5 | The No Child Left Behind Act and LGBT Students

There’s no greater challenge than to make sure that every child . . . not just a few children, every single child, regardless of where they live, how they’re raised, the income level of their family, every child receive[s] a first-class education in America.

President George W. Bush

President George W. Bush signed the No Child Left Behind Act (NCLB Act) in front of a cheering crowd of high school students in Hamilton, Ohio, on January 8, 2002. A complex and comprehensive package of policies reauthorizing the Elementary and Secondary Education Act of 1965, the NCLB Act codified his administration’s campaign promise to improve public education for every child in the United States. The law focused on creating accountability for student performance through federally mandated standardized testing, allowing parents to choose their children’s schools through vouchers and the creation of charter schools, and giving greater control of federally funded education programs to local governments. It received bipartisan support in Congress, including from liberal senator Edward Kennedy (D-MA), and both houses symbolically assigned the bill the number “1” to illustrate that education policy was its top priority.

Given the historic changes in education policy included in the NCLB Act and President Bush’s public promise of helping every student, this chapter offers a unique examination of how the NCLB Act affects LGBT youth in schools. It summarizes certain provisions that may specifically affect LGBT students—concerning school vouchers, single-sex education, standardized testing, Internet filtering, violence prevention, and parental rights—and amendments to the bill that have been passed by Congress to specifically address anti-LGBT policies supported by the Boy Scouts of America and the U.S. military. This chapter analyzes how those provisions and amendments address issues already discussed, in previous chapters, as affecting LGBT students.
Vouchers and School Choice

[We] trust parents to make the right decisions for their children. Any school that doesn’t perform, any school that cannot catch up and do its job, a parent will have these options: a better public school, a tutor, or a charter school.5

—President George W. Bush

Beginning with the 2003–4 school year, the NCLB Act allowed parents of children attending “schools identified for improvement, corrective action, or restructuring” to send their children to a different public school or charter school within the same school district. Low-income students attending schools that failed to meet state standards for at least three of the four preceding years must be allowed to use federal funds to pay for “supplemental education services from the public- or private-sector provider selected by the students and their parents.”6 The NCLB Act also requires school districts to spend up to 20 percent of their federal funding to provide school choice and supplemental educational services to eligible students.7 Given the effect of antigay harassment and violence on academic achievement, does this provision help parents of LGBT students who qualify as “low-income”? The answer is complicated and requires more detailed explanation of how charter schools and school vouchers work. For example, parents of LGBT students may have no real “choice” in school districts where religious charter or private schools are the only alternative to public schools.

School vouchers allow public tax dollars to be used to pay for private, religious schooling, which had historically been a losing proposition for social conservatives. However, in Zelman v. Simmons-Harris (2002), the U.S. Supreme Court ruled five to four that a school voucher program in Cleveland was constitutional because it was “entirely neutral with respect to religion” and “provide[d] benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district.”8 Referring to a 1947 case in which the Court had ruled that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion,”9 Justice John Paul Stevens, in his dissent, called the Zelman v. Simmons-Harris decision “profoundly misguided.”10

The Court’s ruling paved the way for the school vouchers provision in the NCLB Act, which allows federal dollars to support private schools,
which may not be mandated to follow state or local education policies that protect youth from harassment or discrimination based on sexual orientation and gender identity. Many of these private schools are religiously affiliated and have policies and practices that are discriminatory toward LGBT teachers, parents, and youth. In 2000, more than 80 percent of the private schools included in Cleveland’s voucher program were affiliated with a specific religion. As a result, $8 million in public funds were distributed to schools in Cleveland that taught religious doctrine to thirty-seven hundred economically disadvantaged children in the 1999–2000 school year. Nonetheless, there is at least some anecdotal evidence that religious schools may, in some cases, provide a haven of sorts for LGBT students harassed in public schools. For example, Jamie Nabozny, a gay student subjected to significant antigay harassment and violence in Wisconsin public schools (see profile in chapter 2), reported that he experienced less harassment and violence in a religious school to which he was temporarily transferred than in public school.

Charter Schools

Beginning with a single school in Minnesota in 1992, the charter school movement has burgeoned into a nationwide phenomenon with more than three thousand schools in 2004–5 serving more than seven hundred thousand students in thirty-nine states and the District of Columbia. Publicly funded but granted relative autonomy with regard to structure, curriculum, and educational focus, charter schools function more or less independently of the public school system. Proponents argue that a charter school’s freedom from the regulations and bureaucracy of a public school system allows for greater innovations that can ultimately better meet students’ needs.

The types and quality of charter schools vary dramatically, as do the state laws and regulations that govern them. Arizona, one of the states with the most charter schools, imposes almost no restrictions on them at all. In Rhode Island, charter schools’ curricula and teacher certification standards are highly regulated. Some charter schools have been created by groups of parents and teachers seeking an alternative to the neighborhood public school. Others have been established by private, for-profit enterprises. Some are even former public schools that have converted to charter status, in the hopes of having greater freedom with which to provide innovative education.
School choice is “not just about making opportunities for people to create new, potentially more effective public schools [but also] represents a dramatic change in the way states offer public education.” The same can be said about the charter school movement itself. Both have become controversial issues that have forged unusual political alliances (e.g., between conservative white members of Congress and black urban parents) and caused friction between other long-standing political allies, like the national teachers unions and their local affiliates. Some advocate for vouchers and school choice programs because they use tax dollars to provide affordable alternatives to low-income, mostly black and Latino students in urban areas. In some urban school districts, students may indeed get a better education at charter schools than at struggling public schools. But many educators and elected officials denounce such programs for draining scarce public funds from already struggling public school systems and for funneling the brightest students to private and parochial schools, all the while meeting the educational needs of a very small number of students.

Lesbian Youth Takes Control of Her Life with the Help of the Harvey Milk High School

A Profile of Tenaja Jordan

Tenaja’s high school career began well. As a freshman at Staten Island Technical High School, she felt loved by her parents and accepted at school. She knew she was a lesbian, but she was not out to anyone. During her sophomore year, Tenaja started seeing her sexual orientation in a social and political context and began her coming-out process. By her junior year, everyone at school knew that she was gay. She never felt in physical danger, but she did experience verbal harassment. Female students would say, “At least I’m not a lesbian like her,” while male students taunted her by calling out, “Come with me, I’ll make you straight.” Generally speaking, Tenaja felt that students viewed her lesbianism as “disgusting.” The other students’ reactions to her sexual orientation quickly took a toll on Tenaja’s well-being; she began to skip school, and her grades started to slip. During the middle of her junior year, she went to a guidance counselor for help.

Unfortunately, the guidance counselor was not equipped to help Tenaja deal with the harassment she was experiencing. At a loss, the
counselor called Tenaja’s parents, even though Tenaja was afraid to tell them about her lesbianism: her parents are Jehovah’s Witnesses, and Tenaja knew they would have a difficult time accepting her sexual orientation. In a meeting with her parents, Tenaja was backed into a corner by the counselor, who kept pushing her to tell her parents what was bothering her. Feeling that she had no choice, Tenaja came out to her parents. Her mother refused to accept that she was gay, while her father refused to deal with it at all. Her mother believed it was the result of the bad influence of other students and forbid Tenaja from attending any extracurricular school activities. As Tenaja put it, “All I had was school and home.” Neither environment offered her much in the way of support.

The situation went from bad to worse when her Jehovah’s Witnesses congregation excommunicated her. Even so, Tenaja’s mother continued to take her to church, where she was forbidden to speak to anyone and others were prohibited from speaking to her. By the end of the school year, Tenaja had made the decision to move out and live on her own. She got into an independent living program in Brooklyn during the summer and was determined to graduate from Staten Island Tech and prove to her parents that she could make it on her own. However, Tenaja found it difficult to return to her old school life and be constantly reminded that she was not accepted.

Worse still, she was identified as a “troubled teen” and an “underprivileged kid” by the city’s Department of Youth Services, which was trying to make decisions for her at a time when Tenaja felt it was important to make decisions for herself. She fell into a deep depression, slept a lot, and rarely went to school. When she did go, she was regularly harassed. Fortunately, while searching the Internet for LGBT youth resources, Tenaja discovered the Hetrick-Martin Institute, home of the Harvey Milk High School.

During the middle of her senior year, Tenaja transferred to Harvey Milk, and the world became a brighter place. She went from a school where she was one of eight black students and the only lesbian to a school where LGBT youth of color were the majority. From an environment where she was taught, she recalls, that “everything that is white is beautiful and everything that is beautiful is white,” she moved to a place that embraces diversity. Tenaja was surprised when other students asked her to identify as aggressive or femme. She responded by declaring herself a “nondenominational lesbian.” She made friends with other lesbians for the first
time. “It was great,” Tenaja explains. “It felt very, very positive to me.” She also loved the teachers at the Harvey Milk High School, whom she describes as “really, really nice people” who gave her the freedom to make her own choices and create a plan for her life.

Tenaja went on to Hunter College, with plans to go to graduate school. She remained actively involved with the Hetrick-Martin Institute, becoming the chairperson of its youth advisory board. She even reestablished contact with her parents, hoping that they could all reconcile their differences. In response to the criticism that the publicly funded Harvey Milk High School is a return to segregated schools, Tenaja argues, “Separation of at-risk students is not segregation. It is a temporary solution to a problem. It stabilizes young people so that they can get an education. [In extreme cases,] it saves a life. The Department of Education owes kids a safe space.” The Harvey Milk High School provided support and guidance for Tenaja and enabled her to draw on her own strength and follow her own path. She says she shares her experiences because “if my story helps another queer minority youth, I’m all for that.”

The National Education Association supports “public charter schools that have the same standards of accountability and access as other public schools,” but, as the American Federation of Teachers point out, very few can claim to. Charter schools are also problematic because they often pay their teachers far less than public schools (which are often unionized), may be more racially segregated than public schools, and are often unable to meet the needs of students with disabilities. The jury is still out on whether the quality of the education they provide is better than or even equal to public schools.

The school choice movement will continue to be a presence in the debate on improving public education in the United States. Ideally, all youth, gay and straight, would be able to receive a first-rate education by attending a public school that is free of any type of violence and harassment. Nonetheless, it would be wrong to ask today’s youth to bear the burden of creating the public schools of tomorrow by not acknowledging that some of today’s public schools are substandard, unsafe, and educationally unsound. For LGBT youth experiencing harassment, progressive charter schools with explicit values of acceptance may provide a much-needed alternative to their public schools. The charter school op-
tion might also provide an opportunity to replicate successful LGBT-supportive schools like New York City’s Harvey Milk High School. But the decentralized nature of charter school governance may leave charter schools susceptible to homophobic policies. Given the increasing popularity of the charter school movement, it is important to advocate for the inclusion of LGBT-friendly curricula and policies at all such schools.

Administrators of charter or private schools may simply be unwilling to implement LGBT-inclusive safe schools initiatives, creating hostile environments for LGBT youth and the children of LGBT families. Even in states with nondiscrimination laws protecting LGBT people, such legislation often exempts private or religious institutions. Because of these serious limitations, the Gay, Lesbian, and Straight Education Network warns of the negative impact that school voucher programs and other privatization programs can have on LGBT youth.

Public money should be spent on improving the nation’s public schools rather than diverted to private institutions that may not be accountable to local educational policies and may not provide equal access or treatment for all students.

**Single-Sex Education**

The NCLB Act allows federal education funds to be used for “programs to provide same-gender schools and classrooms” as long as they comply with applicable civil rights laws, including Title IX, which guarantees equal educational opportunities for all students regardless of sex. That may be easier said than done. In 1996, the Supreme Court declared that single-sex programs must have “an exceedingly persuasive justification” in order to be constitutional under the Equal Protection Clause of the Fourteenth Amendment. Though it ruled out programs that “perpetuate the legal, social, and economic inferiority of women,” the Court decided that single-sex education would be permissible if it were used to “compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, [and] to advance full development of the talent and capacities of our nation’s people.” In 2002, the U.S. Department of Education issued a report supporting the amendment of Title IX “to provide more flexibility to educators to establish single-sex classes and schools at the elementary and secondary levels.” Given the research indicating that students who do not conform to gen-
der-role stereotypes are more likely to be targeted in schools, it is important to explore the proposed benefits and costs of single-sex education, as well as its potential impact on LGBT students.

Civil rights groups opposed to single-sex education cite *Brown v. Board of Education*, the historic 1954 U.S. Supreme Court ruling that declared a separate public education system for black children to be inherently unequal. “Separate but equal” single-sex education could potentially result not only in inequities but also in the reinforcement of harmful gender-role stereotypes. Opponents of single-sex education argue that, at best, it is a cheap solution to educational problems in urban schools that would be better addressed by improving the quality of education for all students.

Proponents of single-sex education argue that it is merely a response to what they view as the failure of schools to increase academic achievement “even after allocating significant dollars,” particularly for urban schools. They also claim that there is no comparison between today’s single-sex schools and the segregated schools of the past, because today’s parents and children are actively choosing a separate education. According to the *Christian Science Monitor*,

> We have scores of books and articles on how disadvantaged boys just don’t identify with academic achievement. They gain their self-esteem from sports. . . . even disadvantaged girls too often seek validation in early motherhood. . . . Equal doesn’t necessarily mean the same kinds of services have to be provided. Sometimes to achieve equal educational opportunity, we have to provide different kinds of opportunity to students.28

Similar arguments, focusing on LGBT students’ safety and well-being, have been made about the need for the Harvey Milk High School.

Organizations like the ACLU and the American Association of University Women (AAUW) strongly disagree and have even disputed the ability of single-sex schools to meet the needs of female students. According to Maggie Ford, president of the AAUW Educational Foundation, “[S]eparating by sex is not the solution to gender inequity in education. . . . When elements of good education are present, girls and boys succeed.” These elements include small classes, a rigorous curriculum, high standards, discipline, good teachers, and attention to eliminating gender bias. Strategies that help to achieve an equitable learning environment for all students regardless of gender include staff development.
for all teachers focusing on gender equity, the recruitment of female and minority administrators who can act as role models, the adoption and dissemination of school nondiscrimination policies, sexual harassment prevention programs, and equal opportunities for female students in athletic programs.30

*Brown v. Board of Education* overturned a government-enforced policy of racial segregation that sanctioned an inherently inferior education system for blacks that was indeed separate but unequal to the education offered to white students. Today’s generation of single-sex schools, the Harvey Milk High School, and schools for students with disabilities were created, in part, to respond to the failure of mainstream public schools to serve certain populations of students, not out of a desire to exclude them. Dealing with the gender inequality that girls experience in coeducational institutions is obviously the best long-term goal. But while the necessity for such schools might not exist in a perfect world, it is hard to argue either with parents who want the best for their children today and cannot find it in the public school system as it exists or with youth who merely want to go to school without being harassed, threatened, and assaulted.

Do single-sex schools reinforce gender-role stereotypes or free their students from them? Proponents of single-sex education believe the latter and cite complex reasons rooted in both sociology and biology. According to the National Association for Single Sex Public Education, “At every age, girls in girls-only classroom[s] are more likely to explore ‘non-traditional’ subjects such as computer science, math, physics, woodworking, etc.” But are single-sex institutions better? A comprehensive report by the AAUW that analyzed existing research on single-sex education found that girls in single-sex education programs did have higher indicators of self-esteem than those in coeducation institutions, a difference attributed to a learning environment in which girls were less critical of their own behavior. However, a ten-year study of student attitudes and achievements in one all-boys and one all-girls high school in Australia reported conflicting results. After each school made the transition from single-sex to coeducational, indicators of both girls’ and boys’ self-esteem dropped slightly. However, after five years, their self-esteem increased to a higher level than when students were in single-sex classrooms. Research on academic achievement differences is also contradictory, with no definitive answer to whether single-sex education is better than coeducation.31

Because many of the LGBT youth who are harassed are gender non-conforming, would single-sex school environments be better for them? Or would they fare better in coeducational environments, because they
may be more likely to have friendship networks that include members of the opposite sex? No one knows for sure. Very little has been written about the impact of single-sex education programs on gender and sexuality development or on anti-LGBT harassment and violence. Despite the need for more research, there is preliminary evidence and a historical context that indicates single-sex schools could affect gender equality and the gender development of all students, particularly those that are gender nonconforming and transgender. According to one education expert, “The underlying message of these schools is that girls are less capable, and that the only way to control boys’ behavior is to separate them from girls.”

A 2001 report on California’s pilot program for single-gender schooling expressed similar concerns.

Our interviews and observations of the single-gender academies often revealed definitions of gender that were either limited, as was the case with masculinity, or unrealistic, as was heard in messages about femininity. Gender was constructed as a dichotomous entity within the single gender academies, promoting a paradigm of girls as good, boys as bad.

Such environments raise other questions as well. Would a transgender student who was born male but identifies as female be welcome at an all-female school? Would gender-nonconforming boys be further stigmatized in a boys-only elementary school? Further research into the effect of single-sex education is needed to specifically assess how these schools would affect LGBT youth.

**Standardized Testing and Multicultural Education**

[The] first principle is accountability. . . . in return for federal dollars, we are asking states to design accountability systems to show parents and teachers whether or not children can read and write and add and subtract in grades three through eight. . . . I understand taking tests aren’t [sic] fun. Too bad.

—President George W. Bush

The NCLB Act requires school districts to administer annual exams in reading and math to students in the third through eighth grades. Data from those exams become part of annual report cards on school perfor-
mance, which give parents information about the quality of their children’s schools. Statewide reports also include performance data specific to the race and gender of students, “to demonstrate progress in closing the achievement gap between disadvantaged students and other groups of students” largely along economic, racial, and ethnic lines. Some educators argue, however, that relying almost exclusively on standardized testing to measure school performance undermines efforts to close that gap. Innovative studies in improving education policy and bridging the achievement gap have focused on multicultural education, which centers on curricula that validate and explore the diverse experiences of students, including LGBT students.

Multicultural education is a philosophical concept built on the ideals of freedom, justice, equality, equity, and human dignity. . . . It recognizes the role schools can play in developing the attitudes and values necessary for a democratic society. It values cultural differences and affirms the pluralism that students, their communities, and teachers reflect. It challenges all forms of discrimination in schools and society . . . [and] helps students develop a positive self-concept by providing knowledge about the histories, cultures, and contributions of diverse groups.

According to one researcher, textbooks designed to help students achieve high scores on standardized tests give students “predigested knowledge presented as indisputable fact . . . written to be as non-controversial as possible . . . and are still based largely around the worldview and sensibilities of the white male middle and professional class.” Thus the highly prescriptive curricula required to meet objectives determined solely by standardized testing may be incompatible with the goals of multicultural education, as well as the policy changes required to close the achievement gap. Another researcher adds,

Texts still completely ignore the idea that social classes exist in this country. . . . Americans all appear to be happy, middle-class, well-treated members of society enjoying equal access to success. One wonders how those images fit with the experiences of many of the children who read those texts. . . . When someone with the authority of a teacher, say, describes the world and you are not in it, there is a moment of psychic disequilibrium, as if you looked into a mirror and saw nothing.
This is particularly salient for LGBT students. The inclusion of test questions on LGBT literature, history, and the arts would be essential to ensuring that LGBT issues are covered in curricula. However, the school environment in many school districts is hostile to even the mention of homosexuality in the classroom, let alone the creation of LGBT-inclusive curricula and textbooks.

Standardized testing operates on the assumption that all students have an equal opportunity to learn. Given that much of the variation in student performance on these tests may be attributable to factors outside of the classroom—such as school funding levels, class size, and other socioeconomic issues—the playing field may be anything but level. Standardized tests that are culturally biased can adversely affect students from many cultural groups and contribute to lower expectations of student performance, negative attitudes toward low-performing students, and decreased self-esteem. This is especially likely for the proportion of LGBT students who miss school because of harassment and violence and score lower on other indicators of school performance, including grade point average.

It is highly unlikely that standardized testing mandated by the NCLB Act will include LGBT history and issues. This more exclusive focus on measuring educational achievement marginalizes not only LGBT youth and the children of LGBT parents but also other groups largely ignored by school curricula and textbooks. Addressing the violence and harassment faced by LGBT students does not end with nondiscrimination policies and the creation of gay-straight alliances. A school curriculum that accurately portrays the contributions made by all people is more likely to address the root causes of racism, sexism, homophobia, and other forms of intolerance at the heart of social inequality. From the writings of Walt Whitman, Gertrude Stein, and Audre Lorde to the activism of Emma Goldman, Magnus Hirschfeld, and Bayard Rustin, there is a rich history of LGBT people who have made important contributions to American and world culture. The education and school experience of LGBT students could also improve if curricula and standardized testing included the contributions of LGBT people.

**Internet Filtering**

The NCLB Act allows school districts to apply for federal funds to purchase computers and other Internet-related technology. Schools receiv-
ing these funds must have a “policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access . . . to visual depictions that are obscene; child pornography; or harmful to minors.” The technology protection measure most readily available to public schools is Internet filtering software. But the federal definitions of “obscene” and “harmful to minors” are unclear, and studies have shown that filtering software routinely prevents students from accessing information about sex education, sexually transmitted diseases, sexual orientation, and gender identity. This is particularly problematic for LGBT students, who may feel uncomfortable accessing age-appropriate information from the Internet on these issues at home even if they are able to do so.

According to the American Civil Liberties Union, “There is no universal definition of obscenity that a blocking software company can employ.” In fact, creating a definition for “obscene” has plagued U.S. courts for more than fifty years. In 1964, Supreme Court justice Potter Stewart tried to explain his definition for obscene: “I shall not today attempt further to define the kinds of materials I understand to be embraced . . . [b]ut I know it when I see it.” The spirit of Justice Stewart’s definition is not too far from the standard still used by courts today, which was explained by Chief Justice Warren Burger in 1973:

(a) whether the ‘average person applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest,
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

According to these guidelines, the determination of obscenity is relative to individual community standards. One local school board might decide that information about a LGBT youth group or local LGBT community center is obscene, while another deems such material completely appropriate.

Because Internet filtering software is developed for a national audience, tailoring it to individual community standards is difficult, which, according to the ACLU, makes the software both ineffective and consti-
stitutionally suspect. The ACLU also argues that a community’s definition of obscenity cannot be legally determined by government entities, such as school boards or public libraries. Only a judge or a jury can make that decision, requiring a lengthy and costly court hearing.53 Similar problems arise when applying the “harmful to minors” standard established by the NCLB Act. Information that is inappropriate for a five-year-old may be lifesaving for a seventeen-year-old gay student facing harassment in school and rejection at home because of his sexual orientation.

The U.S. Supreme Court ruled in 1997 that a single “harmful to minors” standard is not applicable to the Internet, as it would limit some minors from accessing constitutionally protected speech.54 The case arose out of challenges to the Communications Decency Act, signed by President Bill Clinton in 1996. It sought to protect minors from harmful material on the Internet by criminalizing the transmission of obscene or indecent messages to any recipient under eighteen.55 The Supreme Court’s seven-to-two ruling also declared that Internet content should enjoy the same First Amendment protections as print media. This decision was influenced by the wide range of socially valuable speech censored by the law, including speech about safe-sex practices and many other sexually related topics of importance to both youth and adults.56 Supreme Court justice John Paul Stevens summarized the majority opinion as follows:

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.57

One year after that ruling, in October 1998, Congress passed the Childhood Online Protection Act (COPA). Designed with the unconstitutionality of its predecessor in mind, COPA criminalized the communication for commercial purposes of any material deemed harmful to minors by community standards. Despite the change in language, the ACLU argued that COPA was still unconstitutional, because it “effectively suppress[ed] a large amount of speech on the World Wide Web that adults are entitled to communicate and receive,” even if that speech was deemed harmful to minors by some communities’ standards.58 Ex-
amples of Web sites that would have been censored under COPA include Beacon Press, an independent publisher of a wide variety of books, including titles about gay, lesbian, and gender studies,59 and the Sexual Health Network, which provides educational material to disabled persons about how they can express their sexuality despite their disability.60

COPA was ruled unconstitutional by multiple federal courts. According to the National Academy of Sciences, education is more likely than restrictive laws like COPA to protect youth from harmful content on the Internet. Still, Congress opted to introduce a new Internet censorship law, the Children’s Internet Protection Act (CIPA), which was signed into law by President Clinton in 2000.61 Like its forebears, CIPA restricts access to obscene or harmful material on the Internet among minors using computers and related equipment purchased with federal funds in public schools and libraries. However, it also includes a provision that allows any Internet filtering software or device to be turned off at the request of any student or library patron age seventeen or older.62

In 2002, the American Library Association challenged only the provision that restricted Internet access in libraries. But the Supreme Court ruled in 2003 that CIPA was constitutional, because library patrons can turn off the filters at any time without having to give a reason or revealing what information they are trying to access.63 Consequently, both libraries and public schools must either have implemented Internet filtering software by July 1, 2004, or have chosen to forfeit federal funds.

How Internet Filtering Works

Despite the legislative focus on filtering as the solution for protecting youth from harmful Internet content, many experts, Internet monitoring organizations, and civil liberties groups warn that filtering software is not only ineffective but also allows software companies to censor Internet content based on their political beliefs and religious ideologies.64 In testimony in a Senate committee hearing on the legislation, one expert summarized the flaws inherent to filtering the Internet as follows:

The word “filter” is much too kind to these programs. It conjures up inaccurate gee-whiz images of sophisticated, discerning choice. When these products are examined in detail, they usually turn out to be the crudest of blacklists, long tables of hapless
material which has run afoul of a stupid computer program or person, perhaps offended by the word “breast” (as in possibly breast cancer).  

Keyword filtering is the least sophisticated method used by filtering software to block access to various Web sites. It compares the text of a Web page to a list of restricted words or phrases. The software then removes the words from the Web page, or blocks the site altogether. There are inherent flaws to this method. While blocking access to Web pages that include the text string s-e-x may prevent youth from accessing some, but not all, pornographic sites, it may also block sites with information about, for example, musical sextets; Essex, England; the poet Anne Sexton; and the Catholic Church’s position on same-sex marriage.

Address- or URL-based filters block access to specific Web sites. Companies that produce such software typically employ automated programs that search the Internet for content deemed objectionable. Reviewers then look at each site and rate it according to a corporate standard. Internet filtering software can also use systems that require Web site publishers to rate their own pages or that rely on third-party ratings of Internet sites. Given the number of new Web pages available on the Internet every year, this method is humanly impossible to maintain properly.

Internet Filtering and LGBT Students

In 2001, as debate over the Childhood Internet Protection Act intensified, GLSEN tested the home version of Bess, filtering software whose manufacturer, N2H2, claimed it was installed on “over 40 percent of all schools in the U.S. that have chosen to filter Internet access” and was “trusted to protect over 16 million students.” (N2H2 was eventually acquired by McAfee in 2008.) GLSEN found that the software blocked approximately 20 percent of LGBT youth advocacy sites it attempted to access. This finding was consistent with a study published the same year by Consumer Reports, which found that several Internet filtering programs blocked one in five sites that contained “serious content on controversial subjects.”

In 2003, the Frontier Foundation and the Online Policy Group conducted a study on Internet blocking in public schools, which tested Bess
and SurfControl, another popular Internet filtering tool, by attempting to access almost one million Web pages. The goal of the study was “to measure the extent to which blocking software impedes the educational process by restricting access to Web pages relevant to the required curriculum.” The study found that “schools that implement Internet blocking software even with the least restrictive setting will block at a minimum tens of thousands of Web pages inappropriately.” In fact, when researchers elected to use all of the block codes suggested by the software manufacturers for compliance with CIPA guidelines, the software blocked and miscategorized up to 85 percent of the one million Web pages in the sample.

The same study also found that schools using Internet filtering software’s most restrictive settings block 70 percent or more of the Web sites listed in search results based on state-mandated curriculum topics. The study concluded that Internet filtering software cannot help schools comply with CIPA: while failing to block many sites deemed obscene or harmful to minors by some community standards, they restrict access to many others protected by the First Amendment. In 2005, Consumer Reports published a follow-up analysis of eleven popular Internet filtering programs and found that sites about health issues, sex education, civil rights, and politics were still blocked and that “[m]ost unwarranted blocking occurred with sites featuring sex education or gender-related issues.”

In United States v. American Library Association, the Supreme Court upheld CIPA, which the NCLB Act references directly in its provision requiring schools to protect students from material that is “obscene” or “offensive.” Despite the inherent flaws of using Internet filtering software to protect minors from harmful content, schools must either develop ways of providing students access to Internet resources while employing such software or refuse federal funding for computers and related Internet technology.

Filtering software may significantly affect the educational experiences of both LGBT and straight youth, who are forced to view the Internet through a lens meant to keep out material that may be an important part of their education, health, and safety. Denying LGBT youth access to age-appropriate information on the Internet may reinforce their isolation and put them at greater risk. This makes their ability to access such materials from schools and libraries all the more vital. Toward that end, GLSEN has developed alternative recommendations for protecting minors from pornographic or other harmful content on the
Internet while still maintaining access to educational and sometimes lifesaving information:

- Develop an Acceptable-Use Policy for the Internet. School administrators should create policies on Internet usage, in partnership with students and teachers, allowing access to valuable educational information while restricting access to pornography and other inappropriate material.
- Conduct trainings on Internet usage. Schools should make instruction in this policy a prerequisite for Internet access, along with instruction on how to use the Internet as an educational resource. Students should be made aware of the privilege they exercise, and taught to respect its power and inherent dangers.
- Enforce policies. If students are informed of their responsibilities and the tentative nature of their connection to the Internet, they will use it more responsibly. If Internet access is used inappropriately, the student should be held responsible, in accordance with the school’s acceptable-use policy.
- Increase teacher presence. A $40 software program will never replace an experienced teacher. The supervision of trained teachers is much likelier to protect children from accessing inappropriate Internet sites than any filtering program. But the debate over Internet filtering software has largely ignored the shortage of teachers and resultant large class size at many American schools.75

Violence Prevention and Unsafe Schools

The NCLB Act reauthorizes the Safe and Drug-Free Schools and Communities Act of 1986, which grants federal funds for the creation of programs that “prevent and reduce violence in and around schools . . . and foster a safe and drug-free learning environment that supports academic achievement.”76 The NCLB Act specifically defines “violence prevention” as

the promotion of school safety, such that students and school personnel are free from violent and disruptive acts, including sexual harassment and abuse, and victimization associated with prejudice and intolerance, on school premises, going to and from school, and at school-sponsored activities, through the creation
and maintenance of a school environment that . . . fosters individual responsibility and respect for the rights of others.\textsuperscript{77}

This provision of the NCLB Act could be interpreted to address the need for programs that both protect LGBT students and educate teachers and students about tolerance and violence prevention. For example, the provision not only calls for programs to “assist localities most directly affected by hate crimes” in developing educational and training programs to prevent them; it also uses the definition of “hate crime” from the Hate Crimes Statistics Act of 1990: “[a] crime against a person or property motivated by bias toward race, religion, ethnicity/national origin, disability, or sexual orientation.”\textsuperscript{78}

This provision could also be interpreted to address bias-motivated harassment and violence against LGBT youth, as such harassment and violence is motivated by “prejudice and intolerance.” However, it does not specifically mention such characteristics as race, ethnicity, religion, sexual orientation, or gender identity, which are often the basis of bias-motivated harassment or violence. Because sexual orientation and gender identity are not specifically enumerated categories, some school administrators and teachers may claim that the law does not specifically require them to protect LGBT youth. This concern is supported by the Supreme Court’s decision in \textit{Romer v. Evans}, in which Justice Anthony Kennedy wrote, “Enumeration [i.e., specifically including the phrase \textit{sexual orientation} in nondiscrimination laws] is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.”\textsuperscript{79} Specific inclusion of sexual orientation and gender identity (as well as race, religion, and ethnicity) in this provision of the NCLB Act would have provided clearer direction about its scope and impact and given teachers and school administrators the backing they need to feel confident in their response to harassment and violence against LGBT students.\textsuperscript{80}

Despite this shortcoming, the law does provide opportunities for an LGBT student in an unsafe school to go to a different, hopefully safer school. Under the Unsafe School Choice Option of the NCLB Act, every state that receives federal funds under the act must establish and implement a statewide policy that allows a student who is attending a persistently dangerous public school or is a victim of a violent criminal offense while on school grounds to attend a different, safer school, including a public charter school.\textsuperscript{81} While this school choice option establishes the right of LGBT youth to attend school in a safe environment, there are
few school districts that have alternative public or charter schools that are any safer. It also places the burden of going to a safe school on students and parents, who must arrange, on their own, to travel to a different school.

Parental Rights Provisions

The NCLB Act kept a provision from its predecessor, the Elementary and Secondary Education Act of 1965, which gives parents the right to inspect “any instructional material used as part of the educational curriculum for the student,” as well as student surveys that ask questions about political affiliations, mental illness, sexual behavior, illegal or antisocial behavior, family members, religious beliefs, or family income. This provision only applies to surveys that students are “required, as part of an applicable program, to submit to.” An additional provision requires school districts to develop written policies and procedures, in consultation with parents, regarding any student survey. At a minimum, these policies must specify how parents will be notified about surveys and how they will be given the opportunity to excuse their children from participating. School districts are required to notify parents of these rights annually.

As written, this provision does not dramatically inhibit researchers’ ability to collect information. Many schools regularly choose to notify parents about surveys administered to students, allowing them to request that their child not participate. In practice, however, few parents exercise their opt-out option, and it has had no substantial impact on survey results. But any policy requiring that parents actively opt in by sending prior written consent for their child’s participation makes collecting reliable data extremely difficult. The danger inherent in the parental rights provision of the NCLB Act is that conservative activists may attempt to modify it in the future or may use it to pressure their state legislatures or local school boards to adopt active permission or opt-in requirements for surveys. Once in place, such active parental consent regulations would make it virtually impossible to collect data on large representative samples of students, including information about their sexual orientation or gender identity. This has already occurred in three states—Alaska, New Jersey, and Utah—which require the prior written informed consent of a parent before any survey, even one that is voluntary, can be administered to a student. Alaska’s opt-in law actually prevented the state from obtaining a high enough re-
response rate for it to participate in the national 2001 Youth Risk Behavior Survey.85

Additionally, if a school uses federal Safe and Drug-Free Schools money to fund education programs to prevent illegal drug use, sexual harassment, and “victimization associated with prejudice and intolerance,” as well as programs that foster “respect for the rights of others,” the school must make “reasonable efforts” to inform parents about such programs. If parents disagree with the content in these programs, they can excuse their child from participating.86 Fortunately, very few programs designed to prevent such victimization are actually funded through the Safe and Drug-Free Schools program, but school districts should be aware of the potential repercussions of paying for them with that program’s money.

Preventing the Promotion of “Sexual Activity, Whether Homosexual or Heterosexual”

According to the NCLB Act, federal education funds cannot be used “to develop or distribute materials, or operate programs or courses of instruction directed at youth, which are designed to promote or encourage sexual activity, whether homosexual or heterosexual.”87 This is significantly different from and, in fact, somewhat preferable to some existing state laws that only prohibit positive discussion of homosexuality (see chapter 3).

The NCLB Act provision prevents schools from directly promoting sexual activity of any kind—gay or straight—with federal education money. But schools can still develop and implement curricula or programs designed to provide age-appropriate and comprehensive sex education, because such curricula and programs focus on enhancing the physical and emotional health of all students and are not designed to encourage or promote sexual activity of any kind. They must treat homosexuality no differently than heterosexuality and “include the health benefits of abstinence.”88 The NCLB Act also explicitly states that the federal government has no right “to mandate, direct, review, or control a State, local educational agency, or school’s instructional content, curriculum, and related activities,” nor does it have a right to “require the distribution of scientifically or medically false or inaccurate materials.”89

None of the provisions in the NCLB Act restricts the ability of schools to implement programs designed to prevent anti-LGBT harassment or discrimination. Indeed, school districts have both a legal re-
sponsibility and an ethical obligation to ensure that LGBT students, like any other students, can receive the benefits of education without being subjected to harassment or discrimination.

The Boy Scout Equal Access Act and the Vitter Amendment

Included in the family protections section of the NCLB Act are the Boy Scouts of America Equal Access Act (Boy Scouts Act) and the Vitter Amendment. These provisions threaten public schools with the loss of federal funding if they prevent the Boy Scouts or the U.S. military from using public school facilities for meetings or recruitment. Both additions to the NCLB Act were crafted in response to the increasing number of school districts that limited the Boy Scouts’ access to school grounds, in response to a U.S. Supreme Court ruling affirming the Boy Scouts’ right to discriminate against gay scouts and scoutmasters. To legally prevent the Boy Scouts from using school facilities, school districts would have had to prohibit all outside organizations from using them, and the few that only limited the Boy Scouts’ access eventually garnered the attention of Congress.

Specifically, the Boy Scouts Act states,

[N]o public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department [of Education] shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 of the United States Code (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in Title 36 of the United States Code.

The seventy-four organizations listed as patriotic societies in the U.S. Code include a number of national organizations that regularly provide services to youth, like Big Brothers Big Sisters of America, Boys and Girls
Clubs of America, the Girl Scouts, and Little League Baseball. The Boy Scouts Act redundantly affirms the legal right for any and all of the seventy-four private organizations to access the resources of public schools whose policies prohibit anti-LGBT discrimination while openly discriminating against LGBT youth and adults. (Except for the Boy Scouts, none of the seventy-four currently does so.) The act does not require schools to officially sponsor any of the organizations.

In *Boy Scouts of America v. Dale*, the U.S. Supreme Court upheld the Scouts’ right to prohibit openly gay scoutmasters from participating in scouting. Under the First Amendment, Boy Scouts have the right to both exclude gays and still have access to public school facilities regardless of state and local nondiscrimination laws.

House sponsor Van Hilleary (R-TN) and Senate sponsor Jesse Helms (R-NC) introduced the Boy Scouts Act because “the Boy Scouts are under attack and being thrown out of public facilities that are open to other similarly situated groups . . . as retribution for the Supreme Courts’ ruling. . . . This amendment is designed to stop this wasteful cycle in litigation and harassment.” Those in favor of the amendment argued that protecting the Boy Scouts from unequal treatment was necessary to ensure that America’s children could continue to embrace the “timeless values” of the Boy Scouts as “a model of integrity, strong ethics, devotion to God and the public good.”

Those opposed to the Boy Scouts Act, however, rejected the notion that it was the Boy Scouts of America that was being treated inequitably. According to Representative Bill Delahunt (D-MA),

> The reality is that this amendment is not about the Boy Scouts. It is about a conservative social agenda that holds passionate views about sexual orientation. The Boy Scouts’ policy on sexual orientation is well known. That is fine. [Representative Hilleary] is entitled to his views, and the Boy Scouts are entitled to their views. But they ought not to be entitled to use the Congress of the United States to make a political statement that promotes intolerance and discrimination.

Holding a letter of support signed by twenty-two organizations, including the National Parent Teacher Association, the National School Boards Association, and the National Association of Secondary School Principals, Representative Lynn Woolsey (D-CA) summarized her arguments against the Boy Scouts Act as follows: “[W]e should vote against this because it is not necessary in the first place . . . [A] vote against this amend-
ment would be a vote telling our children that all children are important, not just some children.”

In a May 2001 letter to the Senate, the ACLU argued that the amendment represented an unconstitutional endorsement of a specific point of view: “By punishing schools for excluding the Boy Scouts and other youth groups for their discriminatory membership criteria, the [Boy Scouts Act] would provide protection for the Boy Scouts’ discriminatory viewpoint that no other viewpoint receives. Such unequal treatment of different viewpoints is unconstitutional.” Its opponents did not prevail, and the Boy Scouts Act passed by a voice vote.

The U.S. Department of Education office responsible for enforcing the Boy Scouts Act is the Office for Civil Rights. On March 25, 2002, that office sent a letter to every school district in the United States, explaining the Boy Scouts Act and warning, “If a public school or agency does not comply with the requirement of the Boy Scout Act, it would be subject to enforcement action by the Department [of Education].” The letter also encouraged school districts to file complaints against other districts that were not in compliance with the policy. Signed by the assistant secretary for civil rights, the letter ends, “I look forward to working with you to ensure equal access to education and to promote educational excellence throughout the nation.”

The Vitter Amendment forces public schools to allow the military to actively recruit on their campuses, regardless of school nondiscrimination policies, by threatening to cut off federal funds if they refuse. In support of the amendment, Congress members claimed that the victim of discrimination was the military, not the 13,500 gay men, lesbians, and bisexuals who have been investigated and discharged as of fiscal year 2009 because of its “Don’t Ask, Don’t Tell” policy. According to the amendment’s lead sponsor, Representative David Vitter (R-LA), “This amendment will prevent discrimination against armed services recruiters and will simply offer them fair access to secondary schools that accept Federal funding.” In 2002, the U.S. Defense Department reported that two thousand of more than twenty-one thousand high schools did not allow the military to actively recruit on campus. Representative Vitter claimed this was “because of school administrators’ own personal antimilitary bias. . . . [W]hat is clearly going on is pure, old-fashioned bad political correctness and antimilitary ideology being shoved down the throats of our young people.” There was no significant opposition to the Vitter Amendment in Congress, and it passed by a voice vote.