunities Section of the Civil Rights Division at the Department of Justice, in coordination with the Department of Education, has the authority to investigate violations of rights provided through Title IV and Title IX. Any educational institution, including postsecondary schools, that receive federal financial support are required to be in full compliance with civil rights laws that protect students from harassment and discrimination. DOJ has indicated that investigating violations of these two provisions is a top priority.

How the Obama administration has already helped

DOE sent a letter to school districts in October 2010 making them aware of the specific provisions in Title IV and Title IX that entitle students to antibullying protections. In the letter, the Assistant Secretary for Civil Rights provided examples of harassment (including anti-LGBT behavior) that violate civil rights laws, articulating that gender-based discrimination falls within the definition of sex discrimination if a student is “harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.” Further, the department reiterated its responsibility for enforcing these laws, and encouraged school districts to be more proactive by publicizing policies and procedures regarding harassment and acting to protect a harassed student even if that student does not file a complaint.

Beyond promoting awareness of existing laws, DOJ and DOE have used their legal authority to enforce the law by launching investigations into specific cases where students had been bullied based on perceived or actual LGBT identification. In upstate New York, a DOJ investigation at Mohawk Central School District found that a 14-year-old gay male student was subjected to repeated threats and physical violence as well as verbal harassment by other students because of what they perceived as “feminine mannerisms.” The school district reached a settlement with the federal government, agreeing to review harassment policies and provide an annual training for faculty and staff to prevent future bullying and violence.

The federal government was able to reach a similar settlement with Tehachapi Unified School District in California following an investigation into the circumstances that led to the death of Seth Walsh. DOJ and DOE’s investigation found that Seth had been verbally, physically, and sexually harassed for more than two years by other students due to gender stereotype nonconformity. The investigation found that despite being aware of the problem, the school district failed to adequately address the situation. As a result of the settlement, Tehachapi Unified schools will take steps to review policies and eliminate the dangerous environment resulting from bullying.

Other investigations into Title IV and Title IX violations are ongoing. For example, DOJ and DOE are currently investigating the Anoka-Hennepin school district in Minnesota following the violence and suicides that have been reported. This investigation and settlements from others like it are crucial to ensuring that schools receiving federal funding are in compliance with existing civil rights laws.

Recommendations

The Obama administration should be applauded for ramping up its efforts to protect LGBT students from bullying and harassment to the fullest extent allowed under existing law. But more comprehensive legislative action must be taken to guarantee all students a safe and productive learning environment. In fact, the cases that DOJ and DOE are investigating underscore the need for a strong, comprehensive federal law that would require schools to take steps to prevent anti-LGBT bullying and harassment from happening in the first place.

As mentioned earlier, members of Congress has introduced three pieces of legislation this year that would provide students protection from harassment based on actual or perceived sexual orientation and gender identity:

- The Safe Schools Improvement Act would amend the Elementary and Secondary Education Act to require public schools receiving federal funding to adopt antibullying policies that explicitly include LGBT students.

- The Student Nondiscrimination Act is modeled after Title IX and requires public schools that receive federal funds to expand protections against harassment and bullying based on sexual orientation and gender identity.
- The Tyler Clementi Higher Education Anti-Harassment Act provides similar protections for college and university students, by requiring higher education institutions receiving federal student aid dollars to adopt policies that prohibit discrimination and specifically include LGBT students.

Enforcing existing civil rights laws is an important remedy in the short term to the bullying problem, and we encourage DOJ and DOE to continue their enforcement of Title IV and Title IX to protect LGBT youth from abusive environments in our nation's schools. But our nation's students need and deserve a proactive and comprehensive approach to solving this problem. Congress should immediately move to pass comprehensive federal antibullying protections to make sure that all students—including LGBT students—no matter where they live can attend schools that are safe and provide equal access to a quality education.

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