

June 11, 2021

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U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202
Submitted via *email*

RE: Announcement of Public Hearing; Title IX of the Education Amendments of 1972

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Office for Civil Rights (“OCR”) of the U.S. Department of Education (the “Department”) on the above-captioned notice announcing a public hearing on Title IX of the Education Amendments of 1972 (“Title IX”). *See* 86 Fed. Reg. 27,429 (May 20, 2021).

The undersigned are scholars affiliated with the Williams Institute, an academic research center dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on discrimination faced by lesbian, gay, bisexual, and transgender (“LGBT”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population. These efforts include producing widely-cited best practices for the collection of SOGI information on population-based surveys.¹

As the Department is aware, Title IX provides protections from discrimination against individuals, including students and employees, “on the basis of sex” in schools and other educational programs in receipt of federal financial assistance.² In 2020, the Supreme Court ruled in *Bostock v. Clayton County* that prohibitions on sex discrimination encompass discrimination on the basis of SOGI.³ The Department of Justice has formally adopted the position that there is “nothing persuasive . . . to justify a departure from [applying] *Bostock*’s textual analysis” to claims under Title IX, noting that its prohibition on sex discrimination is “interchangeable”⁴ with the similar prohibition contained in Title VII of the Civil Rights Act of

¹ *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

² 20 U.S.C. § 1681(a) (1972).

³ 140 S. Ct. 1731 (2020).

⁴ Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

1964,⁵ which the Supreme Court analyzed in *Bostock*. Additionally, in *Price Waterhouse v. Hopkins*, the Supreme Court held that discrimination on the basis of sex stereotyping similarly violates protections against sex discrimination.⁶

Despite these protections, LGBT people frequently report experiences with discrimination in settings covered by Title IX. Research shows that these experiences are prevalent and often go unresolved by school officials, suggesting that OCR and the Department must engage in additional activities to fully enforce Title IX and its guarantees. Such action has been called for in recent executive orders, specifically those calling on the Department and other agencies to fully implement the *Bostock* decision,⁷ and to engage in “additional [Title IX] enforcement actions . . . to the fullest extent permissible under law.”⁸

The undersigned write to provide OCR with research relevant to discrimination based on SOGI in educational settings, and to suggest ways that OCR can improve and expand protections for LGBT students and employees consistent with the statutes it enforces, including Title IX. In Part I, we present research illustrating the widespread stigma, discrimination, harassment, and violence that LGBTQ⁹ people, including both students and employees, report facing in schools. In Part II, we discuss research demonstrating that the experience and expectation of discrimination can harm LGBT people in a variety of ways, including by contributing to reduced educational attainment for students and by creating the minority stress shown to be a major cause of health disparities between LGBT and non-LGBT populations. Finally, in Part III, we provide recommendations consistent with this research.

I. LGBT People Face Widespread Discrimination in Schools

In the United States, approximately 4.5% of the adult population¹⁰ and 9.5% of the youth population (ages 13–17)¹¹ identifies as LGBT. Younger people are more likely than older people to identify as LGBT, including 8.2% of millennials (born 1980–1999).¹² Approximately 11 million adults in the United States identify as LGBT,¹³ which includes an estimated 3.4 million

⁵ 42 U.S.C. § 2000e-2(a)(1) (1964).

⁶ 490 U.S. 228, 250 (1989).

⁷ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

⁸ Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 08, 2021).

⁹ Consistent with the literature on sexual and gender minority youth, we use “LGBTQ”—with the Q representing questioning or queer—to capture those youth who identify their SOGI using such terms, including those whose identities are less developed or more fluid. Certainly, adults question their SOGI and can identify as queer; however, few studies relevant to this comment address discrimination among LGBT adults who specifically identify as queer or questioning; hence, we generally use “LGBT” when discussing sexual and gender minority adults unless supported by the underlying study.

¹⁰ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

¹¹ KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

¹² Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

¹³ CONRON & GOLDBERG, *supra* note 10.

students ages 18–40.¹⁴ Additionally, we estimate there are nearly 2 million LGBT youth ages 13–17 in the United States;¹⁵ approximately 150,000 of these youth are transgender.¹⁶ The number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.¹⁷

LGBT people have faced a long history of discrimination in the United States across a range of contexts. In *Obergefell v. Hodges*, the Supreme Court observed that gay men and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”¹⁸ The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”¹⁹ Regarding transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”²⁰

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades, ample research confirms that LGBT people continue to experience persistent and pervasive discrimination, including harassment and violence, in all areas of life, including in schools. Such anti-LGBT discrimination has been documented across a variety of sources, including court cases, administrative complaints, media reports, and surveys.

a. Discrimination Against LGBT Students

Several recent surveys indicate that LGBT students continue to face discrimination, harassment, and bullying at school. One such example is the Access to Higher Education Survey (“AHES”), which asked a nationally representative sample of U.S. adults ages 18 to 40 to report on their lifetime experiences in schools. A forthcoming Williams Institute analysis of AHES data found that over a quarter of transgender people (26.0%), and almost one in ten (9.4%) LGBQ cisgender people, reported barriers to their academic success, including experiencing

¹⁴ KERITH J. CONRON, KATHRYN O’NEILL, & BRAD SEARS, WILLIAMS INST., COVID-19 AND STUDENTS IN HIGHER EDUCATION 7 n.1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-College-Student-COVID-May-2021.pdf>. Additionally, we note that an estimated 2.5 million people are LGBT students ages 18–24. *Id.*

¹⁵ CONRON, *supra* note 11, at 1.

¹⁶ JODY L. HERMAN, ANDREW R. FLORES, TAYLOR N.T. BROWN, BIANCA D.M. WILSON, & KERITH J. CONRON, WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 4 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf>.

¹⁷ BIANCA D.M. WILSON, SOON KYU CHOI, JODY L. HERMAN, TARA L. BECKER, & KERITH J. CONRON, WILLIAMS INST., CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GNC-Youth-CA-Dec-2017.pdf>.

¹⁸ 135 S. Ct. 2584, 2596 (2015).

¹⁹ *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

²⁰ *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

unfair treatment, harassment, or bullying, for being LGBTQ.²¹ Additionally, LGBTQ people of color were more likely than White LGBTQ people to report that unfair treatment due to being LGBTQ impeded their academic success (10.4% vs. 4.4%, respectively).²²

Other surveys have indicated similar patterns of discrimination and harassment. For example, an analysis of data collected in 2019 through the Youth Risk Behavior Survey (“YRBS”)—a nationally representative survey of high school students conducted by the Centers for Disease Control and Prevention (“CDC”)—found that 39.5% of LGB students, compared with 22.2% of heterosexual students, reported being bullied on school property.²³ Additionally, 11.9% of LGB students, compared with 6.3% of heterosexual students, reported being threatened or injured with a weapon on school property.²⁴ According to GLSEN’s 2019 National School Climate Survey (“NSCS”), 81% of LGBTQ students reported being verbally harassed in the past year because of their sexual orientation, gender expression, or gender.²⁵ Additionally, 34.2% of LGBTQ students reported being physically harassed, and 14.8% of LGBTQ students reported being physically assaulted, in the past year because of their sexual orientation, gender expression, or gender.²⁶ Notably, 20.8% of LGBTQ students reported being told to change their own behavior after reporting anti-LGBT harassment; similarly, 7.3% were disciplined after reporting their victimization to school staff.²⁷

Research also suggests that LGBTQ students are at particular risk of experiencing sexual harassment and assault. The 2019 Association of American Universities Campus Climate Survey on Sexual Assault and Misconduct found that LGBTQ undergraduate and graduate/professional students were more likely than non-LGBTQ students to say that they had experienced nonconsensual sexual contact involving physical force or inability to consent.²⁸ Among all respondents, bisexual students reported the highest rate (25.6%), followed by those selecting more than one sexual orientation category (22.2%); asexual, queer, questioning or not listed (18.5%); gay or lesbian (15.1%); and heterosexual (11.5%).²⁹ Additionally, gender minority students reported rates similar to those of cisgender women (22.8% vs. 25.9% for

²¹ KERITH J. CONRON & KATHRYN O’NEILL, WILLIAMS INST., LIFETIME SCHOOL EXPERIENCES AMONG LGBTQ U.S. ADULTS AGED 18–40 (2021) (forthcoming).

²² *Id.*

²³ Kathleen C. Basile et al., Ctrs. for Disease Control & Prevention, *Interpersonal Violence Victimization Among High School Students — Youth Risk Behavior Survey, United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 28, 33 (2020), <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf>. These results were noted as being statistically significant. *Id.*

²⁴ Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 19, 23 (2020), <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf>.

²⁵ JOSEPH G. KOSCIW ET AL., GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION’S SCHOOLS 28, https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

²⁶ *Id.* at 28–29.

²⁷ *Id.* at 34.

²⁸ DAVID CANTOR ET AL., ASS’N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 33 (2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf).

²⁹ *Id.*

undergraduates, and 14.5% vs. 9.7% for graduate students).³⁰ Moreover, research suggests that many LGBTQ students are sexually harassed prior to entering higher education. Among respondents to the 2019 NSCS, over half (58.3%) of all LGBTQ students reported experiencing sexual harassment at school in the past year, with 13.4% reporting that such experiences had occurred often or frequently.³¹ And, per the CDC’s analysis of 2019 YRBS data, LGB students are more likely than heterosexual students to report experiencing sexual dating violence in the past year (16.4% vs. 6.7%).³²

While studies reflect that both sexual and gender minority youth regularly experience discrimination in schools, research suggests that gender minorities bear a disproportionate share. A recent study by the CDC reviewing YRBS data from ten states and nine large urban school districts found that 34.6% of transgender students reported being bullied at school, 29.6% reported electronic bullying, 26.9% felt unsafe at or traveling to school, and 23.8% reported being threatened or injured with a weapon at school, in the previous twelve months.³³ An earlier CDC study observing a representative sample of 5,469 students from the 2013 YRBS conducted in four urban school districts found a “significant linear relationship between gender expression and bullying victimization[.]” with each unit increase in a student’s perceived gender nonconformity resulting in a 15% greater likelihood of their experiencing bullying.³⁴ The 2015 U.S. Transgender Survey (“USTS”)—the largest survey of transgender and gender nonconforming people to date—found that 54% of respondents reported being verbally harassed, 24% reported being physically attacked, and 13% reported being sexually assaulted, while in grades K-12 because they openly identified or were perceived as transgender.³⁵ Similarly, 24% of USTS respondents who were out as transgender in college or vocational school reported that they had been verbally, physically, or sexually harassed at school.³⁶ And, an earlier study found that 82% of transgender students reported hearing negative comments based on their gender identity or expression from other students “sometimes or often[.]” with 31% reporting hearing such comments from school personnel.³⁷

Examples from caselaw reflect some of the situations in which LGBT students are subjected to discrimination and harassment by their peers and school employees alike. In one case, the parent of a student who died by suicide alleged that, after receiving complaints that the student’s peers called him derogatory names and assaulted him for coming out, teachers engaged in their own disparaging comments including that the student was “fruity” and “in need of

³⁰ *Id.* at 78.

³¹ KOSCIW ET AL., *supra* note 25, at 30.

³² Basile et al., *supra* note 23, at 31.

³³ Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Abuse, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

³⁴ Allegra R. Gordon et al., *Gender Expression, Violence, and Bullying Victimization: Findings from Probability Samples of High School Students in 4 US School Districts*, 8 J. SCH. HEALTH 306 (2018).

³⁵ SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 132* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

³⁶ *Id.* at 136.

³⁷ Jennifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH ADOLESCENCE 1175, 1179–90 (2010).

help.”³⁸ In another, a student alleged that his school had installed an internet filter blocking websites with positive messages about LGBT issues, but not those with negative messages.³⁹ Many transgender students report being denied access to restrooms and other facilities consistent with their gender identity.⁴⁰ Some students report being denied recognition for Gay Straight Alliances consistent with other student groups⁴¹ and being told that they cannot attend prom with a same-sex partner or while wearing clothing that does not conform with sex stereotypes.⁴² Finally, LGBT students have also alleged discipline being tied to their SOGI, including being told in front of other students that they cannot wear “any [] shirt referencing LGBT rights”⁴³ and experiencing punishment for participating in a peaceful protest intended to bring awareness to anti-LGBT bullying.⁴⁴

b. Discrimination Against LGBT School Employees

Research also shows that LGBT people regularly experience discrimination in employment. For example, a recent nationally representative survey found that LGB people were significantly more likely to report negative workplace experiences than their heterosexual peers, with 60% of LGB people reporting being fired from or denied a job and 48% reporting being denied a promotion or receiving a negative evaluation, compared to 40% and 32% respectively among heterosexuals.⁴⁵ Similarly, according to a 2017 representative survey, “one in five LGBTQ people report[ed] being personally discriminated against because of their sexuality or gender identity when applying for jobs” and 22% said they had experienced such discrimination in pay or promotion.⁴⁶

While research on the specific experiences of LGBT teachers and other school employees is limited, available data suggest that these findings reflect the experiences of many working for

³⁸ *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1112–13 (E.D. Cal. 2011).

³⁹ *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888 (W.D. Mo. 2012).

⁴⁰ Notably, a number of recent decisions have affirmed these types of claims under both Title IX and constitutional grounds. See, e.g., *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 968 F.3d 1286 (11th Cir. 2020), *petition for reh’g en banc pending*, No. 18-13592 (Aug. 28, 2020); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20-1163 (Feb. 24, 2021); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (per curiam); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030 (S.D. Ind. 2018), *appeal dismissed*, No. 18-2696, 2018 WL 7203234 (7th Cir. Sept. 13, 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).

⁴¹ *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011).

⁴² *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010).

⁴³ *Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459, 462 (M.D. Tenn. 2015).

⁴⁴ *Hatcher v. Desoto County Sch. Dist. Bd. Of Educ.*, 939 F. Supp. 2d 1232 (M.D. Fla. 2013), *aff’d Hatcher ex rel. Hatcher v. Fusco*, 570 F. App’x 874 (11th Cir. 2014).

⁴⁵ ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY AND BISEXUAL PEOPLE IN THE US 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf>.

⁴⁶ NPR ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS 29 (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

educational programs in receipt of federal financial assistance. For example, a 2017 survey of faculty and staff at the University of West Florida found that 18.6% of LGBTQ employees reported one or more experiences of derogatory treatment based on sexual orientation on campus in the prior year, including insensitive or demeaning verbal or written comments (16.3%), unfair treatment (7.0%), exclusion (2.3%), and harassment/bullying (4.7%).⁴⁷ Per a 2016 survey, LGBTQ faculty at Kent State University were more likely than heterosexual faculty to say that they had to work harder than their colleagues to achieve the same recognition (46% vs. 37%), that they were uncomfortable with the climate in their department (23% vs. 16%),⁴⁸ and that they were reluctant to bring up issues that concerned them out of fear that it would negatively impact their job (45% vs. 35%).⁴⁹ A 2015 survey conducted at Virginia Tech found that LGBT faculty and staff felt less comfortable reporting acts of discrimination than their heterosexual counterparts (72.9% vs. 83%); additionally, they were more likely to witness (29.6% vs. 19.5%) and experience discriminatory behavior (18.8% vs. 12.2%).⁵⁰

As OCR and the Department do not appear to regularly collect and disseminate data on the experiences of these LGBT school employees, we are ultimately limited in our efforts to understand the full extent to which such employees experience discrimination in violation of Title IX. However, examples from caselaw and the media demonstrate that such discrimination both exists and can present in a variety of ways. For example, many LGBT school employees report being terminated or not having contracts renewed upon discovery of their SOGI,⁵¹ including after marrying their same-sex partners.⁵² Often, these claimants note that they had received no criticism for their job performance prior to discovery of their SOGI; this is regularly alleged in cases where an individual is terminated shortly after disclosing their transgender status.⁵³ And, many cases claiming termination or failure to hire⁵⁴ allege sentiments by school

⁴⁷ Unpublished data from campus diversity climate survey gathered by Susan E. Walch and colleagues in 2017 (on file with authors).

⁴⁸ RANKIN & ASSOCIATES, KENT STATE UNIVERSITY: CAMPUS CLIMATE RESEARCH STUDY 65 (2017), <https://www.kent.edu/sites/default/files/file/Kent%20State%20University%20-%20Aggregate.pdf>.

⁴⁹ *Id.* at 122, 129.

⁵⁰ MARCY SCHNITZER & FANG FANG, LGBTQ CLIMATE SURVEY REPORT 43 (2015), https://www.inclusive.vt.edu/content/dam/inclusive_vt_edu/resources/publications/reports/lgbtq-climate-survey.pdf.

⁵¹ *Dawkins v. Richmond Cty. Schs.*, No. 1:12CV414, 2012 WL 1580455 (M.D.N.C. May 4, 2012), *adopted by* *Dawkins v. Richmond Cty. Schs.*, No. 1:12-CV-2014 (M.D.N.C. Feb. 19, 2014); Katie Buehler, *Texas Panel Finds State Law Prohibits Sexual Orientation Bias*, LAW360.COM (Mar. 12, 2021), <https://www.law360.com/articles/1363862/texas-panel-finds-state-law-prohibits-sex-orientation-bias>.

⁵² *Bailey v. Mansfield Indep. Sch. Dist.*, 425 F. Supp. 3d 696 (N.D. Tex. 2019), *appeal dismissed sub nom.* *Bailey v. Vaszauskas*, No. 19-11313, 2020 WL 3053942 (5th Cir. Feb. 28, 2020); *Burrows v. College of Central Fla.*, No. 5:14-cv-197-Oc-30PRL (M.D. Fla. Dec. 17, 2014).

⁵³ *Conservative Woman in Florida Recounts Facing Employment Discrimination Just After Coming Out as Transgender*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/conservative-woman-in-florida-recounts-facing-employment-discrimination-just-after-coming-out-as-transgender/> (last visited June 9, 2021); *Transgender Ohioan: "I Decided to Live My Truth. Because of That, I Lost My Job."*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/transgender-ohioan-i-decided-to-live-my-truth-because-of-that-i-lost-my-job/> (last visited June 9, 2021).

⁵⁴ *Lambda Legal and Tarrant County College Reach Agreement in Discrimination Lawsuit Brought by Lesbian Professor*, LAMBDA LEGAL (July 17, 2012), https://www.lambdalegal.org/news/tx_20120717_lambda-legal-and-tcc-reach-agreement.

administrators that their institutions “d[o] not like homosexuals”⁵⁵ and even that “separate but equal treatment of gay people might be best.”⁵⁶

However, not all cases by LGBT school employees involve discharge, as schools often create hostile working conditions for these employees. Such conditions are commonly experienced by transgender employees, who report being denied access to all-gender restrooms⁵⁷ and seeing exclusions for gender-affirming care under their employee health plans.⁵⁸ LGBT school employees also report being denied promotions, including tenure,⁵⁹ upon discovery of their SOGI. Additionally, LGBT school employees regularly report experiencing harassment by co-workers, students, parents, and other community members based on their SOGI, including in cases alleging social media profiles being hacked to note an “interest[] in boys and men,”⁶⁰ complaints from parents that employees showing photos of their same-sex spouses “promot[es] the homosexual agenda,”⁶¹ and lesbian teachers being prevented from using the women’s restroom by other teachers.⁶²

Finally, LGBT school employees often make claims alleging schools’ failure to investigate instances of anti-LGBT harassment,⁶³ including claims that schools have instead acted in retaliation against them for making reports.⁶⁴ Some retaliation complaints have included allegations that schools have acted against employees, LGBT and non-LGBT alike, for supporting LGBT students. These include claims of being suspended for showing students a popular music video featuring a song supportive of same-sex marriage,⁶⁵ and of unlawful discharge after allowing a transgender student to use a teacher’s restroom (rather than the one designated for them by the school, a quarter mile away from their classes).⁶⁶

⁵⁵ Gill v. Devlin, 867 F. Supp. 2d 849, 856 (N.D. Tex. 2012).

⁵⁶ Philpott v. New York, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017).

⁵⁷ Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1015–16 (D. Nev. 2016).

⁵⁸ Kadel v. Folwell, 446 F. Supp. 3d 1 (M.D.N.C. 2020).

⁵⁹ Eric Bachman, *\$1.16 Million Awarded in Transgender Employment Discrimination Jury Trial*, THE NAT’L L. R. (Dec. 4, 2017), <https://www.natlawreview.com/article/116-million-awarded-transgender-employment-discrimination-jury-trial>.

⁶⁰ Arthur S. Leonard, *Title VII Sexual Orientation Bias Claims Divide Trial Courts*, GAY CITY NEWS (June 23, 2016), <https://www.gaycitynews.com/title-vii-sexual-orientation-bias-claims-divide-trial-courts/>.

⁶¹ Michael Levenson, *Teacher Who Was Suspended after She Showed Photo of Her Wife Reaches \$100,000 Settlement*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/us/stacy-bailey-mansfield-teacher.html>.

⁶² Kerri O’Brien, *Former Teacher Files Lawsuit Against Chesterfield Schools, Says She Was Told To Be More Feminine*, ABC 8 NEWS (Feb. 5, 2019), <https://www.wric.com/news/taking-action/former-teacher-files-lawsuit-against-chesterfield-schools-says-she-was-told-to-be-more-feminine/>.

⁶³ Ariel Sobel, *After Relentless Harassment, Gay Kansas Teacher Driven From Job*, THE ADVOCATE (Apr. 20, 2018), <https://www.advocate.com/crime/2018/4/20/after-relentless-harassment-gay-kansas-teacher-driven-job>.

⁶⁴ Alex Bollinger, *A Gay Teacher Who Was Harassed by Students Got a \$110,000 Settlement*, LGBTQ NATION (Jan. 6, 2018), <https://www.lgbtqnation.com/2018/01/gay-teacher-harassed-students-got-110000-settlement/>; Celia Llopis-Jepsen, *KU Under Fire for Handling of LGBT Discrimination Claim*, TOPEKA CAPITAL JOURNAL (Dec. 10, 2015), <https://www.cjonline.com/news/2015-12-10/ku-under-fire-handling-lgbt-discrimination-claim>.

⁶⁵ Alan Duke & Joe Sutton, *Teacher Suspended for Showing Class Macklemore’s ‘Same Love’ Video*, CNN (Sept. 12, 2013), <http://www.cnn.com/2013/09/12/showbiz/same-love-teacher-suspended/>.

⁶⁶ Complaint at 1–3, 5–6, Matlis v. Sch. Dist. of Pickens Cty., No. 2016-CP-39-01232 (Ct. Com. Pl. Oct. 26, 2016).

II. Experiences with Discrimination Drive Health, Educational, and Other Disparities Observed Among LGBT People

Experiences with discrimination adversely impact LGBT people’s health, well-being, and dignity, and can impact financial security when encountered in the workplace or while in the course of obtaining an education. For example, an individual who is fired from, or not hired for, or forced to leave a job for discriminatory reasons must at a minimum experience the difficulty of searching for a new job, assuming one for which they are qualified exists within a reasonable distance from their home. If such a job does not exist, they may face serious economic consequences, including under- or unemployment, housing instability, and food insecurity.⁶⁷ Similar concerns are likely for those forced to leave their schools due to experiences with anti-LGBT discrimination.

In addition, anti-LGBT stigma and discrimination drive well-documented health disparities between the LGBT and non-LGBT populations, as articulated in the “minority stress” research literature. The minority stress model, which the Institute of Medicine has recognized as a core perspective for understanding LGBT health,⁶⁸ describes how LGBT people experience chronic stress stemming from their stigmatization. While stressors—such as loss of a job or access to education—are ubiquitous in society, experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other factors being equal). This excess stress exposure confers an elevated risk for certain mental and physical health conditions. For example, one study found that LGBTQ youth are at increased odds of having consumed alcohol, cigarettes, marijuana, or non-marijuana illicit drugs over the past twelve months as compared to cisgender boys.⁶⁹

Experiencing employment discrimination and the fear of discrimination are examples of such minority stressors.⁷⁰ According to a 2017 nationally representative survey among LGBT people who experienced SOGI discrimination in the workplace and other settings in the past year, 68.5% reported that discrimination at least somewhat negatively affected their psychological well-being; 43.7% reported that discrimination negatively impacted their

⁶⁷ See generally ADAM P. ROMERO, SHOSHANA K. GOLDBERG, & LUIS A. VASQUEZ, WILLIAMS INST., *LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>; BIANCA D.M. WILSON, M. V. LEE BADGETT, & ALEXANDRA-GRISSSELL H. GOMEZ, WILLIAMS INST., “WE’RE STILL HUNGRY” – LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBT PEOPLE (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf>; M. V. LEE BADGETT, SOON KYU CHOI, & BIANCA D.M. WILSON, WILLIAMS INST., *LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

⁶⁸ INSTITUTE OF MEDICINE, *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 20 (2011), <https://www.ncbi.nlm.nih.gov/books/NBK64806>.

⁶⁹ Sari L. Reisner et al., *Gender Minority Social Stress in Adolescence: Disparities in Adolescent Bullying and Substance Use by Gender Identity*, 52 J. SEX RES. 243, 249 (2015).

⁷⁰ See, e.g., Brandon L. Velez et al., *Testing the Tenets of Minority Stress Theory in Workplace Contexts*, 60 J. COUNSELING PSYCH. 532 (2013); Craig R. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. COUNSELING PSYCH. 218 (1999).

physical well-being; 47.7% reported that discrimination negatively impacted their spiritual well-being; 52.8% reported that discrimination negatively impacted their work environment; and 56.6% reported that it negatively impacted their neighborhood and community environment.⁷¹

Research shows that the high prevalence of suicide attempts and ideation, as well as depression and anxiety, among LGBT people (and in particular, among youth), are related to their experiences with stigma, discrimination, harassment, and violence.⁷² A recent survey by the Trevor Project found that 42% of LGBTQ youth “seriously considered attempting suicide in the past year, including more than half of transgender and nonbinary youth.”⁷³ Two CDC studies made similar findings. In one, the CDC found that 43.9% of transgender students considered attempting suicide, with 34.6% actually attempting suicide, within the past twelve months.⁷⁴ In another, the CDC found that, when compared to heterosexual students, LGB students were more likely to report being sad or hopeless (60.4% vs. 26.4%); having seriously considered attempting suicide (42.8% vs. 14.8%); and having actually attempted suicide (29.4% vs. 6.4%).⁷⁵ Our forthcoming analysis of AHES data found that over half (51.7%) of LGBTQ adults ages 18 to 40 reported feeling that they had to hide their SOGI at a school that they had attended, with over one-quarter (26.9%) of LGBTQ adults reporting feeling that they did not fully belong at school because they are LGBTQ.⁷⁶

And, consistent with research noting the higher prevalence of their experiences with discrimination, available research suggests that gender minorities likely bear a disproportionate share of suicide attempts and ideation. Among transgender respondents to the USTS, for example, 82% “seriously thought” about killing themselves at some point in their lives, with 48% reporting such thoughts in the previous year and 40% reporting actually having attempted suicide at some point in their lives.⁷⁷ Among respondents who attempted suicide, 34% made their first attempt at age 13 or younger; 39% similarly reported a first attempt between ages 14 and 17.⁷⁸ A separate study found that gender minority youth in California experience statistically similar rates of lifetime suicidal thoughts compared to their gender conforming peers, but are much more likely to report suffering severe psychological distress in the past year (17% vs. 7%).⁷⁹

⁷¹ Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

⁷² See, e.g., Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 PROF. PSYCH.: RES. & PRAC. 460, 465 (2012).

⁷³ THE TREVOR PROJECT, THE NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2021 (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/05/The-Trevor-Project-National-Survey-Results-2021.pdf>.

⁷⁴ Johns et al., *supra* note 33, at 69–70.

⁷⁵ Laura Kann et al., Ctrs. for Disease Control & Prevention, *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12*, 65 MORBIDITY & MORTALITY WKLY. REP. 1, 18–20 (2016).

⁷⁶ Conron & O’Neill, *supra* note 21.

⁷⁷ JAMES ET AL., *supra* note 35, at 112, 114.

⁷⁸ *Id.* at 115.

⁷⁹ WILSON ET AL., *supra* note 17, at 2–3.

Finally, experiences with discrimination can have a direct impact on LGBTQ students' educational attainment. For example, in response to the 2019 YRBS, 66.3% of LGB students reported feeling so sad or hopeless that they stopped doing their normal activities for two or more weeks in a row over the past year, compared to 32.2% of heterosexual students.⁸⁰ LGB respondents to the 2019 YRBS were also more likely than non-LGB respondents to report that they did not go to school at least once in the prior month because they felt unsafe (13.5% vs. 7.5%).⁸¹ Among respondents to the 2019 NSCS, 32.7% of LGBTQ students similarly reported missing at least one full day of school in the past month due to feeling unsafe or uncomfortable; 8.6% missed four or more days in the past month.⁸² Additionally, 2019 NSCS respondents were asked whether they have ever changed schools due to feeling unsafe or uncomfortable: 17.1% of LGBTQ students reported having done so.⁸³ Consistent with this finding, 17% of USTS respondents who were out as transgender in grades K-12 similarly reported leaving their school altogether because of the harassment they experienced.⁸⁴

III. Recommendations for Addressing Anti-LGBT Discrimination in Schools

Consistent with the decisions in *Bostock* and *Price Waterhouse*, and the Department of Justice's reasoning on the applicability of *Bostock*, the examples outlined above appear to be clear violations of student and employee rights under Title IX.

The Title IX regulations and accompanying guidance issued by OCR and the Department exist to provide clarity to covered entities and protected individuals as to the full scope of protections granted under that statute. However, impermissible discrimination against LGBT people continues to persist in schools. We therefore offer the following recommendations intended to assist OCR in ensuring the compliance of covered entities with their obligations under Title IX and advancing the mission of the Department to ensure equal access to educational environments for all:

- First, that OCR exercise its legal authority to clearly state within its regulations that discrimination “on the basis of sex” encompasses SOGI discrimination, as well as sex stereotyping discrimination, and that both forms are therefore prohibited for programs in receipt of Title IX funding. Current regulations do not currently explicitly include either,⁸⁵ and as a result may lead to entities mistakenly believing that engaging in or otherwise permitting discrimination motivated by those bases would not violate their obligations under the law.

⁸⁰ Johns et al., *supra* note 24, at 23.

⁸¹ *Id.*

⁸² KOSCIW ET AL., *supra* note 25, at 18

⁸³ *Id.* at xviii.

⁸⁴ JAMES ET AL., *supra* note 35, at 132.

⁸⁵ *See, e.g.*, 34 C.F.R. § 106.40 (explicitly noting protections under Title IX for students related to their “actual or potential parental, family, or marital status” including “pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom”); 34 C.F.R. § 106.57 (same, for employees).

- Additionally, that said regulations be supplemented with guidance intended to provide clarity to entities as to how Title IX’s guarantees can be violated with respect to SOGI and LGBT people, including discussion of how individuals’ rights under Title IX intersect with other laws and policies to ensure that covered entities do not allow impermissible conduct in their attempts to carry out their various legal obligations. Given the prevalence of discrimination against gender minority people, we recommend that OCR provide clarity specific to how covered entities should be providing access to single-sex and sex-segregated programs and facilities as allowed under Title IX.⁸⁶ In addition, we recommend that OCR consider whether its guidance materials should include illustrative scenarios, consistent with the practices of other federal agencies,⁸⁷ to increase the understanding of covered entities as to the commonly-encountered situations in which Title IX violations against LGBT people can occur.
- Next, that OCR exercise its authority to engage in improved, and to the extent necessary, additional, data collection activities that would allow it to fully assess the extent to which LGBT people subject to the protections of Title IX are experiencing impermissible discrimination. Under the Department of Education Organization Act, the Assistant Secretary for Civil Rights maintains the broad legal authority to “collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of [OCR.]”⁸⁸ And, to effectuate its own obligations to enforce Title IX and other such laws, OCR engages in data collection activities like the Civil Rights Data Collection (“CRDC”) in schools through grade 12.⁸⁹ However, instruments like the CRDC currently lack means through which to fully gauge and respond to the experiences of LGBT students, including by failing to collect information on all covered instances of discrimination; lacking collection of certain demographic measures related to SOGI; and conflating certain forms of discrimination in reporting.⁹⁰

As it appears that not all data relevant to anti-LGBT discrimination in schools is being collected, we recommend that OCR consider whether modifications to existing collections, or the creation of additional collections focused on SOGI and LGBT people, are necessary to allow OCR to fully detect and address patterns of anti-LGBT discrimination. In particular, we note the dearth of data on the experiences of LGBT school employees across all levels of education, despite the broad protections for “people” granted under Title IX, and therefore recommend that steps be taken to consistently collect and report such information.

⁸⁶ For example, current regulations on toilet, locker room, and shower facilities for students note only that separate facilities are allowed provided that “such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 C.F.R. § 106.33.

⁸⁷ See, e.g., *Section 12: Religious Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N. (Jan. 15, 2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (providing 56 illustrative examples on how violations of Title VII on the basis of religion can occur in workplaces).

⁸⁸ 20 U.S.C. § 3413(c)(1) (2018).

⁸⁹ *2017–18 Civil Rights Data Collection: General Overview, Changes, and List of Data Elements*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. (Apr. 24, 2018), <https://ocrdata.ed.gov/assets/downloads/2017-18%20CRDC%20Overview%20Changes%20Data%20Elements.pdf>.

⁹⁰ See *2020–21 Civil Rights Data Collection: List of CRDC Data Elements for School Year 2020–21*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. (Mar. 15, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/2020-21-crdc-data-elements.pdf>.

Additionally, we note that while collections like the CRDC could be modified to occur more regularly (e.g., annually) and to allow for the proper disaggregation of data reflecting the various types of discrimination faced by LGBT people, and therefore be of better aid to OCR in its enforcement duties, OCR does not require that all entities subject to Title IX's requirements engage in all of its Title IX-related collections. As such, any changes made to the CRDC would fail to address gaps in data collection in higher education, for example, and so OCR should consider review of all of its data collection activities to help it better assess whether and which changes are needed to improve its capabilities in this respect across all levels of education and for all people subject to Title IX's protections.

- Similarly, that OCR consider establishing a mechanism through which to report information on complaints it has received alleging any form of anti-LGBT discrimination to the public, including demographic and other measures to allow for the assessment of whether individuals are experiencing discrimination on multiple bases as encompassed by the various civil rights laws enforced by OCR. To the extent that any Title IX-related data collections withhold information from the public consistent with this recommendation, it is suggested that these changes be considered there as well.
- Finally, in light of evidence suggesting that LGBT people are subjected to sexual harassment in schools, and that they frequently experience retaliation for making claims related to sex discrimination under Title IX, that OCR amend the regulations issued in its 2020 rulemaking⁹¹ to better provide protections for LGBT students and employees.⁹² In making these amendments, OCR is advised to consider: whether its current definitions pertaining to sexual harassment⁹³ should be modified to the standards contained within OCR's previous guidance⁹⁴ or some other standard that would sufficiently allow LGBT people to report claims; whether its regulations covering retaliation⁹⁵ should see similar amendment, including assessing whether the "materially false statement in bad faith" rule promulgated in its recent rulemaking⁹⁶ is consistent with the protections provided by Title IX; and whether current grievance procedures⁹⁷ and remedies⁹⁸ sufficiently protect LGBT people and others experiencing discrimination in violation of Title IX.

⁹¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020).

⁹² See generally Williams Institute Scholars, Comment Letter on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-DOE-Title-IX-Jan-2019.pdf> (comment by Williams Institute scholars to OCR noting the possible implications of the 2020 rulemaking for LGBT students and their claims under Title IX).

⁹³ 34 C.F.R. §§ 106.30(a), 106.44(a).

⁹⁴ See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES – TITLE IX (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁹⁵ 34 C.F.R. § 106.71.

⁹⁶ 34 C.F.R. § 106.71(b)(2).

⁹⁷ 34 C.F.R. § 106.45.

⁹⁸ 34 C.F.R. § 106.30(a).

IV. Conclusion

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